VIOLENT CONFLICT and SOCIAL CAPITAL in ETHNICALLY-POLARIZED DEVELOPING COUNTRIES

by

Theresa Engelina Miedema

A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science
Graduate Department of the Faculty of Law
University of Toronto

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Abstract

This dissertation explores the problem of violent ethnic conflict in ethnically polarized developing countries using the concept of social capital. Ethnically polarized developing countries typically have high levels of intra-ethnic social capital (social capital existing within groups) but low levels of inter-ethnic social capital (social capital existing between groups). Violent conflict can be averted by cultivating higher levels of inter-ethnic social capital. High levels of inter-ethnic social capital create incentives for elites to adopt moderate strategies. A civic compact emerges when the general population internalizes the norms of inter-ethnic social capital (the rule of law; the right to participation; and the right to continued physical and cultural existence). The civic compact is associated with a general expectation that elites will not pursue extra-institutional strategies such as violence to advance their interests.

Peace processes that originate in “hurting stalemates” afford fragile opportunities to begin to cultivate inter-ethnic social capital. At such moments, elite incentive structures align in such a way as to overcome barriers to reform associated with path dependence. The cultivation of inter-ethnic social capital is initiated by integrating the norms of inter-ethnic social capital into
the structure of the peace process, although eventually state institutions (which must incorporate these norms into their design) will also re-enforce these norms.

Elites begin to internalize the norms of inter-ethnic social capital by repeatedly engaging with each other during the peace process in a manner that actualizes these norms into their experiences. I explore how the norms of inter-ethnic social capital can be integrated meaningfully into the peace process so that elites begin to absorb these norms and so that the institutions that emerge from the process are perceived to be legitimate.

Inter-ethnic social capital is developed among the masses primarily through the interactions that the masses have with state institutions. The peace process must focus on rehabilitating the relationship between the masses and the state. This dissertation assesses how this relationship may be rehabilitated and how the norms of inter-ethnic social capital can be integrated into the process of rehabilitating this relationship so that the masses can begin to internalize these norms.
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Finally – *Soli Deo Gloria!*
Dedication

Dedicated with love and respect
to my first and my best teachers,
my parents.

Ate (Arthur) Miedema
1933 – 1986

and

Agnes (nee Huisman) and Hank Van Puurveen
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Chapter 1
Introduction

1. Introduction
This dissertation addresses the problem of violent ethnic conflict in ethnically polarized, developing countries. Violent ethnic conflict is a serious impediment to political, social, and economic development. Many ethnically polarized countries experience some degree of conflict. In the case of developing polarized countries, this conflict is frequently violent and highly destructive. The widespread occurrence of violent ethnic conflict and its devastating impact on human security and well-being make this problem an important matter for study. At the same time, the persistence of inter-ethnic violence suggests that there is still much work to be done in terms of understanding why such violence arises and how it can be contained.

My approach to ethnic conflict is rooted in a claim that while it may not be possible to eradicate ethnic divisions or to prevent ethnic conflict entirely, it is possible to confine ethnic conflict to institutional arenas. Channelling ethnic conflict into such institutional arenas avoids outbreaks of violence and instability and thus mitigates the worse effects of ethnic conflict. To be clear, the existence of well-designed institutions is generally insufficient to prevent violent conflict. Collier notes, for example, that in the poorest countries of the world, “democracy increases political violence in all its main forms.”1 Good institutions must be underpinned by what I call the civic compact. The civic compact refers to a societal-wide acceptance of the norms of inter-ethnic social capital2 and an expectation that elites will pursue their agendas

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2 The norms of inter-ethnic social capital include the right of each ethnic group to its continued physical and cultural existence, the right of each ethnic group to participate in decision-making process where their interests are
through the institutions of the state. Accordingly, the management of ethnic conflict requires the adoption of well-designed institutions and the cultivation of the civic compact. My approach to managing ethnic conflict differs significantly from scholars who seek to eliminate ethnic conflict entirely, for example, by cultivating civic nationalism or through assimilation of ethnic groups. My objections to such approaches will be canvassed more fully in Chapter Two, although key aspects of the foundation of my objections will be laid in this chapter.

I consider that the incentive structures of ethnic elites are pivotal to understanding why ethnic conflict erupts into violence and how such conflict can be successfully confined to institutional arenas. I will use a social capital analysis to explore the incentive structures of ethnic elites in polarized, developing societies and the consequences of these incentive structures for the mitigation of violent conflict. I will employ this social capital framework of analysis to identify the factors that propel ethnic elite to advocate radical, extra-institutional strategies such as insurgency or terrorism. I will then argue that the risk of violent ethnic conflict may be mitigated by altering the incentive structures of elites so that elites pursue their agendas through existing formal institutions rather than through radical, extra-institutional mechanisms. I will present the cultivation of inter-ethnic social capital as the central means of altering the incentive structures of elites in this regard. I will then explore how inter-ethnic social capital may be cultivated in a deeply divided, polarized society. In this regard, I will pay particular attention to the peace processes and institutional reform in developing countries after periods of violent conflict.

at stake, and the rule of law. I will discuss these norms, and the concept of inter-ethnic social capital more generally, in greater detail in Chapter 2.
While there is a relatively large body of scholarship exploring institutional arrangements that are well-suited to governance in polarized countries, there is comparatively little consideration of how such arrangements come to be adopted. An important exception is Douglass North’s work on the process of economic change. North draws attention to the close relationship between belief systems, institutions, and institutional change. He argues that informal institutions such as norms, conventions, and internally held codes of conduct are a major determinant of real change within a polity. While the formal rules embedded in institutions can change very quickly, the informal institutions, which constrain the functioning of formal institutions, take much longer to change. North links socio-cultural evolution of informal institutions to path dependence, which he suggests involves recognition,

…that the institutions that have accumulated give rise to organizations whose survival depends on the perpetuation of those institutions and which hence will devote resources to preventing any alteration that threatens their survival…The interaction of beliefs, institutions, and organizations in the total artifactual structure makes path dependence a fundamental factor in the continuity of a society…Path dependence is not “inertia,” rather it is the constraints on the choice set in the present that are derived from historical experiences of the past. Understanding the process of change entails confronting directly the nature of path dependence in order to determine the nature of the limits to change that it imposes in various settings.

I build on North’s recognition of the importance of belief systems and informal institutions. I draw attention to how inter-ethnic social capital (including the norms of inter-ethnic social capital) can be cultivated during the peace process following periods of violent conflict. I focus in particular on how the structure of the peace process, including proceedings that form part of transitional periods (e.g., truth commissions) and the procedures used in the process of

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formal institutional reform, impact levels of inter-ethnic social capital. This dissertation will thus contribute to the scholarship on institutional arrangements in ethnically polarized countries by examining how informal institutional change, which must accompany formal institutional reform, can be promoted during peace processes.

Until now, there has also been relatively little consideration of what social capital may mean in the context of ethnic differences and what possibilities social capital may hold for the management of ethnic conflict.5 By applying a social capital analysis to the problem of violent ethnic conflict, I will draw attention to relational dynamics in a polarized society that can establish a foundation for coexistence. Ethnic conflict has been extensively studied. Scholars have highlighted a wide variety of structural and institutional mechanisms relevant to managing conflict. However, there has been limited study of the underlying relational and normative elements that give these mechanisms the capability to manage conflict over the long term. I will fill this gap by pointing to social capital as a key resource for facilitating coexistence in a polarized country. In so doing, I will contribute to a better understanding of how institutions can serve to mitigate violent ethnic conflict.

For clarity, this dissertation focuses on ethnic conflict in polarized societies as opposed to conflict in ethnically fragmented or diverse societies. In a polarized society, the polity is shared by only two or three ethnic groups whereas in a fragmented society, there are numerous

5 An important exception is Ashutosh Varshaney who has applied the concept of social capital to an analysis of ethnic conflict in India. See Ashutosh Varshaney, Ethnic Conflict and Civic Life: Hindus and Muslims in India (New Haven: Yale University Press, 2002). As I will detail in Chapter Two, although I do not disagree with Varshaney’s arguments, I consider that his analysis is incomplete and does not offer a satisfying account of how social capital impacts ethnic conflict. I will add to Varshaney’s scholarship on ethnic conflict and social capital in materials respects, thereby deepening the scholarship on the impact of social capital on ethnic conflict.
ethnic groups living within the state. This difference has a material impact on the nature of inter-ethnic relations. In a fragmented society, a single ethnic group is less likely to dominate all other groups economically or politically since there usually are not enough members of a single group to establish and maintain a monopoly on power. Elites in fragmented societies generally need to draw support from outside their own ethnic groups in order to have a realistic chance of obtaining and retaining power. Accordingly, elites have inherent incentives to adopt more moderate, non-ethnic positions and strategies. By contrast, in a polarized society, there are far fewer groups in society and therefore it is easier to rely on the exclusive support of the members of the elites’ own ethnic groups. Elites thus have a greater incentive to adopt ethnocentric approaches. These approaches tend to be more divisive and increase the risk of conflict. In essence, whereas elites in fragmented societies have incentives to build bridges across ethnic lines in order to mobilize support, elites in polarized societies have incentives to “rally the ethnic faithful” in their bids for power. As a result, politics in polarized societies tends to focus heavily on ethnic identity, creating a greater risk of ethnic conflict than in fragmented societies.

This dissertation begins by creating a foundation for the core arguments that I will make in this study. Thus, in Chapter One, I will review key concepts such as “development” and “ethnicity”, as well as review evidence on the impact that violent ethnic conflict has on the social, economic, and political lives and well-being of people in developing countries. I will also discuss important dimensions of the causes of ethnic conflict. In Chapter Two, I will set out my core analysis of the impact of social capital on the incentive structures of elites and my arguments that robust levels of inter-ethnic social capital provide a basis for the coexistence of groups in a divided polity. The concept of social capital itself will be presented in Chapter
Two. I will also discuss in general form my proposals for how inter-ethnic social capital may be cultivated in a polarized society.

Chapters Three, Four, and Five focus on specific dimensions of my proposals. Chapter Three explores how inter-ethnic social capital can be cultivated at the level of the elites. I discuss the role of institutions and the peace process in promoting inter-ethnic social capital among elites, and I consider how the norms of inter-ethnic social capital can be meaningfully integrated into the peace process so that elites can begin to internalize these norms. Chapters Four and Five focus on cultivating inter-ethnic social capital among the general population. I argue that inter-ethnic social capital is cultivated among the masses primarily through their interactions with the state and its institutions. In light of the state’s role in the commission of atrocities and human rights violations, the development of social capital among the masses requires that the relationship between the masses and the state be rehabilitated. Chapter Four examines how the legacy of the past can be addressed with a view to restoring the legitimacy of the state. Chapter Five considers the challenge of rehabilitating the relationship between the masses and the state by looking forward to what can be done to foster a healthier relationship between the state and the general population. In this regard, I propose that the masses must develop a sense of ownership of the state and I analyze various approaches to fostering this sense of ownership. The discussion of the rehabilitation of the relationship between the masses and the state in both Chapters Four and Five includes consideration of how the norms of inter-ethnic social capital can be integrated into the processes adopted to restore the legitimacy of the state and to foster a greater sense of ownership of the state among the masses. In this regard, the discussion in Chapters Four and Five assess how the norms of inter-ethnic social capital can be actualized in the experiences of the masses during the peace process.
2. “Development”
For the purposes of this dissertation, I adopt Amartya Sen’s conception of development as freedom. Sen regards human freedom as both the principal end and the primary means of development. From Sen’s perspective, the basic concern of development is with the capability of individuals to lead lives they have reason to value and to enhance the real choices they have. Sen describes this approach as “development as freedom” since the ability of people to live the lives they have reason to value derives from their substantive freedoms.

The “development as freedom” approach conceptualizes poverty as the deprivation of basic capabilities, that is, as the deprivation of the freedom of an individual to lead the life he or she values. Sen describes a person’s capability as follows:

A person’s “capability” refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, freedom to achieve various lifestyles).

Individual capabilities depend upon a number of crucial variables including economic, social and political arrangements. Sen distinguishes between capability deprivation and inadequate income, which is a typical marker of poverty. While there are important linkages between

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6 See Amartya Sen, Development as Freedom (New York: Anchor Books, 2000) [Sen, Development]. See also Amartya Sen, The Idea of Justice (Cambridge, MA: Harvard University Press, 2009), in which Sen explores the philosophical rationale for seeking to improve human capabilities. Sen views justice as intimately related to individual capabilities since a person’s capabilities provide that person with agency, choice, and the ability to participate in democratic dialogues about actual socio-economic and political outcomes. In this regard, Sen demonstrates that he is concerned with actual justice – justice that impacts a person’s day to day life – rather than abstract ideals of justice. Sen further suggests that capabilities also bring duties and responsibilities such that having capabilities is not merely about the opportunities available to oneself, but also to others. For Sen, the link between justice and capabilities is direct and immediate: the promotion of justice requires increasing human capabilities.

7 Sen, Development, ibid. at 87.

8 Ibid. at 75.
income and capabilities, Sen notes that the relationship between income and individual achievements and freedoms is neither constant nor automatic. “Different types of contingencies lead to systematic variations in the “conversion” of incomes into distinct “functionings” we can achieve, and that affects the lifestyles we can enjoy.”9 Contingencies that affect a person’s functioning include (but are not limited to) unemployment, ill health, lack of education and social exclusion. The development as freedom approach focuses on how these contingencies affect a person’s ability to choose the life that he or she values. From this perspective, development is a project dedicated to enhancing individual capabilities by improving social, political, and economic freedoms so that each individual can make real choices about the life he or she wishes to lead.

Conceptualizing development as freedom casts development broadly. Development is not measured exclusively by economic markers of growth, but rather by the full range of substantive freedoms enjoyed by individuals. This conception of development is multi-dimensional and engages at a minimum the economic, political, and social spheres of life. Studies of development, including this dissertation, must therefore take a broad, multi-dimensional approach to understanding the obstacles to development and to formulating strategies to overcome these obstacles.

3. “Ethnicity”
Broadly speaking, “ethnicity” refers to a category of identification that is based on a belief in shared kinship ties. These ties are manifested in shared characteristics such as language,

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9 Ibid. at 109.
religion, culture, geographic origin, physical attributes, or any combination of these factors. The ethnic group is held together by a belief among its members in their consanguinity. It is the belief in shared kinship ties that is important, and not the objective reality of such ties. As Max Weber observed, ethnicity is based upon a “subjective belief” in “common descent...whether or not an objective blood relationship exists.” The emphasis on the belief in a common ancestry distinguishes ethnicity from the concept of “race”. Race is a category based on genotype and makes “explicit reference to physical or ‘visible’ difference as the primary marker of difference and inequality”. Where ethnicity emphasizes the belief in shared kinship ties, race emphasizes phenotypes. Furthermore, traits such as shared language, religion, history, geographic origin, and history are central to the ethnic identity, while racial identity is based on biological traits.

Ethnic identity is deeply connected with a sense of birth and blood ties, ancestry and descent, “belonging” and “peoplehood”. Ethnic identity is a corporate membership: it speaks to one’s place in a collective body that is “intergenerational, ongoing, and independent of its present members”. Generally, one acquires one’s ethnic identity at birth, and it is very difficult to change this identity. It is, however, possible to become a member of some ethnic groups by choice. Horowitz suggests that it is helpful to “regard ethnic affiliations as being located along a continuum of ways in which people organize and categorize themselves. At one end, there is

10 For a good discussion of the concept of “ethnicity”, see Donald L. Horowitz, Ethnic Groups in Conflict 2nd ed. (Berkeley and Los Angeles, California: University of California Press, 2000).
11 Max Weber, “Ethnic Groups” in Guenther Roth and Claus Wittich, eds., Max Weber, Economy and Society: An Outline of Interpretive Sociology (New York: Bedminster Press, 1968) 389 at 389. See also Horowitz, ibid. at 52-53, where Horowitz outlines the findings of physical anthropologists who can demonstrate that different ethnic groups have drawn, at some time, from the same gene pool.
13 Horowitz, supra note 10 at 52.
voluntary membership; at the other, membership given at birth.”\textsuperscript{15} Nevertheless, “there is always a significant element of descent. Most people are born into the ethnic group in which they will die, and ethnic groups consist mostly of those who have been born into them.”\textsuperscript{16}

The ethnic group is closely related to the nation, though the two entities are not one and the same. The nation refers generally to a geo-political unit that is also an ethno-cultural community.\textsuperscript{17} Ethnic groups may and often do serve as the basis for the nation. Although the ethnic group has pre-modern origins, the fusion of the ethnic group with the geo-political unit of the state (i.e., the nation) is largely a modern phenomenon. Anthony Smith describes the relationship between the ethnic group and nationalism in the modern era:

\begin{quote}
Nationalism extends the scope of ethnic community from purely cultural and social to economic and political spheres; from pre-dominantly [sic] private to public sectors. To make any real headway in the \textit{modern} world, ethnic movements must stake their claims in political and economic terms as well as cultural ones, and evolve economic and political programmes….Nationalism has endowed ethnicity with a wholly new self-consciousness and legitimacy as well as a fighting spirit and political direction.\textsuperscript{18}
\end{quote}

The kinship aspect of ethnicity makes ethnicity a particularly powerful category of identification and an effective vehicle for mobilizing the masses. I will return to the kinship dimension of ethnicity below, when I explore the causes of ethnic conflict.

\textsuperscript{15} Horowitz, \textit{ibid.} at 55.
\textsuperscript{16} \textit{Ibid.}
\textsuperscript{17} Ernest Gellner provides one of the clearest definitions of “nationalism”: “…nationalism is a theory of political legitimacy, which requires that ethnic boundaries should not cut across political ones, and, in particular, that ethnic boundaries within a given state…should not separate the power-holders from the rest”. See Ernest Gellner, \textit{Nations and Nationalism} (Ithaca, NY: Cornell University Press, 1983) at 1.
4. The costs of ethnic conflict for development

Ethnic divisions play an important role in shaping development outcomes in poor countries around the world. Ethnicity has proved to be a powerful vehicle for social, political, and economic mobilization in developed and under-developed countries. Inter-ethnic rivalries and hostility have a demonstrated ability to disrupt the stability and peace of a society and to obstruct economic growth and political and social advancement. Ralph Premdas, a scholar focusing on ethnic conflict, comments,

> From Lebanon in the Middle East to Guyana on the South American continent, from Northern Ireland to Azerbaijan, and Bosnia in Europe to Quebec in North America, from the Sudan and South Africa to Sri Lanka and Malaysia, the assertion of the ethnic factor has made shambles of development objectives and social peace everywhere, on all continents, in both underdeveloped and industrialized societies.²⁹

Premdas further observes that while ethnic conflict is a pervasive problem in both developed and developing societies, the intensity of the conflict tends to be lower in developed societies.²⁰ Ethnic conflict refers to disputes or clashes of interests in which parties are mobilized along ethnic or communal lines. Ethnic conflict also includes slurs, threats, or violence directed again a person or group on account of the person’s or group’s ethnicity. Not all ethnic conflict is violent; ethnic conflict includes, for example, political disputes in which

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²⁰ Premdas, “Caribbean”, ibid. Premdas does not explore in any depth why ethnic conflict tends to be more intense in developing countries as compared to developed countries.
political parties and organizations are ethnically-based, non-violent agitation for secession or
greater autonomy, and discriminatory acts motivated by prejudicial attitudes. Countries as
diverse as South Africa, Burundi, Rwanda, Northern Ireland, Spain, Belgium, Canada, Mexico,
Lebanon, Iraq, Israel, Trinidad and Tobago, Guyana, Argentina, Fiji, Sri Lanka, Pakistan,
India, Russia, Croatia, and Serbia have experienced varying degrees of ethnic conflict.

The impact of ethnic conflict on developing countries is particularly harsh. These conflicts
often become violent and include acts of atrocities, massive violations of human rights, coups
d’état, and terrorism. There is no shortage of examples in this regard. In Sri Lanka, conflict
between Tamils and Sinhalese has frequently become violent and often included acts of
terrorism. There have been three coups d’état in Fiji since 1987, all of which were related to
the political balance of power between native Fijians and Indo-Fijians. Both Indonesia and
India have experienced ethnic riots. The secession of Bangladesh from Pakistan followed a
civil war that pitted the Urdu-speaking Muslims of West Pakistan against the Bengalis who
comprised the vast majority of the population of East Pakistan. Hostilities related to
secessionist claims have also arisen in the Kashmiri region of India and in Aceh province in
Indonesia. Burundi descended into civil war following the assassination of its first
democratically elected Hutu president in 1992. Prior to this civil war, the civil rights and
security of Hutus living in Burundi were routinely compromised by the Tutsi military
controlling the country. In South Africa, whites used apartheid to subvert the civil rights and
security of blacks and other minorities in a systematic fashion. One of the most extreme
examples is Rwanda, where it is estimated that three-quarters of the Tutsi population were murdered during the 1994 genocide.21

Newly industrialized countries and middle income countries also have experienced violent ethnic conflict. In Russia, for example, there has been brutal warfare in Chechnya that has included allegations of atrocities committed by both Russian government forces and Chechynyan rebels. As the former Yugoslavia broke apart, various factions participated in ethnic cleansing—an act regarded as a crime against humanity. In addition to the general civil war throughout Yugoslavia, there has been intense violence and instability in the Kosovo region of Serbia. Cyprus has also experienced periods of violent conflict between Greek and Turkish Cypriots. The civil rights and security of Palestinians has been compromised by Israel, particularly in the Gaza strip, while Israel has had to contend with terrorist attacks initiated by militants from groups such as Islamic Jihad, Hezbollah, and Hamas. In Lebanon, the fragile peace existing between Christians and Muslim groups has been punctuated by violent protests and attacks on churches and mosques. In Iraq, conflict between the Kurds, Sunni Muslims, and Shia Muslims have fundamentally undermined stability and security in Iraq.

Violent ethnic conflict poses obvious impediments to political, social, and economic development. Human life is taken, and human dignity and security are fundamentally undermined. Political and civil rights are compromised. Democratic reforms are subverted.

Key infrastructure for development such as roads, telephone lines, and hydro lines are destroyed. Investors flee unstable societies, taking key capital resources with them, while members of the population flee, taking their human capital with them. Governments overspend on security, leaving fewer resources for social services such as health care and education. In a myriad of ways, violent ethnic conflict has a debilitating effect on social, political, and economic development and erodes prospects for future growth.

Although it is incontestable that violent conflict poses an obstacle to development, highlighting some specific costs of this conflict underlines the urgency and importance of this issue for development scholars. Violent ethnic conflict is an assault on the physical and emotional well-being of those living in its wake, many of whom are civilians. In many cases, non-combatants are specifically targeted for violence during episodes of ethnic conflict, often by other groups of civilians acting under the direction of the ethnic elite. During the 1994 Rwandan genocide, for example, all Tutsis were targeted by Hutu extremists, regardless of age, gender, or occupation. In the 1972 massacre of Hutus in Burundi, Tutsi attackers targeted all Hutu elites, including school children. The attacks on Hutus resulted in the deaths of approximately 100,000 Hutu civilians.\(^\text{22}\) Subsequent violence between Hutus and Tutsis in 1988 targeted civilians of both ethnic groups.\(^\text{23}\) In Northern Ireland, civilians constitute the largest category of individuals killed during the Troubles: a study of the deaths in Northern Ireland during the Troubles found that civilians accounted for 53 percent of the total of 3593 deaths stemming


from Troubles-related violence.\textsuperscript{24} Between 1990 and 2000, a total of 207 children (104 Loyalist children and 103 Republican children) were shot by paramilitary organizations in Northern Ireland.\textsuperscript{25}

Ethnic conflict appears to have a particular ferocity. At times, inter-ethnic violence takes on genocidal proportions. For example, approximately 1.5 million Armenians living in Ottoman lands were killed by Turks between 1915 and 1917. This represents approximately one half to three-quarters of all Armenians living in Ottoman lands at the time.\textsuperscript{26} The Holocaust of the Jews during World War II claimed between five and six million Jewish lives—approximately two-thirds of the total Jewish population living in Europe at the time.\textsuperscript{27} During the explosion of violence in the Balkans during the 1990s, the term “ethnic cleansing” was introduced into the world’s lexicon to capture the horrific blend of mass murder, rape, and forced migration of ethnic civilian populations. In Bosnia-Herzegovina alone, it is estimated that more than 250,000 people died and another 200,000 people were wounded.\textsuperscript{28} The conflict in Bosnia-Herzegovina resulted in more than two million refugees and displaced persons.\textsuperscript{29} Many of those left living suffered severe emotional and psychic injury: “[c]linical reports of Bosnian

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\textsuperscript{25} U.K., The Northern Ireland Affairs Committee of the House of Commons and Northern Ireland Committee Against Terror, \textit{They Shoot Children, Don’t They? An Analysis of the Age and Gender of Victims of Paramilitary ‘Punishments’ in Northern Ireland} by Professor Liam Kennedy (August 2001), online: Conflict Archive on the Internet (CAIN), INCORE, University of Ulster <http://cain.ulst.ac.uk/issues/violence/docs/kennedy01.htm>.


\textsuperscript{27} “Case Study: The Jewish Holocaust,” online: Gendercide Watch <http://www.gendercide.org/case_jews.html>. See also Dr. Steve Paulsson, “A view of the Holocaust” BBC (January 1, 2003), online: BBC <http://www.bbc.co.uk/history/war/genocide/holocaust_overview_01.shtml>.


\textsuperscript{29} \textit{Ibid.}
\end{footnotesize}
refugees in treatment show rates of depressive symptoms ranging from 14 to 21% and post-traumatic stress disorder (PTSD) symptoms rates from 18% to 53%.”

The 1994 Rwandan genocide was carried out with unbridled brutality and efficiency. The ferocious nature of inter-ethnic attacks exacts a toll in terms of lives lost, physical injuries of survivors, and emotional and psychological wounding that impacts a divided society for generations to come. As Philip Gourevitch observes in the context of Rwanda, the damage done by violent ethnic conflict extends far beyond the loss of human life:

A UNICEF study later posited that five out of six children who had been in Rwanda during the slaughter had, at the very least, witnessed bloodshed, and you may assume that adults had not been better sheltered. Imagine what the totality of such devastation means for a society, and it becomes clear that Hutu Power’s crime was much greater than the murder of nearly a million people. Nobody in Rwanda escaped direct physical or psychic damage. The terror was designed to be total and enduring, a legacy to leave Rwandans spinning and disoriented in the slipstream of their memories for a very long time to come, and in that it was successful.

Violent ethnic conflict also threatens physical and emotional security indirectly through the destruction of important infrastructure, the disruption of social services, and by compromising agricultural production. According to Duncan Pedersen, sectarian and authoritarian governments and subversive groups around the world pursue similar tactics:

…disruption of agricultural production (i.e. landmines in Africa and coca plantations in Latin America), systematic destruction of service infrastructure (health services and schools, communications, roads and bridges), sabotage of water and electrical supplies, poisoning of wells, killing livestock and

30 Ibid.
31 Philip Gourevitch, We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda (New York: Picador, 1998) at 224.
These tactics result in food shortages, increased disease due to contaminated water, and disruption of key social services such as education and health care. Community life is severely disrupted. Migration may be necessary, thereby increasing the social and emotional toll that conflict takes on a population. The impact of violent conflict on social welfare is illustrated by changes in measures of life expectancy at birth and infant mortality rates. In an empirical study of 22 conflict episodes in low- and middle-income countries, Gupta et al. found that the rate of improvement of life expectancy at birth significantly declined during conflict periods. Trends for the improvement of life expectancy at birth pick up again in the immediate post-conflict period, however. Gupta et al. also found a significant deterioration in the rate of improvement in infant mortality during conflict periods. Unlike the rates for life expectancy at birth, the deterioration in the rate of improvement in infant mortality continues into the immediate post-conflict period.

In terms of economic development, ethnic conflict imposes a significant cost on countries. Ongoing violence imposes a heavy economic burden on governments in terms of increased military expenditures. Large military expenditures divert scarce government monies away from the resources available for the delivery of key social goods such as health care and

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34 Ibid.
35 Ibid.
36 Ibid.
According to one study on civil war, the average developing country (defined as a country with less than $3000US per capita GDP in 1995) spends approximately 2.8 percent of GDP on the military during peacetime. Spending on the military increases to about five percent of GDP, on average, during periods of civil war. In Sri Lanka, for example, defence spending increased from 1.4 percent of GDP to six percent of GDP between 1983 and 1996; in terms of total government spending, the share of the government budget devoted to defence increased from 4.4% to 21.6%. Knight et al. quantified the costs to growth of military spending. According to their simulations, the increase in military spending that occurs over the course of the average civil war would result in a permanent loss of about two percent GDP. Other empirical studies, using a variety of methodologies and data, have also found that political instability and violence is inversely related to economic growth or investment. Returning again to the Sri Lankan example, Richardson and Samarasinghe found that the economic cost of the armed conflict in Sri Lanka in the five year period between 1983 and 1988 was approximately US$4.2 billion or approximately 68% of the Sri Lankan GDP in

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37 See the empirical study conducted by Gupta et. al.: Gupta et. al., ibid.
39 Ibid. at 14.
42 Ibid. This calculation is based on an increase of 2.2% (from 2.8% to 5.0%) in military spending, sustained over the entire period of the average civil war, where the average civil war lasts approximately seven years.
1988. A similar study conducted by Arunatilake et. al. for the period between 1983 and 1996 found that the conflict in Sri Lanka cost the country about twice its 1996 GDP.

Empirical studies have also considered the impact that the cessation of hostilities and cuts to defence spending have on local economies. Although earlier studies suggested that military spending has a positive economic impact in developing countries, more recent empirical studies suggest that cuts to military spending, not increases, foster economic growth. These recent empirical studies suggest that lower military spending promotes economic growth in a number of ways such as by increasing capital formation and by improving the efficiency of the use of resources in the economy. The cessation of armed conflict is associated with a “peace dividend”: the reduction of military spending frees up resources that can then be used for more economically productive purposes like lowering taxes, increasing spending on social services, or reducing the deficit.

Economic activity is compromised by the destruction of key infrastructure necessary for conducting business, such as telephones, roads, bridges, and electricity. Armed conflict also undermines financial development in a country due to its impact on investor confidence.

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45 Arunatilake, Jayasuriya & Kelegama, supra note 40.
48 Gupta et. al., supra note 33 at 407.
49 Ibid.
Addison et. al., for example, argue that armed conflict can result in fears of inflation and the depreciation of local currency, leading to crises of confidence in the domestic currency.\textsuperscript{50} Similarly, investors respond to conflict by moving their funds away from productive assets like bank deposits to non-productive assets like gold.\textsuperscript{51} Addison et. al. also found that armed conflict can impact financial regulation.\textsuperscript{52} Addison et. al. conclude that armed conflict has a significantly negative impact on financial development and that this negative impact increases as conflict intensifies.\textsuperscript{53}

The insecurity inherent in a region marked by conflict makes investment in the local economy unattractive to investors. Conflict leads to capital flight, and it may be difficult to entice investors back into a country even after hostilities appear to have ended. Collier et al. reports the following regarding capital flight as a result of civil war:

\begin{quote}
Prior to conflict, the typical civil war country held 9 percent of its private wealth abroad. By the end of the civil war, this had risen to an astonishing 20 percent, so that more than a 10\textsuperscript{th} of the private capital stock had been shifted abroad. Even this probably underestimates the extent of overall capital flight, for example, cattle may be moved to neighboring (sic) countries and sold.\textsuperscript{54}
\end{quote}

The repercussions of the 1987 coups in Fiji and the 1990 promulgation of a highly ethnocentric constitution illustrate the economic cost of ethnic conflict. The immediate results of the destabilizing events of 1987 were, “a sharp loss of business confidence, increased emigration,

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\item \textsuperscript{51} \textit{Ibid.}
\item \textsuperscript{52} \textit{Ibid.}
\item \textsuperscript{53} \textit{Ibid.}
\item \textsuperscript{54} \textit{Ibid.} at 15.
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and capital flight.”\textsuperscript{55} After the first military intervention in 1987, Indian, Chinese, and European investors “withdrew their funds from banks and transferred them overseas leading to a crisis in the balance of payments. In the wake of this loss, Fiji devalued its currency twice in 1987, reducing its value by 30 percent.”\textsuperscript{56} Fiji also experienced a considerable exodus of skilled workers and professionals. The events of 1987 and the subsequent promulgation of a constitution heavily weighted in favour of native Fijian interests in 1990 sparked a massive emigration of Indo-Fijians from Fiji. By 1992, approximately 88 percent of the 40,000 people who had emigrated from Fiji since 1987 were Indo-Fijian.\textsuperscript{57} Since a large proportion of professionals such as doctors, lawyers, accountants, teachers, and engineers were Indo-Fijian, the emigration of so many Indians left gaps in the Fijian economy, particularly in skills and trades that are important for fostering development.\textsuperscript{58}

Econometric studies suggest that, overall, the effect of civil war on a country’s economy is devastating. Stewart, Huang, and Wang, for example, reviewed data from 18 countries that were affected by civil war and found the following:

- of the 14 countries whose average growth rates of gross national product per capita could be calculated, the average annual growth rate was negative, at -3.3 percent;
- per capital income declined in 15 countries;
- food production dropped in 13 countries;
- external debt as a percentage of GDP increased in all 18 countries; and


\textsuperscript{56} \textit{Ibid.}

\textsuperscript{57} \textit{Ibid.} at 34.

\textsuperscript{58} The World Bank, “Fiji Development”, \textit{supra} note 55 at 3, cited in Premdas, \textit{Ethnicity and Development}, \textit{ibid.} at 34.
export growth declined in 12 countries.59

Another study conducted by Collier suggests that the annual growth rate of GDP per capita during civil war is reduced by 2.2 percent relative to what the growth would have been if there was no conflict.60 In the case of a civil war that lasts only one year, Collier finds that civil war has a continuing negative impact on growth for the first five years after the conflict ends: civil war causes a loss in growth of 2.1 percent per annum during the first five years of peace.61 This loss in growth is not significantly different from the loss in growth that occurs during the actual conflict. Long wars, however, have a different impact on growth in the immediate post-war period, due in large part to varying levels of capital stock. Thus, while short wars result in continued post-war decline, sufficiently long wars tend to give rise to a phase of rapid growth in the years immediately following the cessation of hostilities.62 The phase of rapid growth that follows long civil wars does not detract from the economic decline that occurs throughout such conflicts, however. Based on an annual growth rate that is 2.2 percent slower during periods of civil war than during peace, Collier et al. find that,

…after a typical civil war of seven years duration, incomes would be around 15 percent lower than had the war not happened, implying an approximately 30 percent increase in the incidence of absolute poverty. The cumulative loss of income

61 Ibid. at 181.
62 Ibid. at 176. According to Collier, the different impact of short wars versus long wars on growth in the post-war period results from differences in the process of capital stock adjustments. The downward adjustment of capital stock is a slow process. The level of capital stock after a short civil war may still be above the desired wartime level and the desired post-war level. Capital stock will therefore continue to decline until it reaches a level that appropriately reflects the risks associated with perceived instability, the risk of renewed conflict, and the continuing burden of military expenditures. By contrast, if a civil war is long enough, there will be sufficient time for capital stock to adjust completely to war-time conditions. Thus, at the end of a civil war, capital stock will have adjusted to a level below that which is desired for post-war conditions. The end of the war thus triggers a repatriation of capital stock, thereby facilitating rapid economic growth.
during the war would be equal to around 60 percent of a year’s GDP.  

Countries like Northern Ireland, Spain, Sri Lanka, and Israel that have had to deal with terrorist-type episodes of violence also experience the negative economic effects of ethnic conflict even if the conflict does not grow into full-scale civil war. In a study of the economic impact of terrorism in the Basque region of Spain, for example, Abadie and Gardeazabel found that per capita GDP in the Basque Region declined approximately 10 percent relative to a “synthetic” control region. They also found a correlation between the widening of this gap and spikes in terrorist activities. Other studies have found that domestic and regional terrorism has, as one would expect, a negative impact on tourism, a major economic industry in some developing countries.

The discussion above highlights the devastating social, political, and economic consequences of violent ethnic conflict. To paraphrase Collier and Hoeffler and Reynal-Querol, violent ethnic conflict is “development in reverse”. The frequency with which such conflict occurs and the impact of conflict on development suggest that the mitigation of violent ethnic conflict is an important issue for law and development scholars. As Premdas observes, the “ethnic factor is a fundamental force in the Third World environment and must be incorporated into

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63 Collier et al., Breaking the Conflict Trap, supra note 38 at 17.
65 Ibid.
67 See Collier, Bottom Billion, supra note 1 at 27 and see Anke Hoeffler & Marta Reynal-Querol, “Measuring the Costs of Conflict” (March 2003), online: Anke Hoeffler Home Page <http://users.ox.ac.uk/~ball0144/hoereyque.pdf>.
any strategy of development that is adopted.”68 This dissertation presents a strategy for mitigating violent ethnic conflict in ethnically-polarized developing societies. Programmes designed to advance the overall social, political, and economic development of such societies should include this strategy as a vital component of their approach.

5. Three question about the causes of ethnic conflict
Strategies for mitigating ethnic conflict must address the root causes of such conflict in order to provide the basis for long-term stability and peace. There is a large body of scholarship that explores the causes of ethnic conflict. Important theories of ethnic conflict include: modernization theory69; resource competition theory70; realistic conflict theory71; economic theories such as the cultural division of labour72 and the split market theory73; rational choice

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71 For the seminal discussion of realistic conflict theory, see Muzafer Sherif, Group conflict and cooperation: Their social psychology (London: Routledge & Kegan Paul, 1966) [Sherif, Group conflict]


theory\textsuperscript{74}; contact theory\textsuperscript{75}; theories of cultural pluralism\textsuperscript{76}; and socio-psychological theories\textsuperscript{77} such as categorization theory\textsuperscript{78} and social identity theory\textsuperscript{79}. Most of these theories offer important insights into a dimension of ethnic conflict, but fail to explain other dimensions adequately. There does not appear to be a truly comprehensive explanation of the causes of ethnic conflict. I do not propose to review the entire body of this literature, nor will I attempt to formulate a theory that provides a thorough and complete explanation of why and how ethnic conflict develops.\textsuperscript{80} Instead, I will present an approach that focuses on asking and answering three critical questions about ethnic conflict. These three areas of inquiry probe dimensions of ethnic conflict that must be understood in order to formulate effective responses to violent ethnic conflict. The discussion that follows will establish a foundation for


\textsuperscript{76} See, for example, J.S. Furnivall, Colonial Policy and Practice (London: Cambridge University Press, 1948) and M.G. Smith, The Plural Society in the British West Indies (Berkeley: University of California Press, 1965) at 82.


\textsuperscript{80} For an excellent overview of the causes of ethnic conflict, including discussion of the range of theories related to this topic, see Horowitz, supra note 10.
understanding the role of social capital in both the emergence and the mitigation of violent ethnic conflict.

My first question probes the group identity dimension of conflict. Why do individuals respond to mass mobilization on the basis of shared group identity, particularly when they seem to have little to gain personally and much to lose? Furthermore, why does conflict occur along ethnic lines? Why is ethnicity, as opposed to e.g. economic class, geographic region, or gender cast as the salient dividing line in so many conflicts? This first line of inquiry is related to an important assertion made in this thesis, namely that it is likely not possible to prevent altogether mobilization along ethnic lines or low levels of inter-ethnic competition and rivalries. Second, we must understand the reasons for inter-ethnic hostility. Why do ethnic groups fight and what are they groups fighting about? Third, we must understand why the intensity of ethnic conflict varies. In some cases, ethnic conflict has resulted in genocide, yet in others ethnic conflict has been channelled through democratic processes such that competition between ethnic groups occurs in elections and referenda rather than violence. Understanding the reasons for such variations is crucial to developing a strategy for mitigating violent ethnic conflict. As I will argue below, the goal in ethnically polarized societies should not be to eradicate all forms of conflict as this goal is likely unachievable, but rather to confine ethnic conflict to institutional arenas in order to prevent violence and insurgency.

My approach to understanding the causes of ethnic conflict begins by seeking insight into the relationship between the individual and the group. One of the perplexities about ethnic conflict is why individuals so willingly identify themselves with the ethnic group and engage in
collective action, even if their participation comes at great personal cost with minimal tangible personal reward. As I will discuss below, elites have incentives to mobilize the masses: their ability to secure access to political, social, and economic power depends in part on the support of the masses. What is less clear is why the masses respond to the urgings of the elite. Psychology and sociology offer insight into this dimension of ethnic conflict.

From a social-psychological perspective, group membership matters to individuals. Humans are fundamentally social beings who have an innate need to belong to a wider community. As Hayes puts it, a human being is “a social animal, not so much in that he is indiscriminately social with all men as in that he is particularly social with a particular group of men. He seems always to be drawn naturally to some special group and to have displayed a marked loyalty to it.” The tendency to cleave to “some special group” is frequently referred to as the “belongingness want” of humans. The group functions, at least in part, to meet the “belongingness want” of its members. The need to belong “is one of the most powerful human motivational forces. It prods a person to undertake many activities, whose very meaning is hard to unveil unless the importance of group mentality is taken into account.”

The powerful need to belong explains in part why individuals have proved willing to sacrifice their own personal interests for the sake of the group.

Psychologists and sociologists also suggest that the personal interests of the individual become closely affiliated with the interests of the group. The close affiliation between the individual’s

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81 C. Hayes, supra note 77 at 1. See also V.D. Volkan, The Need to Have Enemies and Allies (Northvale, NJ: Aronson, 1988).
82 Hayes, ibid. at 1.
83 Kecmanovic, supra note 77 at 27. See also Kreh, Crutchfield & Ballachey, supra note 77 at 394.
84 Kecmanovic, ibid. Kecmanovic uses the term “group mentality” as a synonym for “belongingness need”. 
interests and the group’s interests appears to arise because the individual’s sense of self-worth becomes bound up with the status of the group as a whole. As Horowitz notes, group members seem to be motivated by a desire for “a positive evaluation of the group to which they belong. A favourable evaluation is obtained by comparison to other groups in the environment.” The desire to ensure that one’s own group compares favourably with other groups motivates each individual to ensure that his or her ethnic group increases its advantages, status, power and resources relative to other groups in society, and not merely just in an absolute sense. Since an individual’s sense of worth is tied to his or her group’s status relative to other groups, personal sacrifice that bolsters the status of the group is perceived to have value at both an individual and a group level. There is thus a personal reward for sacrificing for the group.

The tendency to compare one’s own group’s status with that of other groups illustrates that there is an inherently competitive dimension to inter-group relations. This is congruent with the basic nature of group membership, for the existence of a distinctive group implies boundaries and a separation of group members from non-group members. As Volkan notes, the process of identifying with a group creates a sense of “us” and “them”. Thus, there is an element of membership in a group that is inherently oppositional; in order to have a “we”, there must also be a “they”. Premdas summarizes the intersection between group identity and the

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85 The view that an individual’s sense of self-worth is closely tied to the status of the individual’s group as a whole was largely developed by proponents of the social identity theory. The social identity theory was pioneered by Turner and Tajfel. For their key writing on the social identity theory, see Tajfel & Turner, “Integrative theory”, supra note 79; Tajfel & Turner, “Social identity theory”, supra note 79; and Turner, “Current Issues”, supra note 79.
86 Horowitz, supra note 10 at 144.
87 See Volkan, supra note 81.
process of differentiation, illustrating how this intersection tends to set members of different groups in opposition to each other:

…the human is defined inherently as a group bounded creature whose deep identity needs for belonging can only be met in a comparative if not appositional relationship of inclusion/exclusion with other groups. Identity formation and sustenance is relational, often appositional and conflictual.88

The tendency to cleave and to compete and to adopt a “we-they” mentality when confronted with other groups is well documented.89 The “we-they” dimension of group membership manifests itself in various ways. For example, individuals tend to treat fellow group members preferentially vis-à-vis others who are not members of the same group.90 Individuals also tend to attribute positive characteristics to their own group and to describe their own group in more favourable terms than the out-group. This is referred to as “in-group favouritism”.91 Patterns of in-group favouritism are evident in ethnographic data from societies in various parts of the world.92 At the same time, individuals typically attach negative attributes to members of other groups. There is a tendency to disparage members of other groups and to treat them with

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90 Kecmanovic, supra note 77 at 29.
91 Searle-While, supra note 78 at 9-11 and 12.
92 Ibid.
suspicion and hostility. This is referred to as “out-group devaluation” or “out-group denigration”. Out-group devaluation can be manifested in a number of ways, from jokes or stories that denigrate the out-group to strongly held convictions that the out-group is evil, barbaric and treacherous. Such extreme attitudes can make it far easier to justify aggression towards the out-group. The “we-they” antipathy is also reflected in the desire for relative advantage: in experiments involving social categorisation, group members preferred to maximise the difference between the in-group and the out-group rather than to seek absolute gains for the in-group.

As the above discussion illustrates, developing an understanding of the causes of ethnic conflict begins by recognizing that, from a socio-psychological perspective, there is a nexus between a person’s individual sense of self and his group identity. This nexus provides insight into why individuals are often willing to sacrifice their own personal interests for the sake of the group. Personal sacrifices that benefit the group as a whole ultimately carry individual personal value due to the close relationship between an individual’s perception of his own welfare and that of the group as a whole. Moreover, our “belongingness want” and our tendency to cleave and to compete suggest that individuals are, by nature, highly responsive to appeals to action that are based on shared group identity, including actions against members of other groups. Moreover, once people have been mobilized along group lines, they typically demonstrate fierce preference for and loyalty to the group’s interests. Elites have long recognized this tendency in people and have frequently exploited group allegiances to pursue various social, political, and economic opportunities. I will return to the role of the elite in the

93 Kecmanovic, supra note 77 at 29.
94 Searle-While, supra note 78; see also Kecmanovic, ibid. at 29.
95 Kecmanovic, ibid.
development of ethnic conflict below. First, however, it is necessary to consider why the need for community often is met within the ethnic group as opposed to other possible categories of group affiliation.

The notion of an inherent “belongingness want” and the tendency to cleave and to compete do not provide sufficient insight into why conflict frequently falls along ethnic lines. These socio-psychological insights point to why group identity is important, but not why ethnic identity in particular serves as the basis for mobilization of the masses and fractures societies. All group affiliations should, on the logic of these insights, have the capacity to trigger the mobilization of the masses. In his book examining the violence associated with communal identities, Amartya Sen observes,

> [i]n our normal lives, we see ourselves as members of a variety of groups – we belong to all of them. A person’s citizenship, residence, geographic origin, gender, class, politics, profession, employment, food habits, sports interests, taste in music, social commitments, etc., make us members of a variety of groups. Each of these collectivities, to all of which this person simultaneously belongs, gives her a particular identity.96

Sen goes on to argue that people have the freedom to choose which communal bonds to favour and which to neglect when defining themselves. The objective reality is that each person’s identity is multi-faceted and cannot be reduced to only one dimension of her life. So long as the different elements of a person’s identity are not in conflict, these elements can co-exist, and a person need not choose which elements to retain and to cultivate and which elements to disregard. Nevertheless, as Sen notes, each person does choose, “if only implicitly, about the

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96 Sen, Identity, supra note 15 at 4-5.
priorities to be attached to our different affiliations and associations.”97 Sen argues that the
ability to choose among our affiliations and associations is one of our most important
freedoms: “[t]he freedom to determine our loyalties and priorities between the different groups
to all of which we may belong is a peculiarly important liberty which we have reason to
recognize, value, and defend.”98

Each person’s freedom to determine the priority and loyalty attached to different group
affiliations, including ethnic affiliation, ought to have significance for the management of
ethnic conflict. Perhaps an important strategy for managing ethnic conflict is the cultivation
and protection of this freedom of choice in the hopes of de-emphasizing the importance of
ethnic bonds. Perhaps if ethnic affiliation was reduced in importance, ethnic rivalry would be
less likely to fractionalize society and spark conflicts. But such an approach rests on a key
assumption: that it is possible to de-emphasize the significance of ethnic identity so that each
person can make meaningful choices about which identity she wants to cultivate. There is
evidence, however, that suggests that it is much harder to de-emphasize the importance of
ethnic identity than Sen might hope. This evidence, which is briefly reviewed below,
highlights the salience of ethnic identity in the lives of people. It appears that regardless of our
freedom to determine our loyalties and priorities between the groups to which we belong, we
tend to gravitate towards assigning our ethnic identities a central role in our lives.

Ethnic identity consistently has borne and continues to bears significance in the lives of
individuals at different times and in different places and in different ways. The centrality of

97 Ibid. at 5.
98 Ibid.
ethnic affiliations is evident in the political realm, for example. Ethno-nationalism—the political doctrine holding that the geo-political unit and the ethnic unit should be one⁹⁹—has had a major impact on events within countries and between countries for over 250 years. Political parties have been organized around ethnic affiliations. Examples include: Sinn Fein (Northern Ireland); Basque National Party (the “PNV”, Spain); Soqosoqo Duavata ni Lewenivanua, Alliance Party, and National Federation Party (Fiji); Frodebu and Parti pour la Libération du Peuple Hutu (Burundi); and Parti Québécois and Bloc Québécois (Canada). People have engaged in subversive activities for causes linked to their ethnic identities. These subversive activities include terrorism, as the actions of groups such as the Tamil Tigers and ETA illustrate.

Ethnic affiliation also impacts the economic and social dimensions of a person’s identity. There is evidence to suggest, for example, that economic differences frequently coincide with ethnic differences.¹⁰⁰ A person’s class identity and affiliations thus often coincide with her ethnic identity and affiliations. Borjas’s study on ethnic capital found that the skills and labour market outcomes of a child depend on the average skills and labour market experiences of the ethnic group in the child’s parents’ generation, and not just on the skills and labour market outcomes of the child’s parents.¹⁰¹ Borjas’s study of the impact of ethnic capital on inter-generational mobility in the United States also found that “there is much more persistence of

⁹⁹ Gellner, supra note 18 at 1.
skills and earning capacity across generations than is generally believed. As a result, ethnic differences in skills and labor market outcomes may persist for several generations. Thus, the parts of a person’s identity that relate to occupation and economic class are impacted by a person’s ethnicity.

A person’s network of ethnic affiliations often overlaps with the network of relationships that a person develops in relation to her trade or profession. Coleman, for example, highlighted the diamond trade among Jewish jewellers in New York City as an example of social capital. Easterly observed that some ethnic groups develop special niches in the market. These “ethnic specializations” exist in both developed and developing countries, although they tend to be less predominant in the former. Sociologists have observed that African entrepreneurs prefer to do business with members from their own ethnic communities. Landa notes that in the case of ex-patriot Chinese middlemen engaged in the rubber trade in countries such as Singapore and Malaysia, “[k]inship/ethnic attributes are…nonprice market signals that convey valuable information to [a trader] about the reliability of his potential trading partner at low cost”. The ethnicity of potential trading partners materially impacts the terms and conditions on which business is conducted. Thus, the part of a person’s self-identity that engages her trade

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102 Borjas, “Ethnic Capital” ibid. at 149.
106 Landa, ibid. at 110.
107 Ibid. at 101, 110-113.
or profession cannot be fully separated from her ethnic identity. There can be significant interplay between a person’s ethnic identity and the operation of her business, particularly in societies in which the enforcement of contracts cannot be achieved effectively through existing state institutions. In such societies, trust and reliability are essential to a business relationship since there is no formal mechanism for the enforcement of contracts.\textsuperscript{108} Shared ethnicity acts as a proxy for reliability and serves as the basis for the development of trust between people.\textsuperscript{109}

The social dimensions of a person’s self-identity are also often impacted by her ethnic affiliations. Marriage between individuals of different ethnic origins remains low in many polarized societies. Moreover, individuals appear to retain significant elements of their ethnic identity after immigrating to new countries. Indeed, individuals resist assimilation into mainstream national culture in their adopted countries, even when they are members of the third or fourth generation to be born in the “new” country. For example, although the United States is presumed to be a “melting pot” in which individuals shed their ethnic identity and assimilate into mainstream American culture, research suggests that America remains a highly


pluralistic and multicultural society. Glazer and Moynihan challenge the “melting pot” assumption, arguing that, in fact, America is characterized by the opposite phenomenon, namely, resistance to assimilation: “[t]he point about the melting pot…is that it did not happen….The American ethos is nowhere better perceived than in the disinclination of the third and fourth generation of newcomers to blend into a standard, uniform national type.”

Further research conducted by Glaeser, Cutler, and Vigdor suggests that voluntary immigrant segregation in the United States has been increasing steadily over the past three decades. For example, evidence points to a tendency for ethnic enclaves to form in cities as “natives” of the country move out of the core of cities to the suburbs.

Notwithstanding the freedom to choose which communal bonds to favour in the process of self-identification and notwithstanding the potential for multiple group identities, ethnicity evidently has a strong tendency to pervade most elements of a person’s life and identity. This raises an important question: if people have the freedom to shape their own identity and can select among multiple affiliations and forms of self-identification, why do people so frequently gravitate towards ethnicity? The answer to this question will also help to explain why conflict frequently occurs along ethnic lines. The nature of ethnicity itself provides insight into the salience of ethnic identity in this regard.


112 See David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, Is the Melting Pot Still Hot? Explaining the Resurgence of Immigrant Segregation, NBER Working Paper No. 11295 (May 2005), online: SSRN <http://ssrn.com/abstract=714067>. “Segregation” is measured used two indices: dissimilarity and isolation. Dissimilarity focuses on the composition of residential neighbourhoods within a city. Isolation focuses on measuring the degree of exposure that immigrants have to other members of their group, taking into account the fact that groups forming a larger share of the population have naturally higher exposure rates.

113 See Cutler, Glaeser & Vigdor, ibid.
Ethnicity touches all that is most basic to a person’s existence: language, culture, religion, and kinship ties. Indeed, ethnicity draws upon the building block of society: the family unit. In this regard, ethnicity creates a bond between people that resonates very deeply. Although other forms of self-identification and affiliation may be important to a person, none carries the weight of family connections. Ethnic affiliation has the capacity to generate strong connections between people, then, because this affiliation draws on aspects of a person’s identity that are believed to be and are experienced as primordial in nature. Clifford Geertz observes that ethnic ties appear to carry inherent significance that is not based on utility or personal affection such that these ties seem to be natural or even spiritual:

By a primordial attachment is meant one that stems from the ‘givens’ – or, more precisely, as culture is inevitably involved in such matters, the assumed ‘givens’ – of social existence: immediate contiguity and kin connection mainly, but beyond them givenness that stems from being born into a particular religious community, speaking a particular language, or even a dialect of a language, and following particular social practices. These congruities of blood, speech, custom, and so on, are seen to have an ineffable, and at times, overpowering, coerciveness in and of themselves. One is bound to one’s kinsman, one’s neighbour, one’s fellow believer, ipso facto; as the result not merely of personal affection, practical necessity, common interest, or incurred obligation, but at least in great part by virtue of some unaccountable absolute import attributed to the very tie itself. The general strength of such primordial bonds, and the types of them that are important, differ from person to person, from society to society, and from time to time. But for virtually every person, in every society, at almost all times, some attachments seem to flow more from a sense of natural – some would say spiritual – affinity than from social interaction.114

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To be clear, ethnic identities and affiliations do not exist as an objective primordial reality. Geertz’s position – one to which I subscribe – is that people believe in and attach emotional importance to what they consider are the primordial objects of their existence such as language and territory. The connections that arise from such objects are then also experienced as being primordial and basic in nature. These elements and the identity and connections that flow from them, however, may be constructed and manipulated.\textsuperscript{115} They are not themselves primordial in actual fact. It is the belief in and importance attached to these elements that are primordial in character. In other words, the response to these elements that are believed to be primordial (kinship ties, language, religion, and so forth) is instinctual, intuitive, and organic, even if the elements themselves are not.

In a similar vein, Stephen Grosby argues that primordiality exists in how people perceive certain objects to which they attach great emotional importance. The primordial aspect of ethnic groups and nationalities exists as an act of interpretive cognition, that is, an object is “primordial” only because people perceive that object as being in the category of the primordial. According to Grosby, “[e]thnic groups and nationalities exist because there are traditions of belief and action towards primordial objects such as biological features and especially territorial location.”\textsuperscript{116} Primordial objects are capable of stimulating emotional sentiment and mobilizing the masses to action because of the significance that human beings attach to such objects. Grosby explains that human beings invest themselves in primordial objects and attach significance to them because,

\textsuperscript{115} Geertz recognizes, for example, the role that the modern state has played in stimulating beliefs and sentiments to primordiality. See Geertz, \textit{ibid}.

the family, the locality, and one’s own ‘people’ bear, transmit, and protect life. That is why human beings have always attributed and continue to attribute sacredness to primordial objects and the attachments they form to them. This is one of the reasons why human beings have sacrificed their lives and continue to sacrifice their lives for their own family and for their own nation.¹¹⁷

The sacredness that humans tend to ascribe to the primordial elements in their lives and the organic, even spiritual, quality of the affiliations arising from these primordial elements explain why ethnic identity can eclipse other forms of self-identification. When the insights gleaned from sociology and psychology are set along side the nature of ethnicity itself, we gain an understanding of why the masses can be mobilized on the basis of ethnic identity, why individuals would sacrifice their personal interests for the group, and why conflict often falls along ethnic lines. The nature of ethnicity helps to explain why ethnic conflict is more likely to become violent than conflict involving class or ideological cleavages. As Horowitz has observed, fellow members of one’s ethnic group are viewed as metaphoric family members. Ethnic conflict thus engages intense emotions related to the protection of one’s home and family. Threats from other groups are perceived as having an existential quality that justifies violent reactions, including mass killings.¹¹⁸

Having explored the salience of ethnicity in our lives and the reasons for this salience, I now move to the second area of inquiry about ethnic conflict, namely the reasons for conflict between ethnic groups. It is a mistake to believe that because ethnic identity has a primordial and organic dimension ethnic conflict is somehow also primordial and organic. Ethnic groups

¹¹⁷ Ibid. at 169.
¹¹⁸ See Horowitz, supra note 11.
do not fight simply because it is in their nature to do so, nor is modern ethnic conflict the product of blood feuds that have existed between groups for hundreds or even thousands of years. Instead, there are two key factors that play a pivotal role in pushing ethnic groups into conflict: the fact of difference in the context of contact between groups, and the pursuit of scarce social, political, and economic resources and opportunities. I will address each of these factors in turn.

First, the fact of difference materially contributes to the emergence of conflict between ethnic groups, particularly in modernizing countries. Ethnic groups tend to differ in a number of important respects. Ethnic groups may speak different languages, practice different religions, and have different cultural understandings and traditions. Each ethnic group also tends to have its own authority structure and its own set of norms about how power is exercised and how business is conducted. When members of different ethnic groups begin to come into contact, there are therefore barriers to effective communication and impediments to coordinated action.

In the past, groups may have been able to avoid contact with each other. Differences between groups did not matter since groups could live separately from each other, with no need to communicate or to coordinate actions. However, the processes of modernization, including urbanization, centralized and standardized education, and economic specialization, bring members of different groups into increasing contact with each other. This increased contact raises the need for effective communication between members of different groups and the ability to coordinate their actions. Moreover, in the post-colonial era, ethnic groups within a state must make determinations about how they will govern their lives together within the
polity. Decisions must be made about how power may be legitimately exercised, the institutional structures of the state, the official language of the state, and how the scarce resources of the state will be used.

Under these circumstances, increasing contact between groups tends to engender conflict. Coexistence within a single state and coordinated action require a homogenization of the ethnic groups’ different norms, institutions, social structures, language, and cultural practices. Ultimately, concessions must be made in order for the groups to settle upon a common language and a set of shared norms and institutions. But which group will make the concessions? As groups broker the assimilation of norms and institutions, each has an incentive to resist making concessions and to insist upon retaining its own structures and understandings. Groups have much to gain or to lose in these determinations. The ability to dominate the institutions that govern the lives of the ethnic groups within their shared state provides a group with access to important scarce resources that not only enhance the ability of group members to survive, but even to advance in status and wealth. Moreover, the conceding/assimilating group will bear certain costs in terms of learning a new language or becoming accustomed to new norms and practices. Conflict results from the inability of groups to reach agreement about which norms and institutions ought to prevail. Forbes describes the matter in the context of coordinated economic action as follows:

Contact seems to be a cause of conflict precisely because it is also a cause of assimilation. In a shrinking world, humanity could converge on many different cultural patterns, and each group wants to preserve as much as possible of its own way of life…generally speaking, when two ethnic or cultural groups find themselves with economic incentives to cooperate in a wider division of labour, as they do increasingly in the modern world, they also inescapably find themselves in a conflict of interest regarding the modalities of their cooperation. Who is going to
imitate whom? Generally speaking, each group would prefer to be imitated and not to imitate.\textsuperscript{119}

The elites of each group in particular have a vested interest in ensuring that their group resists assimilation and, instead, is imitated by the other group. Assimilation of their own group threatens the power and influence of the elites. Thus, elites have strong incentives to ensure that the language, norms, and social structures of their own respective groups dominate society. In order to preserve their sphere of influence, elites must pressure members of other groups to assimilate to the elites’ group while at the same preventing members of their own group from defecting. In the context of two different linguistic groups, Forbes comments:

> Each group has an interest not just in encouraging members of the other linguistic group to become bilingual but also in stiffening the resistance of their own members to assimilation. Each defection adds to the pressure on the remaining loyalists to defect. Conversely, the stiffer the resistance, the more likely the group will succeed in making the other group bear the costs of assimilation.\textsuperscript{120}

Elites face the imperative of ensuring that ethnic group members remain loyal to the language, traditions, culture, and social structures of the group. In order to “rally the ethnic faithful”, elites frequently rely on ethnocentric claims that highlight the glorious heritage of the ethnic group and that disparage the other groups or that portray the other groups as dangerous predators. Given the socio-psychological processes discussed above in relation to the tendency to cleave and to compete, the efforts to rally the ethnic group against assimilation can readily trigger heightened tension and competition between ethnic groups. The pressure to prevent

\textsuperscript{119} Forbes, \textit{supra} note 76 at 146-147.
\textsuperscript{120} \textit{Ibid.} at 147.
ethnic group members from defecting can thus deepen the divide between the groups in society and even radicalize the claims of a group such that conflict between the groups escalates.\textsuperscript{121}

In terms of contact acting as a source of conflict between groups, Forbes observes that the conflict that arises in situations of contact has an impact on the on-going degree of contact between the groups. Conflict impacts contact by “tending to limit and structure the contacts among groups in such a way as to either increase or decrease the assimilation that would otherwise take place.”\textsuperscript{122} For example, a group may withdraw from contact entirely and simply forgo the advantages that accompany contact with outside groups. Alternatively, a group may seek out enough contact that allows it to profit from its exchanges with other groups but that is not sufficient to result in complete assimilation. A third possibility is that a weak group will be unable to resist assimilation. After a period of time, the group, as a distinctive entity, will disappear.\textsuperscript{123} In essence, Forbes suggests that contact generates conflict that, in turn, drives groups apart as each group attempts to preserve its distinctiveness by limiting opportunities for group members to assimilate. While this dynamic is important to understanding the overall pattern of inter-group relations, it is unlikely that groups can avoid contact with each other entirely in a modernizing state. As I noted earlier, the processes of urbanization, centralized (\textit{i.e.}, state-delivered) and standardized schooling, and economic specialization bring ethnic groups into increasing contact. While groups may attempt to hive

\textsuperscript{121} Forbes advances the interesting hypothesis that contact between individuals from different groups may improve relations between those two individuals, but worsen the relationship between the two ethnic groups. Contact between two individuals has an impact on the individual level, but also on the group level of relations since this contact represents two ways of life, two cultures, two language groups coming into contact. The development of a friendly relationship between the two individuals raises a concern within the larger groups about resistance to assimilation and sparks calls to rally the ethnic faithful behind the group’s identity. Consequently, at the group level, the “main immediate effect [of contact between two individuals] is to increase antipathies rather than to reduce differences.” See Forbes, \textit{ibid.} at 169.

\textsuperscript{122} \textit{Ibid.} at 158.

\textsuperscript{123} \textit{Ibid.} at 158-9.
off aspects of their lives from each other, some level of contact is inevitable and, thus, some degree of conflict is also likely to occur.

The second key factor that tends to push ethnic groups into conflict relates to the role of the elite and the pursuit of political, social, and economic resources and opportunities. Elites have long employed ethnicity to mobilize the masses in the pursuit of social, political, and economic gain. William Easterly, for example, describes how King Mithridates VI of Pontus encouraged Asian debtors to kill their Roman creditors when he invaded Roman territory in Asia Minor. Asians responded by killing 80,000 Romans. The masses reduced their debt, while the king weakened his enemy. Otto von Bismarck appealed to the kinship ties existing between Germans who were dispersed over more than 30 sovereign entities in order to unite the Germans in a single state. Bismarck famously exhorted these Germans to “think with your blood!”

Even communist leaders have relied upon appeals to ethnic loyalties to unite the masses, despite the philosophical incompatibility between nationalism and communism. In an analysis of the role of nationalism in the work of Marx and Lenin, Connor notes how both Marx and Lenin reject nationalism as a bourgeois ideology. Nevertheless, both Marx and Lenin recognized the mass appeal of nationalism, and advocated using nationalist sentiment as a means of taking power. Connor also describes how Chinese Communist leader Mao Tse-tung employed appeals to ethno-national sentiment to bolster the support of the Chinese

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125 Ibid.
masses. Mao referred to the Chinese Communist Party as the “vanguard of the Chinese nation and the Chinese people”—not as the “vanguard of the proletariat”, as one might have expected from a Communist leader.\textsuperscript{127} Mao’s propaganda included references to the kinship ties binding all members of the Chinese communist nation together. For example, Mao described Chinese communists as “part of the Great Chinese nation, flesh of its flesh and blood of its blood”.\textsuperscript{128} Mao also called upon “all fathers, brothers, aunts, and sisters throughout the country…all our fellow countrymen, every single zealous descendent of Huang-ti [the legendary first emperor of China]” to “determinedly and relentlessly participate in the concerted struggle”.\textsuperscript{129}

The intense emotions associated with ethnicity and the loyalty people tend to feel towards their respective ethnic groups makes ethnic affiliation a powerful vehicle for mobilizing the masses in polarized societies\textsuperscript{130}. Ethnicity offers other advantages as a basis of mobilization. There are efficiencies associated with working within one’s own ethnic group. A common language and shared cultural norms and ideas reduce the transaction costs associated with building and maintaining support among the masses. Attempting to build support across ethnic boundaries requires that a would-be leader connect with people who may not speak the same language, share the same religion, or share important cultural understandings. Cultivating support from different ethnic groups thus frequently involves higher costs than casting issues in an ethnic


\textsuperscript{129} Brandt, Schwartz & Fairbank, \textit{supra} note 128 at 245, as cited in Connor, Ethnonationalism, \textit{ibid.}.

\textsuperscript{130} Elite incentives differ in fractionalized societies. In fractionalized societies, the support from one’s ethnic group alone is rarely sufficient to secure political power or control over economic resources and social opportunities. Elites must draw support across ethnic groups in order to secure various political, social, and economic opportunities. Accordingly, in fractionalized societies, it is generally not in the best interests of elites to emphasize their ties to any one ethnic group since such an emphasis risks alienating potential supporters from other ethnic groups. Instead, elites have an incentive to emphasize pan-ethnic identities, such as a national civic identity or a regional identity.
light and relying on support from one’s own ethnic group. Another benefit associated with ethnically-based mobilization relates to policing who receives the benefits of hard-won battles for political, economic, and social gain. Because ethnic identity is generally difficult to change, ethnic identity serves as a stable and effective tool for identifying members of winning and losing coalitions. There is thus an additional incentive to rely on ethnicity in the pursuit of political, social, and economic opportunities.

The emergence of the doctrine of nationalism further fused the competition for political power with ethnic divisions. Nationalism tied the right to exercise political power to the ethnic group, thereby giving ethnicity a central role in the public affairs of the state. Nationalism not only legitimatized mobilizing the masses on the basis of ethnicity in the pursuit of political power, it mandated such mobilization. Furthermore, it elevated the status of ethnicity vis-à-vis other forms of group identification. The question of who could legitimately exercise political power and who could have a public role in the state thus became directly tied to ethnic affiliation. As a result, political battles for control fell (and continue to fall) along ethnic dividing lines.

Elites’ use of ethnic affiliation as a means of mobilizing the masses in the pursuit of social, economic, and political power places the competition for such power along ethnic divisions in a polarized society. Conflict between ethnic groups emerges as competing elites mobilize their respective groups in support of their bids for power and influence. This instrumental use of ethnic affiliation is particularly potent as a source of conflict given the socio-psychological “belongingness want” of people and the tendency to cleave and to compete. The competition for social, economic, and political influence becomes laden with the ideology of blood ties,
loyalty to one’s ancestral group, and the duty to ensure the survival and advancement of the group as a whole. Efforts to secure social, economic, and political power are cloaked in rhetoric about the kinship group, the nobility and honour of the group’s history, the group’s rightful place in society, and the need to protect the group from treacherous interlopers. Elites have proven adept at creating and re-creating the identity and history of the ethnic group to serve their own needs. What is, in essence, a battle for influence and resources becomes imbued with an existential quality that engages deep-seated loyalties and antipathies such that ethnic group members feel compelled to respond. Thus, the mobilization of the ethnic masses in service of the elites’ pursuit of social, economic, and political gain triggers wider inter-ethnic conflict in society.

The third and last line of inquiry about ethnic conflict considers why levels of conflict differ from society to society. Inter-ethnic relations in polarized societies differ significantly in terms of the degree of violence and instability flowing from conflict between ethnic groups. In some societies, for example, Belgium and Canada, ethnic conflict occurs primarily in the political realm, such as in the contesting of elections. In other cases, however, conflict takes the form of brutal ethnic riots, coups, civil war, and even genocide, as has been demonstrated in Northern Ireland, Burundi, Rwanda, Fiji, Sri Lanka, and the former Yugoslavia. Understanding the reasons for the different experiences of these countries would greatly facilitate the development of a successful strategy for mitigating violent ethnic conflict.

Existing literature on ethnic conflict does not sufficiently explain why the degree of ethnic conflict varies from society to society. Perhaps the best explanation relates to the existence of
institutions in some states that serve to manage tension between groups effectively. There is a large body of literature that explores various institutional arrangements that contribute to the successful management of ethnic conflict. Such arrangements include, but are not limited to, consociational democracy, power-sharing generally, federalism generally, concurrent majorities, proportional representation, and the recognition of group rights. The adoption of certain types of institutions does appear to be related to the successful management of ethnic conflict. It is relatively uncontroversial to suggest that some types of institutional arrangements are better suited to managing ethnic conflict than others. Nevertheless, the existence of these institutions in some societies does not completely explain why levels of conflict vary from country to country. There are at least three important questions that remain unanswered when we consider the role of certain kinds of institutions in mediating ethnic conflict.

First, how have some countries come to adopt conflict-mediating institutions while others have not? Conflict between ethnic groups presumably existed before these institutions were adopted. How were ethnic groups able to agree upon these institutional arrangements and cooperate in the implementation of the institutions? Moreover, what prevents countries locked

in ethnic warfare from adopting these institutions? The concept of power-sharing, for example, is well-recognized as being a fundamental principle for structuring institutions in polarized societies. Nevertheless, in some countries, it appears as though ethnic groups are willing to risk mass violence and instability rather than compromise on how power should be shared in the polity.

Second, what accounts for the fact that in some cases, countries have adopted institutions recognized to be well-suited for managing ethnic conflict only to slip back into violence shortly thereafter? In Burundi, for example, the return to democracy after a lengthy period of Tutsi domination was cut short after the newly elected Hutu President Melchior Ndadaye was assassinated in 1993. Fiji also raises questions in this regard. In 1995, Fiji began a process of re-drafting its constitution to restore Fiji to a more just and democratic state following the coups of 1987. The constitution that resulted from this process was by many accounts a “fair” constitution in that it gave a relatively balanced role to native and Indo-Fijians in government. In a number of key respects, this constitution contained textbook examples of how institutions may be structured to mitigate violent conflict. The constitution was formally adopted in 1997. In parliamentary elections held in 1999, the People’s Coalition, a party supported by both Indo-Fijians and native Fijians, was elected to power under the leadership of Mahendra Chaudry. Chaudry was the country’s first Indo-Fijian Prime Minister. In 2000, however, Prime Minister Chaudry, most of his cabinet, various Parliamentarians, and their staff members were held hostage for 56 days in a coup led by George Speight. Order was eventually restored and the country returned to democratic proceedings until 2006, when the military force acting under the leadership of Commodore Bainimarama executed another coup. Fiji remains under military rule, though the military insists that it will not abrogate the Fijian constitution unless
absolutely necessary. As the cases of Burundi and Fiji illustrate, good institutions do not appear to be enough to prevent the outbreak of violent ethnic conflict.

Third, what accounts for the fact that ethnic groups in some countries pursue radical goals, including secession, without triggering a descent into violence? The case of Quebec illustrates this perplexity. Nationalists in Quebec have been pursuing secession from Canada for over thirty years. Referenda on the issue of secession were held in 1980 and 1995, both of which were lost by the separatists. In 1995, the separatists lost the referendum on secession by less than one percent. Although Jacques Parizeau, the leader of the provincial separatist party, made reference to the role that “money and the ethnic vote” played in the defeat of the separatists, there were no incidents of rioting, looting, or other violence directed against Anglophones or other ethnic minorities. Moreover, Parizeau did not propose seceding unilaterally from Canada. In essence, the radical goal of seceding from Canada was pursued in a moderate fashion: ballots were cast, votes were counted, and the results were (grudgingly) respected.

There are at least two important observations that must be made about the case of Quebec. First, inter-ethnic conflict does dissipate after many years, economic development, or the adoption of institutions designed to mitigate inter-ethnic tension. Second, the pursuit of a radical goal does not necessarily plunge a country into violence and instability. When the case of Quebec is juxtaposed with the case of Fiji, we also see that the adoption of good institutions is not sufficient to prevent the descent into violence and instability. Indeed, the juxtaposition of the cases of Quebec and Fiji places the question of the reasons for the variance in levels of
ethnic conflict in sharp relief. In order to develop effective strategies for mitigating ethnic conflict, we must understand the reasons for the differences between, for example, Quebec and Fiji. We must also cultivate an understanding of how we can move countries from violence and instability to institutional restraint, even when pursuing radical claims. In Chapter Two, I argue that we can gain insight into the variances between cases like Quebec and Fiji by analyzing intra- and inter-ethnic relations from the perspective of social capital. In so doing, I will contribute to existing scholarship by enhancing our understanding of this key dimension of ethnic conflict.

6. Conclusion
This chapter has highlighted the tremendous cost to social, economic, and political development exacted by violent ethnic conflict in ethnically polarized societies. In this regard, I have established that addressing inter-ethnic conflict should be an imperative when formulating strategies for development in polarized societies. This chapter has also explored three central dimensions of ethnic conflict. First, I highlighted several socio-psychological processes that facilitate mass mobilization and competition between members of different groups. The salience of ethnic identity and its organic, primordial characteristics were highlighted. This first dimension of ethnic conflict suggests that ethnicity is a powerful vehicle for mobilization. Moreover, the importance attached to ethnic ties and the pervasive impact that ethnic affiliation has on people’s lives suggest that it is very difficult to eliminate ethnic divisions in society. This observation will have important implications in my assessment of possible strategies for mitigating violent ethnic conflict in the next chapter. Second, I explored the role of ethnic difference and the role of the ethnic elite in causing conflict. This discussion illustrated that elites often play a pivotal role in the outbreak of ethnic conflict. Moreover, elites frequently have powerful incentives to emphasize ethnic affiliation and to thrust ethnicity
into the centre of public life. In Chapter Two, I will build on these observations in analyzing the nexus between elite incentive structures and the outbreak of violent ethnic conflict. Finally, I highlighted the perplexing question about why levels of ethnic conflict vary from country to country, and I noted that current scholarship has failed to explain this variance satisfactorily. This discussion offered reasons for optimism, as it appears that even radical claims to secession can be pursued without plunging a society into violence and chaos. Yet this discussion also offered cause for concern, as it also appears that good institutions do not suffice to prevent violent ethnic conflict. We have thus arrived at a fundamental question: how can ethnic conflict be channelled into institutional arenas so as to prevent violence and instability in a polarized society? Chapter Two builds on the foundation established in this chapter and addresses this core question by presenting a social capital analysis of elite incentive structures.

In Chapter Two, I argue that robust levels of inter-ethnic social capital provide incentives for elites to adopt moderate policies and to pursue their agendas through the institutions of the state rather than by adopting radical, extra-institutional strategies such as violence or insurgency. The challenge in ethnically polarized, developing countries is how to cultivate inter-ethnic social capital. I argue that institutions that embody the norms of inter-ethnic social capital—the right to participate, the right to continued existence, and the rule of law—can act as forums for conveying and re-enforcing these norms. As elites and the masses engage in and with institutions, they gradually internalize the norms of inter-ethnic social capital. However, good institutional design is not sufficient to initiate the cultivation of inter-ethnic social capital. Instead, I argue that peace processes that begin when there is a hurting stalemate between ethnic groups offer fragile opportunities to begin to foster a shift towards the norms of inter-
ethnic social capital. The internalization of these norms can be initiated by integrating these norms into the peace process at the level of both the elites and the masses.

In Chapter Three, I discuss how inter-ethnic social capital can be cultivated at the level of the elites. I argue that when formal institutions are structured on the basis of the norms of inter-ethnic social capital, elites will gradually internalize these norms as they interact with each other on a repeated basis within these institutions. By integrating the norms of inter-ethnic social capital into the structure of the peace process, elites have the opportunity to begin to learn to engage with each other on the basis of these norms. Moreover, structuring the peace process in this manner increases the likelihood that the institutions adopted during the peace process also embody the norms of inter-ethnic social capital and that these institutions are perceived to be legitimate. Chapter Three explores how the norms of the right to continued existence, the right to participation, and the rule of law can be actualized in the experiences of the elites throughout the peace process.

In Chapters Four and Five, I explore how inter-ethnic social capital can be cultivated at the level of the masses. Different strategies must be adopted for cultivating inter-ethnic social capital at the level of the masses than the strategies adopted at the level of elites. Inter-ethnic social capital is diffused to and internalized by the general population principally through the interactions that the masses have with the institutions of the state. However, given the legacy of state violence and the commission of atrocities, the relationship between the masses and the state must be rehabilitated. Chapter Four addresses the first dimension of rehabilitating the relationship between the masses and the state, namely the re-establishment of the legitimacy of
the state to exercise authority, including its monopoly on the use of sanctioned violence, in the polity. Chapter Five explores the second dimension of rehabilitating the relationship between the state and the masses, that is, the cultivation of a sense of public ownership of state institutions. In this regard, I examine how closer connections between the state and the general population may be fostered in light of the alienation that frequently exists in the polity. Chapter Five also considers the role of reconciliation between ethnic groups in the peace process and in the cultivation of inter-ethnic social capital. Chapter Six concludes.
Chapter 2
Social Capital, Ethnicity, and Elite Incentive Structures

1. Introduction

This chapter sets out my understanding of the relationship between ethnic polarization, social capital, and violent ethnic conflict. I focus on how levels of intra-ethnic and inter-ethnic social capital impact elite incentive structures in polarized developing countries. I argue that the conditions in such countries tend to give rise to robust levels of intra-ethnic social capital, but very low levels of inter-ethnic social capital. The elite incentives that result from the juxtaposition of high levels of intra-ethnic social capital and low levels of inter-ethnic social capital propel a society towards conflict, as the relations between groups in the polity are characterized by zero-sum, “dominate or be dominated” approaches. Elite incentive structures may be altered, however, by cultivating higher levels of inter-ethnic social capital. As inter-ethnic social capital grows, the costs of adopting moderate and conciliatory strategies are lowered and the benefits attached to such strategies increase. Over time, the development of inter-ethnic social capital gives rise to a civic compact, i.e., a widespread attachment among the citizenry to the core norms of inter-ethnic social capital and to the idea that the polity must be shared by all constituent ethnic groups. Ultimately, robust levels of inter-ethnic social capital engender a political market for moderation. Thus, by cultivating inter-ethnic social capital, we can create incentives for elites to work through institutions to promote the interests of their group rather than to adopt radical, extra-institutional strategies such as terrorism or insurgency. There is therefore a strong imperative to increase the stores of inter-ethnic social capital in polarized developing societies. I argue that the structure of peace processes offer opportunities to set the foundation for the growth of inter-ethnic social capital. Institutions play a pivotal role in re-enforcing inter-ethnic social capital. However, the process of
constitutional and institutional reform is as important as the substantive nature of the reform itself. Accordingly, rather than focus on institutional and constitutional arrangements that are congruent with inter-ethnic social capital, I focus on the structure of peace initiatives as key opportunities to begin to lay the foundation for the emergence of inter-ethnic social capital.

Until now, there has been very little consideration of what social capital may mean in the context of ethnic differences and what possibilities social capital may hold for the management of ethnic conflict. There has been ample consideration of how ethnic diversity impacts levels of social capital. However, this scholarship does not explore the particular nature of social capital that exists within or between ethnic groups. I address this deficit in existing scholarship by beginning this chapter with an introduction to the concepts of intra-ethnic and inter-ethnic social capital. The use of existing conceptions of social capital (e.g., bonding and bridging social capital) to describe ethnically-based social capital risks missing key dimensions of this latter form of social capital. Conceptual clarity requires a more precise understanding of ethnically-based social capital. My explanation of the conceptions of intra-ethnic and inter-ethnic social capital provides this much-needed clarity.

There has been only limited study of how social capital may impact the possibilities for peaceful coexistence in polarized societies. Varshney has introduced consideration of how civic life in a state affects levels of violence.132 He focuses on studying the correlations between civic engagement and relative levels of Hindu-Muslim violence in cities and towns in India. Varshney argues that inter-ethnic networks of civic engagement aid in preventing ethnic

violence by building bridges between communities, disseminating important information, and managing tensions between groups. However, if communities are organized along intra-ethnic lines and if there are weak or nonexistent interconnections between ethnic communities, then ethnic violence becomes quite likely.

Varshney does not make explicit reference to social capital. Instead, he focuses on the concept of civic engagement. Varshney points to two specific forms of civic engagement: associational and quotidian, or everyday forms of engagement. Associational forms of civic engagement refer to interactions that occur in organized forms such as business associations, professional organizations, reading clubs, sports teams, and cadre-based political parties. Quotidian forms of engagement consist of the routine, day-to-day interactions of life such as when families from different communities visit with each other, share meals, and send their children to shared public education facilities. Although both forms of civic engagement are useful in preventing violence, associational forms of civic engagement are the sturdier of the two and have the most impact on containing ethnic conflict. Varshney argues that vigorous inter-ethnic associational life constrains politicians from attempting to polarize the population along ethnic lines and, consequently, reduces the potential for violence.

This dissertation adds to Varshney’s scholarship and the study of the nexus between social capital and inter-ethnic violence in three key ways. First, Varshney’s conception of social capital (though he never actually uses the term) is relatively thin, and focuses exclusively on forms of intra-ethnic and inter-ethnic civic engagement (associational and quotidian). Varshney does not consider the role that norms play in the mitigation of violent conflict.
Although I do not disagree with Varshney’s arguments concerning the role of civic engagement in preventing violence, I consider the failure to assess the role of norms to be a significant omission in the analysis of how social capital contributes to the mitigation of violent conflict. I argue that norms are pivotal to understanding how inter-ethnic social capital mitigates violent conflict. By drawing attention to both norms and cross-ethnic networks of relationships, I offer a fuller account of how inter-ethnic social capital can contain violent ethnic conflict.

Second, I bring a different focus to the study of the effect that social capital has on ethnic violence. Varshney’s account centres on the role that different forms of civic engagement have on the containment of violence. In this regard, Varshney focuses on how factors such as reducing uncertainty, preventing the dissemination of rumours and misinformation, and neighbourhood patrols contribute to preventing violence. By contrast, my main focus is on how social capital affects the incentive structures of elites in polarised, developing countries. I thus draw attention to a different mechanism through which social capital facilitates the mitigation of violent conflict. In this regard, my dissertation complements Varshney’s scholarship by exploring a related, though different dimension of conflict prevention.

Third, Varshney’s analysis fails to take into account the paradoxical effect that positive cross-ethnic inter-personal contact tends to have on group relations.\(^\text{133}\) As I will discuss in greater

detail in this chapter, although contact between individuals of different ethnicities may reduce these individuals’ own prejudices, this same contact may trigger increased animosity at the group level. Although it appears paradoxical, empirical evidence bears out the observation that increased contact at the individual level results in heightened inter-group tension, regardless of how positive the contact is at the individual level. Varshney’s failure to address the fact that increased contact appears to engender conflict is a serious weakness in his analysis. Policy prescriptions based on cultivating increased inter-ethnic associational and quotidian forms of engagement alone could ultimately result in more conflict if the effect that contact has on inter-group tension is not adequately addressed.

My analysis of social capital and ethnic relations addresses this weakness in Varshney’s approach by considering networks of inter-ethnic personal relationships and norms that govern inter-ethnic relations in the polity. I propose that the inter-group tension that might otherwise arise from interactions between individual members of different groups can be offset by widespread attachment to the norms of inter-ethnic social capital and the development of the civic compact. My arguments in this regard differ considerably from the policy recommendation of other scholars, who favour the cultivation of civic nationalism (e.g.,

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Conflict: Commerce, Culture and the Contact Hypothesis (New Haven: Yale University Press, 1997) [Forbes, Ethnic Conflict].

Putnam\textsuperscript{135}) or the adoption of “quiet policies of assimilation” (Forbes\textsuperscript{136}). The perspective I bring is more attuned to the realities of inter-group dynamics in an ethnically polarized society and is more consistent with the principles of international human rights law since it recognizes and affirms the continuing existence of ethnic groups and the preservation of their distinctive identities. Thus, this dissertation responds to an important weakness in Varshney’s scholarship by offering a new and arguably better alternative to assimilation and civic nationalism as a means of addressing violent ethnic conflict.

More generally, applying a social capital analysis to the problem of violent ethnic conflict draws attention to relational dynamics in a polarized society that can establish a foundation for coexistence. Ethnic conflict has been extensively studied. Scholars have highlighted a wide variety of structural and institutional mechanisms relevant to managing conflict. However, there has been limited study of the underlying relational and normative elements that give these mechanisms the capability to manage conflict over the long term. I fill this gap by pointing to social capital as a key resource for facilitating coexistence in a polarized country.

This chapter is divided into four sections. I begin by introducing the concept of social capital generally and intra-ethnic and inter-ethnic social capital in particular. I argue that the social capital that inheres within and between ethnic groups has unique qualities such that ethnically-

\textsuperscript{135} See Robert D. Putnam, “The Prosperous Community: Social Capital and Public Life” (1993) 13 American Prospect 35 [Putnam, “Social Capital”] and Robert D. Putnam, Robert Leonardi & Raffaella Y. Nanetti, \textit{Making Democracy Work: Civic Traditions in Modern Italy} (Princeton NJ: Princeton University Press, 1993) [Putnam et al., \textit{Making Democracy Work}]. “Civic nationalism” refers to a type of nationalism where the citizens’ attachment is to the civic institutions of the state such as the constitution, the legislative process, and the judicial system, rather than to the fact that the state’s geo-political boundaries overlap with the ethnic group’s boundaries. According to proponents of civic nationalism, the state derives its political legitimacy from the participation of the citizenry in the civic affairs of the state, including participation in the governance of the state.

\textsuperscript{136} See Forbes, \textit{Ethnic Conflict, supra} note 133.
based social capital merits consideration on its own terms rather than through existing conceptions of bonding and bridging social capital. Second, I argue that polarized developing societies tend to have robust levels of intra-ethnic social capital, but low levels of inter-ethnic social capital. I then analyze the impact of the relative levels of ethnically-based social capital on elite incentive structures in the polity in the context of a modernizing economy. I explain how the robust levels of intra-ethnic social capital and the low levels of inter-ethnic social capital interact to create incentives for elites to seek to ensure that their groups dominate the state. By focusing on the impact that ethnically-based social capital has on elite incentive structures in the context of modernization, I draw attention to a set of factors that has not received significant attention in law and development scholarship related to violent conflict.

Third, I propose that development strategies for polarized countries should have as a central objective the cultivation of inter-ethnic social capital. I explore how inter-ethnic social capital changes elite incentive structures in a manner that creates preferences for promoting elite agendas through existing formal institutions. In this regard, I give particular attention to the emergence of the civic compact and the development of a political market for moderation. In this third section, I also respond to suggestions made by other scholars about how violent conflict may be mediated.

The fourth and final section of this chapter explores how to transition unstable, conflict-torn countries into societies marked by high levels of inter-ethnic social capital. I discuss the nature of the norms of social capital, and contrast my view with that of other scholars who suggest that the rule of law emerges as a result of the balance of power among actors in the polity. I
argue that transitioning into a peaceful coexistence is often stymied by pitfalls in the peace process. The challenge in many countries is not that elites in these countries prefer institutions that are poorly designed to manage coexistence in a polarized society, but rather that the process of adopting institutional reform has not been well managed. Accordingly, I argue that transition can be facilitated by carefully structuring peace processes in a manner that sets the foundation for the emergence of inter-ethnic social capital. In this regard, I set myself apart from scholars who have focused on prescriptions for the design of institutions. While there is a large body of scholarship exploring how institutions and constitutions should be designed in ethnically polarized societies, there is comparatively little scholarship on how the process of reform should be structured. My approach therefore seeks to draw attention to an under-studied dimension of peace processes in the hopes of finding new ways to help deeply divided countries transition into peaceful coexistence.

2. Social capital in ethnically-polarized societies

   2.1. “Social capital”
Social capital refers to the networks of formal and informal relationships among various actors (both institutional and individual) within a society and the norms, expectations, and understandings about rights and obligations that are imbued within these networks which facilitate coordinated collective action.\(^{137}\) Social capital has two important characteristics: it is

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\(^{137}\) The conceptualization of social capital in this study is heavily influenced by the work of James Coleman and Robert Putnam, though unlike these scholars, I do not consider that trust is a key component of social capital. Rather, I view trust as a product of robust levels of social capital. In this regard, my understanding of social capital has been materially influenced by Michael Woolcock. However, I do share Coleman’s and Putnam’s emphasis on norms and networks, as well as their recognition of the inherently functional nature of social capital. For key works by Coleman and Putnam, see James S. Coleman, “Social Capital in the Creation of Human Capital” (1988) 94 American Journal of Sociology S95 [Coleman, “Social Capital”]; James S. Coleman, Foundations of Social Theory (Cambridge MA: Harvard University Press, 1990) [Coleman, Foundations]; Putnam, “Social Capital”, supra note 135; Putnam et al., Making Democracy Work, supra note 135; and Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (New York: Simon & Schuster, 2000) [Putnam, Bowling]. See also Michael Woolcock, “Social capital and economic development: Toward a theoretical synthesis and policy framework” (1998) 27 Theory and Society 151 [Woolcock, “Social capital and
relational and it is functional. Social capital is, by its very nature, relational in that “inheres in the structure of relations between actors and among actors.” 138 Portes describes the matter as follows:

Whereas economic capital is in people’s bank accounts and human capital is inside their heads, social capital inheres in the structure of their relationships. To possess social capital, a person must be related to others, and it is these others, not himself, who are the actual source of her advantage. 139

Social capital is not the relationships themselves, although it is very difficult to separate social capital from relationships in society. Instead, social capital is embedded in the network of relationships and the interconnectedness that accompanies the network, along with that which holds the relationships together, namely, shared norms, expectations, and understandings.

Social capital is also inherently functional. It exists as a resource to actors within networks of relationships that allows these actors to coordinate activities with other actors in the same networks. As Coleman observes, social capital is productive in that it “facilitates certain actions of actors…making possible the achievement of certain ends that in its absence would not be possible.” 140 The functionality of social capital has implications at both the group and the individual level. At the level of the group, social capital allows for the possibility of coordinated collective action by facilitating cooperation among the individual members of the group. This collective action enhances the group’s competitiveness vis-à-vis other groups in the pursuit of scarce resources. At the level of the individual, social capital assists actors in the

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140 Coleman “Social Capital”, supra note 137 at S98.
pursuit of their individual goals by providing access to the resources and influence of other members of the individual’s networks of relationships.

I do not consider that trust forms part of social capital. Rather, robust levels of social capital engender trust, including impersonal forms of trust, i.e., trust between strangers. My conception of social capital in this regard differs from both Coleman and Putnam. Coleman and Putnam identify trust as being a key element of social organization that facilitates collective action.141 However, trust is not essential for coordinated collective action, though it does make such action much more likely.142 Instead, it is adherence to norms and understandings about rights and obligations and the expectation that other parties will do the same that makes coordinated action possible. People adhere to certain norms and understandings, and expect that others will do the same, for a variety of reasons.143 For example, social sanctions and criminal sanctions deter defection from established societal norms and understandings. Trust between the parties need not exist so long as there are other factors, such as sanctions for defection, that give the parties sufficient incentives to adhere to the relevant norms. Thus, trust is not essential to the concept of social capital as a relational and functional phenomenon.

141 See Putnam et. al., “Making Democracy Work”, supra note 135, particularly at 167 and see Coleman, Foundations, supra note 137, particularly at 300-301. See also Coleman, “Social Capital,” supra note 137.
142 Karen S. Cook, Russell Hardin & Margaret Levi argue that there are a wide range of mechanisms other than trust that parties use to secure cooperation. Examples include concern for one’s reputation in a small community, the ability to sue a party for breach of contract, and employee monitoring mechanisms. Trust is shown not to be necessary for cooperation between parties. See Cooperation without Trust? (New York: Sage, 2005).
143 For a discussion of a range of mechanisms that can be used to secure cooperation without trust, see Cook, Hardin & Levi, ibid.
As Woolcock argues, trust, properly understood, is an outcome of repeated interactions, reputation, and so forth.\textsuperscript{144} Trust thus emerges as social capital facilitates repeated interactions between parties based on a shared set of norms and expectations. As Woolcock cautions, we must be careful not to confuse what social capital is (networks and norms) with the consequences of social capital (coordinated action, higher levels of trust, and so on).\textsuperscript{145} Since social capital engenders trust, however, the existence of high levels of trust, especially impersonal trust, does serve as a marker of the existence and relative robustness of social capital.

\textbf{2.2. Bridging, bonding, and linking social capital}

Scholars have described at least three different kinds of social capital, namely bonding, bridging and linking social capital. “Bonding” social capital refers to the ties that exist between family members, close friends and neighbours.\textsuperscript{146} “Bridging social capital” refers to the relationships that exist between parties that are more distant, such as acquaintances, colleagues, or schoolmates. Bridging social capital is “a horizontal metaphor…implying connections between people who share broadly similar demographic characteristics.”\textsuperscript{147} Linkages refer to vertical alliances between marginalized or excluded individuals and other individuals in strategic positions that hold power or access to resources.\textsuperscript{148}

\textsuperscript{144} Woolcock, “Place of Social Capital,” supra note 137 at 13.
\textsuperscript{146} Woolcock, “Place of Social Capital”, \textit{ibid.} at 71-72.
lever resources, ideas and information from formal institutions beyond the community is a key function of linking social capital.”\textsuperscript{149} Linking social capital is also referred to as “cross-cutting ties”. These ties are thought to play an important role in building social cohesion and in opening up economic opportunities to people in less powerful or excluded groups.\textsuperscript{150} Woolcock urges a multi-dimensional understanding of social capital that incorporates all three types of social capital. The combination of bonding, bridging and linking social capital, he argues, is essential to understanding the outcomes that have been observed in the literature on social capital.\textsuperscript{151}

Heretofore, there has not yet been substantial study of the nature of intra-ethnic and inter-ethnic social capital and the impact that these types of social capital have on social, political, and economic development.\textsuperscript{152} Some scholars have applied the concepts of bridging and bonding social capital to the study of inter-ethnic relations.\textsuperscript{153} Bridging social capital is

\begin{itemize}
\item \textsuperscript{149} Ibid.
\item \textsuperscript{150} Deepa Narayan, Bonding and Bridges: Social Capital and Poverty (Washington DC: The World Bank, 1998) at 3-4 [Narayan, Bonding and Bridges].
\item \textsuperscript{151} Woolcock, “Place of Social Capital”, supra note 137 at 13.
\item \textsuperscript{153} See, for example, Paula M. Pickering, “Generating social capital for bridging ethnic divisions in the Balkans: Case studies of two Bosnian cities” (2006) 29:1 Ethnic & Racial Studies 79, particularly at 80-81. See also see Kathleen M. Dowley & Brian D. Silver, “Social capital, ethnicity, and support for democracy in the post-socialist states” (2002) 54 Europe-Asia Studies 505. Pickering focuses primarily on how bridging social capital between
\end{itemize}
characterized as an “inclusive”, or cross-ethnic form, of social capital, while bonding social capital is characterized as an “exclusive”, or intra-group, form of social capital. However, as I argue below, the social capital arising within and between ethnic groups should be conceptualized separately from bridging and bonding social capital since ethnic forms of social capital have distinct characteristics that are not be typical of all forms of bridging and bonding social capital.

2.3. Social capital within and between ethnic groups
The social capital that exists within and between ethnic groups is uniquely shaped by the sociology and psychology of ethnic affiliations and rivalry. Rather than rely upon existing conceptions of social capital (bonding and bridging social capital and linkages), I will refer to the particular form of social capital that arises within and between ethnic groups as “intra-ethnic social capital” (or “ethnic capital”) and inter-ethnic social capital, respectively. Before proceeding to an analysis of the impact of levels of inter-ethnic and intra-ethnic social capital on development, it is helpful to describe the key characteristics of these two forms of social capital.

2.3.1. Intra-ethnic social capital
Intra-ethnic social capital refers to the social capital that arises within an ethnic group. The most distinctive feature of intra-ethnic social capital is the connection that this type of social capital has with a sense of shared kinship ties. Because intra-ethnic social capital inheres in the ethnic groups can be fostered. Dowley and Silver critically assess whether the “usual” markers of social capital (interpersonal trust, political interest, and voluntary group participation) correlate with the most and the least successful cases of democratization in East-Central Europe and the post-Soviet states and whether these markers may have different significance in ethnically diverse and ethnically polarized societies. Dowley and Silver argue that the existence of the usual markers of social capital in an ethnically polarized society do not indicate the existence of a healthy, democratic society, but are rather warning signs that democracy may be in jeopardy since high levels of bonding social capital provide mobilization opportunities for ethnic entrepreneurs.

See Pickering, ibid. at 80-81.
bonds between members of the same ethnic group, this type of social capital is imbued with a sense of common ancestry, familial loyalty, and obligation. Intra-ethnic social capital is not merely about networks of relationships between people who share the same religion, culture, and language. The connections between members of the same ethnic group extend beyond the sum of commonalities such as religion, culture, and language. These commonalities are manifestations of a deeper and more fundamental bond. Intra-ethnic social capital is rooted in a network of connections that are experienced as kinship ties, complete with norms relating to the accompanying myth of common ancestry, a belief in the distinctiveness of the group, in-group preferences, emotional attachments, and a shared sense of responsibility for each other. Borjas and Azam were among the first scholars to take note of the unique elements of intra-ethnic social capital, which they refer to as “ethnic capital”. Borjas first coined the term “ethnic capital” to describe the bonds between members of the same ethnic group and the embedded norms, traditions, knowledge, and support that are inherent within those bonds of shared ethnicity. Azam described “ethnic capital” as a specific form of social capital, namely “the ‘social capital’ that the ethnic groups provide for its members”.

Inter-ethnic social capital encompasses bonding and bridging social capital and linkages. Because the connections between people are experienced as kinship ties, the horizontal and vertical bonds within the ethnic network of relationships are particularly “sticky”. In other words, the connections are strong and durable and hold together well. Moreover, even relatively remote connections (e.g., between two individuals living in different towns and holding different types of jobs) are experienced as close and familiar bonds. The norms

relating to familial loyalty and obligation that arise from the kinship dimension of ethnic
capital also exert influence over the nature of vertical associations between members of the
same ethnic group. Accordingly, what we might otherwise characterize as bridging social
capital or linkages are experienced as the much closer, kinship connection typical of bonding
social capital. The kinship dimension of intra-ethnic social capital thus creates unique
dynamics that are not adequately reflected in the concepts of bonding and bridging social
capital and linkages. Using these concepts to explore the nature of the social capital that
inheres within ethnic groups therefore risks confusion and a lack of clarity. Instead, it is
preferable to regard the networks of relationships and norms that exist within an ethnic group
as constituting a distinctive form of social capital—a social capital encompassing both
horizontal and vertical bonds which are experienced as kinship ties.

Where levels of ethnic capital are robust, this form of social capital tends to have greater
prominence in the lives of individuals relative to other networks of relationships. Whereas
other networks of relationships are grounded in common interests, employment, social strata,
or political beliefs, members of the same ethnic group are linked by their blood lines (or at
least a belief in shared blood lines), familial loyalty, and kinship duties. The old adage that
“blood is thicker than water” has truth to it. After all, as I discussed in the previous chapter,
ethnicity touches that which is basic and primordial in our lives: the family unit. The social
capital that arises within the ethnic group shares this basic and primordial quality. The
primordial dimension of ethnicity infuses intra-ethnic social capital with a similar primordial

157 I return to the dynamics of vertical relationships within the ethnic groups below.
158 As I noted in Chapter 1, from an objective perspective, ethnicity is not itself primordial. Ethnic groups are held
together by a belief in shared blood lines, not the actual existence of such blood lines. Nevertheless, the
perception that ethnicity is primordial and that members of the same group are linked through their ancestry tends
quality. There are few other social, economic, or political connections between people that can create a bond as profound as that which exists between members of the same ethnic group. The close connection that members of the same ethnic group feel to one another despite some or many other socio-economic and political differences is important to understanding the forces that propel a polarized society towards conflict. I will return to this dimension of intra-ethnic social capital below.

2.3.2. Inter-ethnic social capital

“Inter-ethnic social capital” refers to social capital (bridging, bonding, and linking) that exists between ethnic groups. Inter-ethnic social capital is not characterized by the type of attachments that accompany kinship ties and that are typical of intra-ethnic social capital. Inter-ethnic social capital has two principal dimensions. First, it consists of the networks of formal and informal relationships between actors of different ethnicity. Inter-ethnic social capital includes relationships between individuals of different ethnicities and between the institutional actors representing different groups (e.g., political parties or labour unions that are predominantly composed of individuals from one ethnic group). Inter-ethnic social capital may therefore exist at both an individual and a collective level.

Second, inter-ethnic social capital consists of the norms, understandings, and expectations about rights and obligations that mediate relations between different ethnic groups and between individual members of different ethnic groups. In this regard, inter-ethnic social capital embodies the “social contract” that underlies the coexistence of ethnic groups within the polity. The three most important norms of inter-ethnic social capital are: the right of each ethnic group to continued physical and cultural existence with the polity (“the right to continued existence”);
the right of each ethnic group to participate in decisions that affect the ethnic group ("the right to participation"); and a commitment to the rule of law.

The right to continued existence encompasses the right to continued physical existence, as well as the right to the preservation of the distinctive elements of the group identity. The distinctive elements of the group identity may include, for example, the group’s language, culture, and religion. The right to participate in decisions affecting a group’s interests and the interests of the state as a whole recognises each group as a stakeholder in the polity. This right to participation is, in part, a tool by which groups may protect their continued existence, since the right is triggered whenever the interests of the group are at stake. The rights to continued existence and to participation are often actualized in the institutions of the state through power-sharing mechanisms (e.g., proportional representation and federalism), the protection of the key interests of ethnic groups (e.g., language rights and influence over educational policies), and the protection of human rights.

The right to continued existence and the right to participate are rooted in the principles of international law. Although certain rights of groups, for example, the right to self-determination, are often considered second or third generation rights, the history of international law’s protection of minorities within a state’s borders extends back several centuries. Recognition of the need to protect religious minorities within a state began to be formalized in international law through treaties during the seventeenth century, after the European wars of religion.\(^\text{159}\) During the twentieth century, the collective rights of ethnic

\(^\text{159}\) See, for example, the Treaty of Westphalia, Holy Roman Empire and France and their respective allies, 24 October 1648, 1 Corps diplomatique du droit des gens, Pt. 6 450, 1 Parry 271, 1 Parry 119; Treaty of Olivia,
groups to be protected against genocide, cultural extinction, and racial discrimination and the right to participate in the political, economic, cultural, and social life of the state were recognized and promoted in various international conventions and declarations.  

The rule of law, as a norm of inter-ethnic social capital, has a predominantly procedural orientation. For the purposes of this discussion of the norms of inter-ethnic social capital, I understand the rule of law to have a number of key attributes. First, the rule of law means that certain aspects of life in society are governed by legally-enforceable rules (i.e., laws). Laws govern aspects of the relationships between individual citizens, between individual citizens and the state, and between groups. Second, laws must be enacted in accordance with the norms that have been established in society for the creation of law. At minimum, these norms must include the provision that laws cannot be retroactive. Moreover, laws must be written down...
and publicly promulgated before they may be applied. The norms that govern the creation of law must be recognized by the constituent ethnic groups in a society and may not be arbitrarily determined or amended by any one group. In most cases, it is advisable for these norms to be formalized in a constitutional document.

Third, the government, the bureaucracy, regulatory institutions, other public institutions, the military, and the police forces are all subject to the operation of the law and are accountable for their actions. The authority exercised by each of these entities is limited and does not extend to the violation of the rights of individuals or groups within the state. Fourth, all public institutions in society, including the government, the bureaucracy, regulatory bodies, the military, and the police, must respect the basic principles of procedural justice in their functioning. In general, procedural justice will be met as long as decisions are made in a manner that upholds the basic fairness of the process. The requirements of fairness will vary in different circumstances, depending on the interests involved and the wider context. Local customs and understandings concerning fairness should inform the definition of this standard so long as these local customs and understandings do not violate other foundational or operational norms in a polarized society, including the right to continued existence and the right to participation. Finally, there must be a set of independent, competent institutions charged with fairly resolving disputes in society involving the breach of laws. There must also be an institutional forum for the timely resolution of disputes between groups, including disputes related to the structure of the institutions themselves and disputes involving challenges to the vires of legislation and its compatibility with human rights law.
The existence of inter-ethnic social capital does not imply that a society has fully assimilated its constituent ethnic groups. Nor does it imply that inter-ethnic rivalries have dissipated or that tension between ethnic groups no longer exists. Inter-ethnic social capital does, however, establish rules of engagement for rival ethnic groups so that these groups can coexist without instability and persistent acts of violence. Inter-ethnic social capital places inter-ethnic rivalries and tensions into a framework that governs how the groups will relate to each other, how authority will be exercised in society, what each group may expect from the other, and what obligations each group must fulfill. This framework is largely embodied in the institutions of a polarized society. The willingness of each group to pursue its agenda through legitimate institutional channels is a key marker of inter-ethnic social capital, for it indicates a commitment to the norms and values governing coexistence that are embodied in the institutions of the polarized society.

The norms of inter-ethnic social capital differ from the norms of bonding and bridging social capital in an important respect. Typically, bonding and bridging social capital exists between two individuals, at the individual level. By contrast, the norms of inter-ethnic social capital largely govern the relationship between ethnic groups at the collective level in the polity. There is thus a distinctive group dimension to the norms of inter-ethnic social capital that does not necessarily exist in the norms of bonding or bridging social capital. This underlines the importance of conceptualizing inter-ethnic social capital as being distinct from bonding and bridging social capital and linkages. As I will illustrate below, the group dimension is also important to understanding how inter-ethnic social capital can mitigate violent conflict.
Examples of inter-ethnic social capital at work include the manner in which the Scots, Welsh, and Quebeckois have pursued greater autonomy from their respective states. In each case, greater autonomy has been sought through existing democratic institutions. Quebeckois nationalists have established political parties to contest federal and provincial elections. Moreover, the issue of seeking sovereignty has been brought before the citizens of Quebec in referenda. Significantly, each time the citizenry has voted against pursuing sovereignty, the leaders of the separatist movement in Quebec have respected the results of the referenda and have not attempted to impose their agenda by force. In Scotland and Wales, the pursuit of greater autonomy has continued for many years through politics and lobbying. The efforts of Scottish and Welsh nationalists to achieve greater autonomy were finally rewarded with the creation of a federal governance system that includes Scottish and Welsh parliaments. In each of the Scottish, Welsh, and Quebeckois cases, it cannot be said that inter-ethnic rivalry abated or that ethno-nationalistic claims were abandoned. What must be noted, however, is that ethno-nationalistic claims were advanced through existing democratic institutions and not through recourse to violent, extra-institutional strategies. Ethno-nationalists did not summarily declare independence, nor did they adopt arbitrary measures to give effect to their desire for autonomy, nor did they attempt to wrest autonomy away from the state through force. At the same time, the claims of ethno-nationalists have not been brutally repressed in the modern era by the state (which has been controlled for the most part by a different ethnic group than the ethno-nationalists, namely, the English in the U.K. and Anglophones in Canada). The Scottish, Welsh, and Quebeckois ethno-nationalist movements have not been subverted by rival ethnic groups, but rather have been tolerated. Thus, in the case of Scotland,

162 It is true that at least one radical separatist group in Quebec (the Front de la liberation de Quebec or the “FLQ”) did use violence in an attempt to advance nationalistic claims. However, the FLQ never gained broad-based public support and its existence was short-lived.
Wales, and Quebec, ethnic groups have respected and conducted themselves according to a shared set of norms and values that have allowed ethnic groups to coexist within a single state without serious violence or instability.

Inter-ethnic social capital does not refer generally to all of the attitudes and patterns of behaviour that characterize the relationship between two ethnic groups. As discussed above, social capital has a distinctly functional dimension: it facilitates coordinated action between actors. Thus, attitudes and patterns of behaviour that are dysfunctional, i.e., that impede coordinated action or cooperation between ethnic groups, cannot be considered manifestations of social capital. Accordingly, distrust, zero-sum competition, brinkmanship, acts of aggression, and the like are not forms of social capital. In fact, they signal that levels of inter-ethnic social capital are low.

3. Social capital in ethnically-polarized developing societies

Many polarized developing countries have low levels of inter-ethnic social capital. These countries do, however, tend to have robust levels of intra-group social capital. The juxtaposition of low levels of inter-ethnic social capital and high levels of intra-ethnic social capital gives rise to serious obstacles to development. Many such countries become embroiled in violent conflict and suffer from ongoing instability and political crises.¹⁶³ Devising strategies for promoting development in these countries must begin by examining how robust levels of ethnic capital combine with low levels of inter-ethnic social capital to subvert growth, peace, and stability. Such an examination will point to the central importance of cultivating inter-ethnic social capital as a key component of development strategies for polarized societies.

3.1. Intra-group social capital in developing societies

Conditions in developing countries tend to give rise to robust levels of ethnic capital due in large part to the pivotal role that the ethnic group plays in meeting the basic needs of group members and in providing structure to community life. Weak governance structures, under-investment in public infrastructure, and a failure by the state to provide access to basic socio-economic services such as health care, education, and law and order are common characteristics of life in a developing country. A significant vacuum arises from the state’s inability to provide key infrastructure and services. In the absence of government-provided infrastructure and services, it is the ethnic group that meets the needs of its individual members.

One important function of the ethnic group is the provision of a social safety net for its members. Collier likens strong ethnic ties in rural societies where people exist at subsistence levels to a form of insurance. He suggests that, “[o]ver time, loyalty to the group becomes reinforced by all the normal power of morality: it is morally good to meet your obligations.”164 Norms based on a strong sense of familial obligation to help members of the extended kinship group provide the backbone for the social safety net that the ethnic group provides to its members. There is often a strong sense among kinship groups that more fortunate members ought to share with less fortunate members. A study of Yi-Chinese entrepreneurs in Liangshan Prefecture, Sichuan province, China, for example, found that the “clan directly or indirectly creates strong pressures of obligation” to donate resources to their community.165 In one of his many dispatches from Africa, journalist Ryszard Kapuscinski describes the crucial role of

164 Collier, War, Guns and Votes, ibid. at 53.
the community in the lives of individuals and the responsibility of individuals to help out members of their communities:

But this is Africa, and the fortunate nouveau riche cannot forget the old clan tradition, one of whose supreme canons is share everything you have with your kinsmen, and another member of your clan, or, as they say here, with your cousin. (In Europe, the bond with a cousin is by now rather weak and distant, whereas in Africa a cousin on your mother’s side is more important than a husband.) So—if you have two shirts, give him one; if you have a bowl of rice, give him half. Whoever breaks this rule condemns himself to ostracism, to expulsion from the clan, to the horrifying status of outcast.  

Traditional authority structures occupy a relevant and important role in overseeing the lives of the members of the ethnic group. Azam comments that “[i]f the state is defined à la Weber, as having the monopoly over coercion, then the African states have to be regarded as being at a stage of formation, because the kin group and the ethnic group both exert substantial coercive power.” The shared norms and understandings within the ethnic group serve as an unwritten code of conduct for the members of the group. These norms govern various aspects of daily life, and provide a structure for everything from the granting of credit to a group-based strategy for advancement to the division of property upon death. In some cases, the norms and authority structure of an ethnic group even regulate the use of a commonly-held resource, such as grazing land.


167 Azam, *ibid.* at 430.

168 See Azam, *ibid.*

169 For an example, see Easterly’s discussion of NYU professor Leonard Wantchekon’s account of how his home village in Benin managed fishing in a local pond: William Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York, N.Y.: Penguin, 2006) [Easterly, *White Man’s Burden*] at 94.
From the perspective of trade and business, traditional authority structures, networks, and shared norms are particularly important given that institutions that might otherwise protect economic interests are often ineffective, inefficient, corrupt, or non-existent. Such institutions include the courts, credit agencies, industry associations, and the like.\(^{170}\) Norms within the ethnic group, including sanctions for cheating and defaulting on credit arrangements, create a structure for conducting business beyond simple “cash and carry” arrangements by providing a mechanism for deterring opportunistic behaviour.\(^{171}\)

As this discussion has illustrated, the ethnic group performs many of the tasks that the government typically performs in developed societies. Azam observes that ethnic capital “ensures to most African people the provision of many services that a modern state has taken over in rich countries, including security, social insurance, education, norms of behaviour, contract enforcement, justice and so on”.\(^{172}\) This observation can be extended to people who live in developing societies outside of Africa such as the Moslem Brotherhood in Egypt.\(^{173}\) In developing societies, the ethnic group, with its norms, authority structure, and networks of relationships, plays a central role in the life of its members and indeed is important for survival. The primacy of the ethnic group in the lives of its members tends to give rise to very robust levels of intra-group social capital. Indeed, in an important respect, the ethnic group constitutes a self-contained society within the larger geo-political unit of the state.

### 3.2. Inter-ethnic social capital in developing societies

\(^{170}\) Easterly, *ibid.* at 81-82.

\(^{171}\) For examples of such norms, see Easterly’s discussion of the practices of the Hausa in Ibadan, Nigeria and the overseas Chinese in Southeast Asia: Easterly, *ibid.* at 82-83.

\(^{172}\) Azam, *supra* note 156 at 430.

\(^{173}\) Ethnic capital plays a role in developed societies, as well, although this role is less expansive than in developing societies due to the presence of a stronger government infrastructure in the former.
In contrast to the robust levels of ethnic capital, inter-ethnic social capital often exists at very low levels in developing countries. There are a number of factors that impede the emergence of inter-ethnic social capital. First, as I discussed in Chapter 1, certain socio-psychological processes create a strong preference for members of one’s own group and a tendency to disparage and to distrust members of other groups. The very process of identifying with a group—a process that is essential to meeting the “belongingness want” in human beings—is oppositional, for to be part of the “we”, there must be a “they”.\textsuperscript{174} Relations with the other group are thus cast in an antagonistic “we-they” dichotomy. The tendency to cleave to one’s own group and to compete intensely with other groups, including the pursuit of relative advantage vis-à-vis the other group, thus obstruct the emergence of inter-ethnic social capital.

Second, the very fact of difference impedes the development of shared norms and inter-ethnic affiliations. Cultural differences and language barriers make it difficult to communicate, much less form shared norms. Variations in religion often mean that groups have different belief systems. Indeed, in some cases, their religious beliefs may set groups in opposition to each other. Moreover, key parts of the lives of the members of different group are segregated due to different religious and cultural festivals, different places of worship, different holidays, and so forth. In essence, ethnic differences cut across key areas of people’s lives in ways that limit the potential for interaction and that hinder the development of a set of shared norms and understandings.

The third factor that impedes the development of inter-ethnic social capital is related to efficiency and transaction costs. Since shared language and cultural norms create ease and

convenience in interactions, it is often most efficient to obtain goods and services, conduct business, and engage in social activities with individuals from one’s own ethnic group. As some things literally go without saying between individuals who come from the same ethnic community, transactions can be conducted quickly and efficiently, without lengthy negotiations about terms and conditions.\textsuperscript{175} By contrast, members of different ethnic groups may face practical barriers to interactions with each other such as language differences. Transactions with individuals from other ethnic groups involve greater costs related to the necessity of establishing clear terms and conditions and negotiating over matters that would be implied if dealing with a member of one’s own ethnic group. The efficiency and convenience of dealing with members of one’s own ethnic group thus creates disincentives to seeking out opportunities to interact with members of other groups.

There is also less risk in transacting business with members from one’s own ethnic group. Shared ethnicity often acts as a proxy for trust. Members of the same community have access to important information about other members’ reputations, skills, and integrity that may not be available to outsiders. Access to such information reduces the risks associated with non-simultaneous transactions. By contrast, a lack of information about individuals outside of the ethnic group increases the risk of conducting transaction with members of a different ethnic group. Intra-group sanctions against defection in business transactions\textsuperscript{176} further reduce the risk of conducting non-simultaneous transactions with fellow group members. A similar mechanism for mitigating risk in transactions with individuals from different groups does not exist since the types of institutions (e.g., banks, credit ranking associations, business

\textsuperscript{175} For a good example of how shared ethnicity can facilitate trade relations through shared norms and trust within the community, see Coleman’s discussion of the diamond trade in the Jewish community in New York City: Coleman, “Social Capital” supra note 137.

\textsuperscript{176} See, for example, the description of the use of houses as collateral in the Hausa community in Ibadan Nigeria and the use of “blacklists” by overseas Chinese communities in Easterly, \textit{White Man’s Burden}, supra note 169 at 82-83.
associations, and civil courts) that traditionally are used to mitigate the risk of impersonal transactions are generally too weak to offer any security in many developing countries. The increased risks involved with transacting business with individuals from different ethnic groups raise the costs of those transactions and thus act as disincentives to pursuing such business opportunities. This, in turn, limits the opportunities for forming inter-ethnic networks of relationships and shared norms.

Fourth, a key factor contributing to low levels of inter-ethnic social capital relates to the relatively short period of contact that most groups in developing countries have had with each other. Prior to colonialism, many ethnic groups lived separate existences, with little or no contact between them. Certain colonial practices brought these groups into contact with each other. For example, colonial powers set the borders of many developing countries in an arbitrary manner, with little regard to traditional boundaries between different groups and tribal homelands. In some cases, colonial powers also exported labour from one colony to another. There was not necessarily extensive contact between ethnic groups even after colonial powers had made various ethnic groups co-citizens, however. So long as groups continued to follow traditional lifestyles, group members tended to remain in the home territory of their own group, away from the members of other groups. It was often not until the forces of modernization brought increased urbanization and migration that members of different ethnic groups began to come into contact on a regular basis. Accordingly, in many cases, there has therefore been a relatively short period of contact between ethnic groups—too short for strong bonds to form between communities and for norms of coexistence and cooperation to evolve.

Finally, the practices of various colonial powers have created tension between ethnic groups that undermines the development of inter-ethnic social capital. The importation of labour from one colony to another, for example, has created deep and lasting divisions in colonized societies such as Fiji, Trinidad, Guyana, Sri Lanka, and Malaysia. In many cases, the labourers and their descendants have never fully been accepted into the societies of the host countries.\textsuperscript{178}

Even after generations have passed, the descendants of the labourers are viewed as being “foreign” and as having loyalties to the home countries of their ancestors even though these descendants have been born and raised locally.

Colonial approaches to governance also tended to entrenched ethnic divisions. Both Britain and Belgium, for example, often explicitly adopted a “divide and conquer” strategy of colonial administration in order to prevent ethnic groups within the colonies from binding together in opposition to the Crown.\textsuperscript{179} The elites of smaller ethnic groups were co-opted or coerced into acting as local agents of the colonial government.\textsuperscript{180} Often, the smaller ethnic group came to dominate the civil service and the police and military forces, which provided this group with a distinct advantage over larger, stronger ethnic groups.\textsuperscript{181} At the same time, the colonial power intentionally maintained the authority and social structures of the various ethnic groups within each colony. In so doing, the colonial power sought to keep the various ethnic groups separate from each other and to cultivate rivalries between the groups. This strategy proved quite effective.\textsuperscript{182} As Horowitz observes, “building colonial administration on a substructure of

\textsuperscript{178} \textit{Ibid.} at 209-211.


\textsuperscript{180} Blanton, Mason & Athew, \textit{ibid} at 479.

\textsuperscript{181} \textit{Ibid.} at 479-480.

\textsuperscript{182} \textit{Ibid.}.\n
ethnic government helped insure that the disparities would be interpreted through the lens of ethnicity. 183 Accordingly, when groups did come into contact in British and Belgian colonies, they did so as rivals within an institutional framework that encouraged them to compete, rather than work together, for scarce resources. In this regard, the British and Belgian approach to colonial management was antithetical to the cultivation of inter-ethnic social capital.

In sum, for a variety of reasons, developing societies tend to have low levels of inter-ethnic social capital. Some countries, in fact, are characterized by deep ethnic divisions and rivalries, particularly where colonial powers set ethnic groups in opposition to each other. In polarized developing societies, the juxtaposition of robust levels of intra-ethnic social capital and inter-ethnic social capital set the stage for institutional dysfunction, instability, and violence as these countries gained their independence and began to modernize.

4. Elite incentive structures in ethnically polarized developing societies

4.1. Dynamics between groups: Two societies, one state
In an important respect, in developing countries with weak institutions and governance structures, ethnic groups that enjoy high levels of intra-group social capital approximate a unique society within the polity. This is especially true when there are low levels of inter-group social capital since there are few links and norms tying group members to “outsiders”. The combination of robust intra-ethnic social capital and weak inter-ethnic social capital within a polarized state thus often results in the existence of two or perhaps three ethnic societies that share the common space of the state.

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183 Horowitz, *supra* note 177 at 150.
As developing countries modernize, groups that previously had minimal contact with each other find that they are living, working, and pursuing opportunities side by side. The ethnic societies sharing the state come into increasing contact as a result of urbanization and migration. This contact does not simply bring two aggregates of individuals together; it brings two societies together, each with their own elites, social and power structures, and sets of norms. Moreover, for the first time in most countries' post-colonial history, the groups co-exist without an overarching colonial power to discipline their actions and to impose the norms and institutions through which political, economic, and social power are exercised. The institutions that the countries inherited upon gaining their independence are generally colonial legacies. Consequently, the ethnic groups sharing the state may feel little loyalty to the values and norms that underpin these institutions since the institutions do not reflect indigenous traditions and normative structures. Under these circumstances, a normative vacuum develops: that is, there are no shared norms and understandings between ethnic groups to guide their coexistence within the state and to mediate ethnic divisions.

Although many aspects of the lives of members of different groups may remain separated from each other, coexistence within the state requires at least some degree of coordination between the ethnic groups, particularly in the public sphere of life. Governance of the state requires that decisions be made about how political authority will be exercised; which languages will be official state languages; which cultural traditions will influence state structure and policy; what holidays will be celebrated nationally; how the courts will operate; who will staff the police force, the military, and the bureaucracy, and so forth. Key government policies must be set with respect to a range of matters in which different groups have a stake. Such matters include, for example, fiscal policies relating to national currency and exchange rates; international
relations; immigration; education; health care; the use of scarce natural resources; and coordinating national transportation systems and airports. As a result of modernization, there is also greater economic specialization, which frequently leads to greater trade between members of different ethnic groups. This, too, requires coordination: what will the terms of trade be? Will credit be extended? What language will be used to negotiate?

In the absence of overarching inter-group norms and shared language, coordinated action requires that concessions and compromises be made in order to facilitate an orderly coexistence. Under ideal (or perhaps idyllic) conditions, groups, led by their ethnic elites, would approach the issue of concessions in a spirit of compromise, fairness, and mutual respect. However, the reality is that conditions in many developing countries are far from ideal. Extreme poverty, deep divisions between ethnic groups, and robust levels of intra-group ethnic capital give rise to incentive structures that propel groups towards poor governance, instability, and a heightened risk of violence.

4.2. Elite incentive structures and the risk of violence
Elites have strong incentives to adopt ethno-centric policy platforms and to resist making concessions and compromises in the process of brokering the coexistence of ethnic groups within the polity. It is crucial to recognize that elites represent the interests of their own ethnic groups, not the interests of the shared polity. Membership in one’s ethnic group is considerably more important than citizenship in the state. The state does not meet the needs of individual citizens; the ethnic group does. In polarized developing societies, most people have only weak associations with the geo-political unit of the state, whereas their ties with their

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184 I concur with Paul Collier that low income and poverty contributes to a conflict trap in developing countries. See Collier, *Bottom Billion*, supra note 163. My approach to transition, however, varies from Collier’s approach. I discuss how my approach differs from Collier later in this chapter.
ethnic group are very strong and central to their day-to-day existence. Accordingly, most
economic, political, and social mobilization occurs along ethnic lines. The legitimacy of elites
as leaders “is thus a function of the extent to which s(he) embodies the identities and
characteristics of the community.” In this context, elites are expected “to act as the
spokespeople and torchbearers of their community.” Elites approach issues related to
managing the coexistence of ethnic groups within the polity with a view to maximizing the best
interests of their constituent ethnic groups, not as a question of what is best for the state as a
whole.

There is much at stake in the governance of the state. The ability to dominate the central
organs of the state provides a group with access to important scarce resources that not only
enhance the ability of group members to survive, but even to advance in status and wealth.
These scarce resources include jobs in the bureaucracy (one of the few stable employment
sectors in many developing countries); control of the military and police; political control and
access to public monies; access to natural resources; and access to a variety of economic
opportunities (e.g. licences, public procurement contracts, etc). Elites face pressures from their
constituent ethnic groups to deliver access to these scarce goods and resources. As Chabal and
Daloz note, “[p]oliticians are expected to represent their constituents properly, that is, to
deliver resources to them.” A strong sense of urgency surrounds securing access to political,
economic, and social power since resources are so limited and poverty levels are so extreme
that the failure to dominate other groups likely means being dominated by them. Elites are
often able to harness the “dominate or be dominated” mentality to solidify their bases of

185 Patrick Chabal & Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (London: The
International African Institute, 1999) at 55.
186 Ibid. at 54.
187 Ibid. at 56.
support, although this strategy requires the elites to adopt ethno-centric platforms that represent them as the best protector of the group’s interests.

In polarized societies with low levels of inter-group social capital, incentives for mediating the coexistence of ethnic groups within the polity through cooperation and coordination are low. In the absence of high levels of inter-group social capital, there is likely to be very little trust between ethnic groups. Making credible commitments to share the power and the resources of the state is very difficult in the face of low trust between groups and an implicit tendency to view other groups with suspicion and disdain. Moreover, cooperation and coordination requires that concessions must be made. Making concessions, however, comes with a cost since it implies accepting the imposition of the other group’s norms, language, and preferences to a certain extent. Conceding groups bear the costs of learning a new language and adapting to new norms and practices. Conceding groups also suffer a loss of prestige and status. Even symbolic concessions related to the selection of a country’s flag and national icons carry weight since these elements represent the state and, by extension, who wields the power and influence of the state. In the context of extreme poverty and low levels of inter-group social capital, there are few reasons why elites would willingly make concessions that restrict access to the resources of the state or impose costs on their own constituent ethnic groups.

There are also powerful disincentives to adopting moderate, cooperative approaches to managing the coexistence of groups at the level of the individual elites. From the elites’ perspective, the costs of facilitating a harmonization of the norms, social structures, and interests of the ethnic groups sharing the polity include the possible loss of their own status and
influence. Agreeing to concessions implies accepting limitations on the extent of their own influence since the influence of the elites is coextensive with that of the ethnic groups they represent. Moreover, elites face the challenge of maintaining the internal support of the ethnic group. Even if the institutions of the elites’ group prevail in the compromises made by the groups, the elites’ own constituents may characterize the elites as having sold-out the interests of the group by pursuing compromise and thus oust the elites.

Leadership within an ethnic group is not static. Factions within the group jostle for influence and for power, especially during times of uncertainty when there are opportunities to challenge the leadership of the group and increase their own influence. A common tactic is to play upon the fears of the group. Rival elites stir up feelings of insecurity, and then offer themselves as better protectors of the interests of the group. As elites compete with each other for the support of the group, they offer chauvinistic platforms as a means of winning the emotional support of the group. This process is often referred to as ethnic outbidding since rival elites attempt to “outbid” each other in their stance against other ethnic groups and their loyalty to their own group as a means of winning support. In order to retain their influence within the group, elites must deliver access to the power and scarce resources of the state and not be perceived to make concessions to the other group in the process.

Incentives to adopt ethno-centric platforms also arise from the pressures to ensure that ethnic group members do not assimilate to the language, norms, and practices of other ethnic groups. The elites of each group understand that their continued influence is contingent upon ensuring

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that a solid majority of group members remains committed to the group’s own language, norms, and institutions. Individual members of the group must be dissuaded from “defecting” to the outside group by adopting the outside group’s norms and language, for example.189 The pressure to prevent individual members of the ethnic group from defecting to the outside group creates incentives to rally members to the cause of the ethnic group and to instil loyalty to the group within the masses. An effective strategy to prevent members of the group from assimilating is the adoption of ethno-centric platforms and rhetoric. For example, early Quebecois nationalist leaders urged the Quebecois to resist assimilating to English Canada’s culture and language by suggesting that French Canadians were called to be a special sort of priesthood among the nations.190 Neglecting the “sacred possession” of the French language was equated with apostasy.191

In sum, low levels of inter-group social capital, robust levels of intra-ethnic social capital, and the conditions of life and social dynamics in polarised developing societies create strong incentives for elites to adopt ethno-centric, “winner-take-all”-type strategies in the polity. Elites also have incentives to avoid even the appearance of being too moderate and conciliatory. As a result of these incentives, interactions between ethnic groups in the polity are characterized by survival politics in which each group attempts to dominate the institutions of the state and to force other groups to assimilate to its norms, social structures, and language. Survival politics is driven by the “dominate or be dominated” ideology; a key tenet of this ideology is that survival of one’s own ethnic group requires the capitulation of other groups.

189 See Forbes, Ethnic Conflict, supra note 133.
191 Ibid.
Survival politics thus generally involves the pursuit of hegemony. Byman describes the nature of hegemonic ambition as follows:

For members of hegemonic groups, their language must be the only official language; their religion must be followed by all citizens; and their institutions must be enshrined in government and society. Hegemonic elites often believe that their narrow group is the legitimate ruler of the polity. To ensure their rule, they must promote the group’s culture, language, demographic predominance, economic welfare, and political hegemony at the expense of other groups.  

In this context, institutions are used strategically to secure advantages over other groups and to reward the constituents of one’s own ethnic group. Rather than serve as forums where ethnic groups can come together to mediate their coexistence within the state, institutions are used as instruments of control and repression. Matters such as education policies and the selection of the state’s official language become battle grounds for control of the state and its resources.

If existing institutions undermine the group’s position, the dynamics of survival politics dictate that radical, extra-institutional strategies, up to and including violence and insurgency, must be adopted. Indeed, such strategies often emerge as the most logical and appropriate course of action under the circumstances, given the low incentives to pursue moderate, conciliatory

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policies and the pressure on elites to deliver access to power and scarce resources to their constituents.

5. Changing elite incentive structures: The role of social capital
The relative levels of intra-group and inter-group social capital are materially implicated in creating elite incentive structures that propel a polarized developing society towards institutional dysfunction, violence, and instability. So long as these incentive structures remain intact, elites will continue to engage in survival politics. However, if elite incentive structures can be altered to create strong preferences for pursuing the interests of the group through legitimate institutional channels, then it is possible to prevent elites from advocating the adoption of radical extra-institutional strategies such as violence or insurgency. In order to change elite incentive structures, the benefits of working through legitimate institutions to promote the agenda of the ethnic group must increase or the costs and risks of doing so must be reduced, or both. The dynamics that give rise to the incentive structures that create preferences for survival politics and that propel a society towards conflict point to a means of altering these problematic incentive structures, namely the cultivation of inter-ethnic social capital. Since robust levels of intra-ethnic social capital and low levels of inter-ethnic social capital create poor incentive structures from the perspective of preventing violence, changing the variable of inter-ethnic social capital offers a means of changing these incentive structures. Cultivating high levels of inter-ethnic social capital impacts elite incentive structures in a manner that facilitates peaceful coexistence in two fundamental ways.

First, the recognition and affirmation of the norms that form part of inter-ethnic social capital create incentives to adopt moderate strategies for promoting the interests of the group. As discussed earlier in this chapter, the three most important norms of inter-ethnic social capital
are: the right of groups to continued physical and cultural existence; the right of groups to participate through their representatives in decision-making processes; and the rule of law. These three norms set the basic structure for governance within the polity and represent a shared understanding about how ethnic groups will manage their coexistence. When the institutions of the polity embody these norms and as the citizenry begins to internalize the norms, elite incentive structures begin to change, creating a preference for moderate strategies.

The right to continued existence and the right to participation affirm the role of each ethnic group as a key stakeholder within the polity. These rights recognize that the polity is more than a mass of individuals, as is often the assumption in most Western liberal democracies. They signify that each ethnic group has the right to participate in the governance of the polity *qua* group, rather than as a set of mobilized individuals with common interests. These rights are also an explicit rejection of the “dominate or be dominated” approach to governance, for they imply that no group may dominate another and that no group need fear for its own survival. The right to continued physical and cultural existence and the right to participation thus reduce the cost of making concessions and adopting moderate positions by reducing the risk that other groups will use concessions to subvert the interests of the conceding group. The assurances that these rights provide to each group thus erode the destructive dynamics fuelled by survival politics.

On an individual level, elites stand to benefit from the adoption of institutions that embody the right to continued existence and the right to participation. Since these rights guarantee a continuing role for the ethnic groups in the governance of the polity, by extension, these rights
also guarantee that the elites of each group will have a continuing role in the exercise of power. Although elites must share power, they are spared the high risks and costs associated with engaging in all-out, “winner-takes-all” politics. These costs include (but are not limited to) the physical risk of assassination of the elites and the elites’ family members; the challenge of mobilizing the masses, which may include rallying people to take up arms; and the necessity of financing campaigns to maintain one’s own stranglehold on power or to challenge another’s hold. By preserving the elites’ spheres of influence while reducing the costs associated with preserving this influence, the rights to participation and to continued existence alter elite incentive structures in a manner favourable to the adoption of moderate strategies.

The rule of law also creates incentives to adopt moderate policies rather than radical, extra-institutional strategies for pursuing the interests of the group.\textsuperscript{195} The rule of law’s most

\textsuperscript{195} But see Douglass North, John Wallis & Barry Weingast, \textit{Violence and Social Order: A Conceptual Framework for Understanding Recorded Human History} (Cambridge University Press, 2009). North, Wallis, and Weingast argue that implementing rule of law reforms can trigger violence and are almost never successful. They divide states into two broad categories: open access orders and limited access orders (or natural states). North, Wallis, and Weingast argue that limited access orders reduce or control the problem of violence in the polity by limiting access to valuable rights and privileges so that the powerful individuals and groups who enjoy access to these rights and privileges have incentives to cooperate rather than fight. By protecting the rents of these powerful individuals and groups, the state limits competition and reduces the risk of violence, but also obstructs long-term economic development. Access to power and to justice in limited access states is a function of personal relations. Open access orders, by contrast, “use competition, open access to organizations, and institutions to control violence and are characterized by rent erosion and long-term economic growth.” (See Barry R. Weingast, “Why developing countries prove so resistant to the rule of law” in James Heckman, Robert Nelson & Lee Cabatingan, eds., \textit{Global Perspectives on the Rule of Law} (New York: Routledge, 2010) 28 at 28-29.) North, Wallis, and Weingast suggest that limited access orders cannot create the rule of law simply by adopting the institutions and governance structures of open access orders. (Weingast at 28.) Instead, limited access orders must transition into open access orders, a process that is difficult and that few states have successfully managed to accomplish. One of the key barriers to this transition is violence. Weingast summarizes the problem as follows:

Transplanting open access order institutions – such as markets, elections, and legal systems – cannot create an open access order. This type of reform has been tried hundreds of times, and it typically does not succeed. The problem is that these reforms seek to dismantle the natural state systems of privilege and limited access, they therefore threaten violence and disorder. Rather than making everyone better off, as the reformers intend, these reforms threaten to make everyone worse off.

...
important role is to make the formal institutions of the polity a legitimate, efficient means for each group to protect and to pursue their interests. The rule of law provides assurances that there are viable institutional alternatives to the adoption of radical, extra-institutional strategies such as violence or insurgency. In this regard, the rule of law aligns incentives to advance the group’s interests through the formal institutions of the polity in three key ways. First, the rule of law establishes how power may be legitimately exercised in the polity and it vests that legitimacy in the processes of formal institutions. Ethnic groups that pursue their interests through formal institutions thus have the benefit of having legitimacy attached to their strategies and to the results of their efforts. This legitimacy makes it easier for elites to rally and to maintain the support of the members of their ethnic group. In countries where a contingent of an ethnic group has adopted radical, extra-institutional strategies, there is almost always opposition to the use of violence or insurgency by other members of the same group.

In Spain, for example, a sizable segment of the Basque population does not support or endorse the actions of ETA. Similarly, in Sri Lanka, not all Tamils support the methods or actions of the LTTE (the Tamil Tigers). The rule of law provides politicians who advocate working

Because these reforms threaten a society with violence, people in these societies resist them. The paradox is that not only will those who benefit directly from the rents fight reform, so too will those who are exploited by the natural state privileges. The reason is that being exploited in a peaceful society is typically better than living under disorder. For this reason, none of the major open access institutions…can be transplanted directly into developing countries qua national states. This is also why, despite hundreds of billions of dollars, the best intentions, and the best development advice, the World Bank, the IMF, and USAID have relatively few success stories. (Weingast at 46, 47, citations omitted).

North, Weiss, and Weingast take a very pessimistic view about the possibility for rule of law reform. However, North, Weiss, and Weingast do not take account of the types of situations on which this dissertation is focused, namely, a polity that suffers from ongoing violence and insurgency. The account of North, Weiss, and Weingast appears to assume that the limited access order has successfully managed to contain violence. This dissertation addresses the situation of polities in which violence has not been contained. The incentive structures in a state that is locked in the grip of violence and insurgency are different than those in a limited access order that has managed to contain violence. In the former, both elites and the general population have cause to seek institutional reform and a change in the governance structures of society while elites and the general population in the latter do not. As I will argue in more detail below, when violence is endemic and a hurting stalemate has arisen, a fragile opportunity for cultivating inter-ethnic social capital, including the introduction of rule of law reforms, exists.
through the formal institutions of the polity with credibility since the governance that occurs through such institutions is consistent with legitimate, democratic practices. In other words, it cannot be said that formal institutions are a “sham” or that working through institutions is a fruitless endeavour.

Second, the rule of law reduces the potential costs associated with working through institutional channels to advance the group’s interests. Ethnic groups may be concerned that formal institutions do little more than allow their ethnic rivals to legitimize arbitrary exercises of power. The rule of law, however, offers safeguards against such abuse of political power. One of the basic premises of the rule of law is that power must be exercised in a fair manner; exercising power in an arbitrary manner runs counter to the very nature of the rule of law. Equality before the law is also an important principle associated with the rule of law. This principle prevents the law from being used to entrench discrimination within the institutions of the state; it also ensures that individuals are treated fairly in their dealings with the state regardless of their ethnicity. These safeguards associated with the rule of law ensure that formal institutions are not captured by a dominant group and used to assert the interests of that group at the expense of other groups. These safeguards also ensure that formal institutions, including political and legislative institutions, remain a neutral arena in which decisions about the collective life in the polity may be taken and implemented. In this regard, the rule of law provides assurances that it will not be to a group’s detriment to work through the formal institutions of the polity. This reduces the risks associated with adopting moderate strategies.
The rule of law also reduces the potential costs of working through institutional channels by providing remedies in situations where a party has defected from the established rules and procedures. Ethnic groups may fear that committing to pursuing their agenda through institutions leaves them vulnerable since the other ethnic groups may defect from the institutional arrangements and inflict losses through the use of violence or insurgency.

Access to remedies provides redress in the event of defection, thereby off-setting the potential cost of working through formal institutions. The existence of institutional remedies also means that groups do not have to adopt “self-help” measures through acts of violence to address defections by the other group. As violent strategies like terrorism and insurgency have high human and economic costs, institutional remedies provide a comparatively low cost option to groups for protecting their interests. Remedies also deter groups from defecting, a factor which increases the overall security within a society.

Third, the rule of law provides certainty about the rules that govern the common space of the state and the interactions between the citizenry and the state. This certainty assists in nurturing a more stable and ordered life within the state and adds greater predictability in the relationship between the ethnic groups. Certainty and predictability give a commitment to working through the formal institutions a comparative advantage over radical, extra-institutional strategies which, by their very nature, tend to give rise to chaos and instability.

Inter-ethnic social capital has the greatest potential to alter elite incentive structures when the norms of this form of social capital are not merely embodied in institutions, but are also generalized throughout the population. Indeed, violent ethnic conflict cannot be contained
merely by creating institutions that embody the right to continued existence, the right to participation, and the rule of law. These institutions must be supported by a firm normative commitment held by the citizenry at large to a cooperative, democratic coexistence within the polity. This normative commitment (which I describe below as the “civic compact”) creates a political market for moderation in which the costs of radical, extra-institutional strategies become too high for elites. The development of a civic compact is a crucial step in moving a country beyond violent ethnic conflict to an environment where inter-ethnic rivalries are contained within the institutional arenas of the polity.

The civic compact arises from the widespread attachment to the norms of inter-ethnic social capital among the citizenry. The civic compact represents a recognition and affirmation by the citizenry and ethnic elites of the continuing existence of the constituent ethnic groups\footnote{By “constituent ethnic groups” I mean ethnic groups who have a historical and geographical claim to the territory of the state. Ethnic groups that have arrived in the state through immigration are not considered constituent ethnic groups. Note, however, that certain groups have existed in a territory for so long or have occupied a territory in a particular manner such that they are now considered constituent ethnic groups. Examples include the Quebecois and Anglophones in Canada, the Indian population in Fiji, and the British in Northern Ireland. Examples of ethnic groups living in a state as minorities, but not as constituent ethnic groups include Turks in Germany and Algerians in France. This is not to suggest that the individual members of such ethnic minorities do not have rights related to their ethnic origin. They should be protected against discrimination on the basis of ethnic identity or place of origin, for example. However, the group as a whole is not entitled to the full panoply of group rights (e.g., the right to participation) that constituent ethnic groups are.} in the polity and of the institutions through which these ethnic groups manage their coexistence. The civic compact is based on the fundamental principle that the state is shared by its constituent ethnic groups and that no one ethnic group has the right to impose policies or law in an arbitrary fashion. The civic compact represents a commitment to upholding the rule of law and to governance through established institutions. Furthermore, this compact is a commitment to using appropriate institutional channels to resolve disputes, whether the disputes occur between
individuals or groups. The civic compact is a fundamental rejection of extra-institutional strategies such as violence and insurgency.

When the norms of inter-ethnic social capital are widely held and a civic compact begins to emerge, it becomes more difficult for elites to advocate extremist positions that limit the rights of other groups or threaten their existence. The norms of inter-ethnic social capital limit the types of strategies and rhetoric that are acceptable in the polity, and create a preference for more moderate positions that accord with these norms. The adoption of radical, extra-institutional strategies become more costly for elites since robust attachment to the norms of inter-ethnic social capital erodes support for such strategies and creates pressure to work through existing institutions. As the civic compact develops through time, it becomes unthinkable to the vast majority of people to suggest that radical strategies such as terrorism or insurgency could be an appropriate and legitimate means of advancing the interests of the group. Elites must adopt more moderate strategies or risk alienating many members of their own ethnic group. In this context, the destructive potential of outbidders is limited since it becomes increasingly difficult to charge that moderate elites have “sold out” the interests of the group when these moderate elites have adopted positions that accord with widely-held norms.

The civic compact is as close to civic nationalism as an ethnically polarized country can come. Civic nationalism involves the creation of a community based on the choice of individuals to honour attachments to the civic state, its institutions, its political creeds, and its symbols.197

197 For examples of scholars who advocate civic nationalism, see Michael Ignatieff, Blood and Belonging: Journeys into the New Nationalism (New York: Farrar, Straus & Giroux, 1993); William Pfaff, The Wrath of Nations: Civilization and the Furies of nationalism (New York: Simon and Schuster, 1993); and Jurgen
These attachments create a supra-ethnic civic identity shared by all citizens in the state. Moreover, these attachments outweigh the attachments to the ethnic group such that ethnic identity becomes primarily a private matter and not a part of public life. Proponents of civic nationalism consider that only civic nationalism can create the basis for a peaceful, liberal democratic state. Accordingly, the appropriate response to violent ethnic conflict is the cultivation at the level of the individual of attachment to the civic state and its political creeds and institutions.

Putnam has recently advocated policy approaches that are focused on building strong cross-ethnic ties that do not obliterate ethnic identities but that do create robust overarching identities. While Putnam does not explicitly explore civic nationalism, his inference appears to be that people should interact with each other in the polity as individual citizens with particular ethnic backgrounds rather than as members of ethnic groups. Putnam’s policy recommendations are made in response to his findings in a study that measured the impact of ethnic diversity on levels of social capital in communities across the United States. This study finds that in ethnically diverse neighbourhoods, residents of all races tend to “hunker down”, that is, withdraw socially from each other. Levels of bridging social capital are lowest in diverse neighbourhoods. Residents of diverse neighbourhoods tend to trust others less (even people from their own race), participate less in cooperative and altruistic behaviour, and have fewer friends. According to Putnam, the negative correlation between levels of diversity and

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199 Putnam considers trust to be part of social capital. As indicated in this chapter, I disagree with Putnam on this point.
bridging social capital holds true controlling for a broad range of variables. Putnam argues that although diversity has the negative short- to medium term effect of reducing bridging social capital, in the long run, diversity confers important cultural, economic, fiscal, and developmental benefits. Although Putnam does not fully explore how societies can best respond to diversity\textsuperscript{200}, he does suggest that the benefits of diversity can be realized by creating cross-cutting bases of social solidarity and broader, more encompassing identities that over-arch narrower group identities.\textsuperscript{201}

While I share Putnam’s concern for cultivating cross-ethnic ties, I consider that Putnam’s policy recommendations and those of the proponents of civic nationalism have limited applicability in polarized developing countries. First, with respect to Putnam’s study specifically, this study on social capital has limited application in the context of a polarized developing country. Putnam’s study was conducted in the United States, where it cannot be said that the needs of individual members of ethnic groups are primarily met by the ethnic group rather than the state. This is an important distinction from developing societies, where the ethnic group plays a central role in the day-to-day life of its members. As I have argued earlier in this chapter, the centrality of the group in the lives of its members in developing countries contributes to robust levels of intra-group social capital and materially impacts elite incentive structures. American economic, social, and political culture is also far more centred on the individual than the cultures of most developing countries. Moreover, the United States is an immigrant society, unlike most developing countries. The United States therefore lacks true constituent ethnic groups would can assert a rightful role \textit{qua} groups in the polity. In

\textsuperscript{200} Putnam indicates that he is engaged in further study of policy responses and plans to publish on this subject matter in the future.

\textsuperscript{201} Putnam, \textit{E Pluribus Unum}, supra note 198 at 163-4.
short, there are important differences between the United States and polarized developing societies that suggest that the dynamics of group relations and the role of the group in the polity in the former differ from those of the latter. We should therefore be hesitant to assume that Putnam’s findings in terms of the relationship between diversity and levels of social capital have implications for societies outside of the United States.

Second, on a broader note, I consider that the proponents of civic nationalism (including Putnam) under-estimate the power of ethnic affiliation as a basis of political mobilization. Due to the ability of ethnic affiliation to mobilize people and due to the central importance that ethnicity frequently has on the lives of people in developing countries, it is unlikely that a non-ethnic, civic identity will be able to eclipse ethnic identity in the public domain. So long as there are some politicians who understands the power of shared ethnicity to touch people and so to rally them behind a cause, ethnic affiliation will continue to play a central role in the politics of polarized societies.\textsuperscript{202} It is more effective to deal with the consequences of ethnic mobilization by containing the worst manifestations of inter-ethnic rivalry than to try to prevent such mobilization entirely.

Third, the emergence of a civic compact is more likely to create incentives for elites to adopt moderate policies and for the population to support such policies than the cultivation of civic nationalism. Unlike civic nationalism, a civic compact does not subordinate ethnic identity to

\textsuperscript{202} Even in diverse countries, where politicians typically have incentives to mobilize people across ethnic lines, there is evidence that ethnic affiliation can have an on-going divisive impact in the polity. In Kenya, for example, ethnic violence erupted after the incumbent President was declared the victor of a presidential election in December 2007 in the face of strong evidence that the opposition party had in fact won the election. Although Kenya is a highly diverse country (there are more than 22 ethnic groups within the state) and notwithstanding Kenya’s history of relative stability, the ethnic affiliations of the incumbent President (a Kikuyu) and the Opposition Leader (a Luo) appeared to trigger violence, particularly between the Kikuyu, the Kisii, and Luo.
a supra-ethnic, state-based civic identity. Instead, in the case of a civic compact, ethnic identity continues to have public relevance in a polarized state, but the citizenry of such a state eventually comes to accept that the state (and the power and resources of the state) must be shared with other constituent ethnic groups. The emergence of a civic compact based on the norms of inter-ethnic social capital thus provides important assurances to ethnic elites and their group members that the ethnic group will survive as a stakeholder in the polity. The political and legal governance structures that result from the actualization of the norms of inter-ethnic social capital protect the spheres of influence of each set of ethnic elites. By contrast, the cultivation of civic nationalism requires suppressing attempts to mobilize along ethnic lines. Elites are likely to resist efforts to engender civic nationalism since they stand to lose an important and highly effective means of mobilizing support. Moreover, as Will Kymlicka has noted, cultivating civic nationalism is often a source of conflict in and of itself since the process of cultivation requires at least one of the groups to assimilate to whatever is defined as the attributes of the “civic state”.\footnote{See Will Kymlicka, “Misunderstanding Nationalism” in Ronald Beiner, ed., \textit{Theorizing Nationalism} (Albany: State University of New York Press, 1999) 131.} Whereas the civic compact affirms the role of all ethnic groups in the polity and reduces conflict by curtailing the “dominate or be dominated” mentality, civic nationalism places ethnic groups in what can only be a pitched battle for control of the state and the state’s civic identity.

The second fundamental way that higher levels of inter-ethnic social capital impact elite incentive structures relates to the emergence of cross-ethnic networks of personal relationships. The impact of cross-ethnic networks of personal relationships on elite incentive structures differs depending on how far advanced the civic compact is and how deeply entrenched the
norms of inter-ethnic social capital have become. If cross-ethnic networks of personal relationships emerge before the norms of inter-ethnic social capital have been internalized by elites and the general citizenry, then it is likely that the ultimate impact of these networks will be a radicalization of the claims made by ethnic elites and a subsequent deterioration of inter-ethnic relations. Because ethnic affiliation is the primary basis for political mobilization, elites fear that their influence will diminish if the relevance of ethnic identity and divisions decline. Cross-ethnic interpersonal relationships threaten a key source of elite influence since these relationships reduce the saliency of ethnic affiliation for individual members of the ethnic group. Consequently, elites frequently respond to rising levels of contact between individual members of ethnic groups by adopting stronger ethno-centric rhetoric and asserting increasingly radical claims in order to shore up the relevance of ethnic affiliation. This response heightens animosity between ethnic groups and risks destabilising fragile peace agreements. Thus, notwithstanding the reduction of prejudice at an individual level, in the absence of the civic compact, increasing contact between individuals from different ethnic groups creates incentives for elites to radicalize their agendas rather than to favour moderate policies.

A different set of incentives exist when the norms of inter-ethnic social capital have taken root in a polarized society and the civic compact has emerged. The civic compact restrains elites from making claims that threaten the institutional framework of a country. While elites may adopt ethno-centric rhetoric, this rhetoric is bounded by the norms of the right of each group to its continued existence, the right to participation, and the rule of law. Moreover, these norms offer assurances to elites that the adoption of moderate policies will not erode the relevance of the ethnic group (and its elite) in the polity. In this regard, the norms of inter-ethnic social
capital reduce the perceived cost of adopting moderate policies. Under these circumstances, the emergence of networks of cross-ethnic interpersonal relationships increases pressure for elites to adopt moderate positions. As individuals come to know members of other ethnic groups on a personal basis, individual prejudice and hostility towards members of other groups gradually begin to decline. By cultivating networks of relationships between members of different ethnic groups, then, it is possible, over time, to create a populace supportive of tolerance and moderation. Networks of cross-ethnic relationships thus contribute to the emergence of a political market for moderation.

Some scholars suggest that the conflict that tends to arise as groups come into contact is best mitigated by gradually eliminating differences between groups through “quiet policies of assimilation”. The goals of these policies of assimilation vary in scope. Civic nationalism, for example, aims to assimilate people into a single, supra-ethnic identity, but does not necessarily imply that specific ethnic identities cannot continue to have relevance in the private lives of people. Civic nationalism does imply that the supra-national identity is each individual’s primary identity, but allows for the possibility of hyphenated identities: Irish-American, Italian-American, French-Canadian, and so forth. Other proponents of assimilation advocate a more complete process where each person’s identity in the polity is gradually homogenized into one national, civic form: Canadian, American, British, French, and so on.

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204 See e.g. Forbes, Ethnic Conflict, supra note 133.
I reject an approach that focuses on neutralizing the power of the ethnic group through assimilation, whether through civic nationalism or broader, homogenizing processes of assimilation, for three reasons. First, as I have already noted in the context of civic nationalism, this approach under-estimates the power and enduring salience of ethnic identity. Second, depending on how it is implemented, an assimilation-based approach may violate international human rights law. International human rights law recognizes the rights of minorities to the preservation of their distinctive group identity205 and also imposes an obligation on states to protect individuals from discrimination on the basis of race or place of national origin.206 Moreover, the 1992 “Declaration on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities”207 imposes a positive obligation on states to protect the existence and the ethnic identity of minorities living within their borders and to facilitate the promotion of these identities. Policies designed to subvert a group’s ethnic identity or to encourage group members to assimilate to a different identity likely run afoul of the provisions of the 1992 Declaration, as well as other international covenants and agreements. Third, robust intra-ethnic social capital has many positive attributes notwithstanding the fact that it contributes to increased tension and rivalry within the state. For example, the ethnic group provides many basic social and economic goods and services to its members in countries where state infrastructure is weak. Preference should be given to policy approaches that mitigate violent conflict without sacrificing the positive value of robust intra-ethnic social capital. My approach centres not on reducing intra-ethnic social capital, but on

205 See, for example, s. 27 of the International Covenant on Civil and Political Rights, supra note 170. Note, however, that there is disagreement about whether this right is an individual right or a group right.
206 See International Convention on the Elimination of all Forms of Racial Discrimination, supra note 160 and the UN Declaration on Race and Racial Prejudice, supra note 160.
increasing inter-ethnic social capital. I thus consider my approach to have more merit than assimilation-based policy recommendations.

Some scholars suggest that adopting growth-promoting policies and institutional reform can mitigate violent ethnic conflict, given the role that poverty plays in fostering such conflict. Collier, for example, identifies a number of factors that he argues contribute to a “conflict trap”, that is, an apparent inability to move beyond conflict in society. The most important factor highlighted by Collier is extreme poverty, low growth, and primary commodity dependence. Collier suggests that low growth contributes to a sense of hopelessness; hopeless poverty increases the attraction of joining a rebel group since membership in such a group offers a small chance at riches. Dependence on primary commodity exports contributes to the conflict trap by providing rebel groups with a means of financing their activities. Collier highlights the fact that once a country has had a civil war, that same country has about a 50 percent chance of falling back into conflict within ten years.

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209 Collier, *Bottom Billion*, supra note 163 at 18-26 and 34.


212 Collier, *Bottom Billion, ibid.* at 34.
Collier makes a compelling case for the role that poverty, low growth rates, and the associated problem of primary commodity dependence have in undermining the prospects for peace. However, while I accept Collier’s observations on these matters, I part ways with him in terms of the implications of these observations for transition in ethnically polarized countries. My concern with drawing conclusions about how to promote development in polarized societies based on Collier’s approach begins with the fact that Collier does not address in detail the situation of ethnically polarized countries separately from ethnically diverse countries. He does note that ethnically polarized countries are more prone to conflict than diverse countries, but he does not pursue this difference. In this regard, I consider that Collier has only given a partial account of the obstacles to transition in polarized societies.

A critical assessment of the impact that ethnic polarity has on governance and the ability of a country to adopt growth-promoting policies is missing from Collier’s account. Without considering the impact that ethnic polarity has on governance, one could conclude that development efforts should focus on creating incentives for countries to adopt growth-promoting policies. While such incentives are important and do have a role in transition, the dysfunctional governance that prevails in many ethnically polarized countries impedes the adoption of such growth-promoting policies. This dysfunctional governance is a product of the deep divisions in society, the dynamics of survival politics, and the profound mistrust between elites. This dysfunctional governance is manifested in a variety of ways. For example, each

group has incentives to extract as much of the state’s resources as quickly possible since there is no guarantee that the group will continue to have access to power.214 These incentives result in short-sighted decision-making as preference is given to policies that maximize rents in the short-term rather than to policies that take a long-term approach to planning. Poor policy decisions also result from the desire of an ethnic group to prevent the other groups from realizing a social, political, or economic benefit. Research suggests that groups prefer outcomes that maximize their group’s relative advantage over other groups, even at the expense of absolute gains for their own group.215 In this context, the policy option that involves subordinating the interests of the other group is generally viewed to be the most favourable, even if its prospects for the delivery of social, economic, or political goods is weak. The end result is often the adoption of policies that are ill-advised, undermine economic growth, threaten political stability, or compromise human rights. 216 Other examples of government dysfunction that have been linked to diversity within a population include: the tendency of local or central governments to under-spend on public goods and education217; the

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214See Keefer & Knack, *Polarization, ibid*.

215 Horowitz, *supra* note 177 at 145-146.

216 For a striking example of poor economic policy decisions that were taken with the apparent aim of undermining the interests of an ethnic rival, see the account of the Ghanaian conflict over cocoa in William Easterly & Ross Levine, “Africa’s Growth Tragedy: Policies and Ethnic Divisions” (1997), 112 Quarterly Journal of Economics 1203 [Easterly & Levine] at 1217-8.

provision of low quality goods and services; corruption and cronyism; political instability; and the misuse of foreign aid, including its diversion into corrupt uses.

The dynamics that give rise to patterns of dysfunctional governance also obstructs institutional and policy reform. Institutional reform often does not have an immediately positive impact in society. Short-term losses are experienced before the full benefits of institutional reform are felt. Moreover, institutional reform and the development of growth-promoting policies generally involve trade-offs, and groups are not prepared to make such trade-offs in the absence of norms that facilitate coordinated actions. Thus, without high levels of inter-ethnic social capital, ethnic groups are unlikely to be able to cooperate to implement effective policies and institutional reform.

Until the destructive dynamics of survival politics and the intense inter-ethnic competition for control over the state are addressed, it will be very difficult for governments in ethnically polarized countries to adopt the sort of policies that are necessary to promote growth.

Ultimately, I agree with Collier that economic growth will reduce the incidence of violence in developing countries. However, I consider that the first priority in transition strategies must be to address the dynamics that result in dysfunctional governance. Accordingly, I turn now to an analysis of how polarized countries can transition from states of violent conflict to countries

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where robust levels of inter-ethnic social capital help to ensure that inter-ethnic conflict is managed through institutions.

6. Transitioning into peace: Cultivating inter-ethnic social capital

I consider that the right to continued existence, the right to participation, and the rule of law—the core principles of inter-ethnic social capital—have inherent normative value. The universality of these principles is reflected in their inclusion in international human rights documents and other international legal instruments. Anecdotal evidence also suggests that these principles have pragmatic value. For example, polarized societies that have successfully managed ethnic conflict have consistently implemented these principles in various forms. Examples of such societies include Canada, Britain (in terms of its relationship with Scotland and Wales), Belgium, and the Netherlands. Prescriptions for development routinely include rule of law reforms. Similarly, constitutional reform in countries emerging from violent conflict typically include cultural, religious and language protections (the right to continued existence), human rights reform (the right to continued existence), and power-sharing mechanisms (the right to participation). There is therefore empirical evidence that bolsters the normative arguments in favour of these principles.

Notwithstanding the normative value of the norms of inter-ethnic social capital, polarized developing countries continue to struggle to break the cycle of violent conflict and to move into peaceful coexistence. The reality is that conditions in polarized countries are far from ideal, and there are many inherent obstacles to the actualization of these principles. In particular, the profound divisions in polarized countries, the deep mistrust between the elites of different groups, and the dynamics of survival politics operate in concert to undermine the adoption of these principles. In addition, some leaders may promote discord between ethnic
groups as a means of consolidating support for themselves from within their own ethnic group; such leaders have a vested interest in continuing conflict between ethnic groups and thus resist the adoption of the principles of inter-ethnic social capital. Thus, while I consider that these norms have inherent value, it is naïve to believe that their value alone facilitates transition away from violent conflict, especially when a polarized society is locked into the dynamics of survival politics and mistrust. Nevertheless, fragile opportunities to cultivate inter-ethnic social capital and to change the dynamics of group relations do arise, even in the midst of violent conflict.

Typically, the best opportunities to begin the process of cultivating inter-ethnic social capital emerge in the context of a hurting stalemate. Hurting stalemates represent “critical junctures” where there is scope for more radical reform than is usually possible. A hurting stalemate exists where no single faction has the ability to impose its will on others. Once a hurting stalemate develops, the balance of power between ethnic groups and elite incentive structures tend to engender a willingness among elites to enter into peace negotiations.

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224 It is possible for ethnic groups engaged in violent conflict to enter into productive peace negotiations before a hurting stalemate exists if the international community intervenes to force a cessation of violence. However, this scenario is unlikely. The international community is generally reluctant to intervene forcibly in domestic
inability of any one ethnic group to impose its will on its rival (or rivals) forces elites to make concessions during the peace process. Elites agree to adopt institutions that reflect the right to participation, the right to continued existence, and the rule of law largely as a result of a pragmatic calculus that such institutions offer them the best chance of accessing power either immediately or in the future. Thus, with respect to the initial impetus for entering into peace negotiations and the factors that influence elites in these negotiations, I agree with scholars like Przeworski, Maravall, and Holmes who take a Realpolitik approach to understanding institutional outcomes. For these scholars, the development of institutions that have the potential to manage violent ethnic conflict is a function of the power relationships in society and the incentives of powerful, self-interested groups in society.225

However, I diverge from the Realpolitik school of scholarship on the issue of the influence of norms on elite behaviour and the prospects for long-term peace and stability. Scholars like Przeworski, Maravall, and Holmes view the normative underpinnings of institutions as relevant only to the extent that the norms coincide with the political incentives of powerful actors. From this perspective, the right to participation, the right to continued existence, and the rule of law are ideas that have little independent influence in the polity. Moreover, these norms can be used to mask the raw exercise of power in the polity. Przeworski and Maravall, for example, suggest that when the rule of law no longer serves the interests of powerful groups in society,

conflicts, due in part to concerns about respect for national sovereignty and the reluctance of many countries to risk the lives of their own soldiers to bring peace to another country. I do consider, however, that the participation of the international community is vital to the success of the peace process. In this regard, I distinguish between the role of the international community as being the catalyst for peace negotiations and the role of the international community in facilitating the peace process once a hurting stalemate has developed.

these groups resort to rule by law—using the law as a blunt instrument to achieve their private ends. What appears to be the rule of law is a façade; in reality, powerful, self-interested groups control institutions and use institutions and the law to serve their own interests. These self-interested groups are only constrained by the rule of law when they lack the power to dominate. Thus, in reality, the ability of the rule of law and related norms to constrain elites is a product of the relative balance of power. Cultivating the rule of law in developing societies is therefore primarily an exercise in creating the right types of political incentives so that the interests of elites are aligned with rule of law-type institutions and values.

Although elites typically enter into peace negotiations for purely pragmatic reasons, norms can develop an independent influence in the polity. Norms have a greater ability to constrain elites than these scholars suggest. The normative commitments of the masses impact the incentive structure of elites, for example. Elites require the cooperation of the masses. Attempting to exert power without the cooperation or tacit consent of the average citizen is costly and difficult. Since norms set the boundaries for acceptable tactics and behaviour in political, social, and economic competition, norms affect the relative costs of strategies for promoting the agenda of the elites. The strategic calculus of elites must therefore factor in the high cost of using tactics that fall outside the tolerance range of the average citizen. By building support among the masses for the norms of the right of participation, the right to continued

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226 See Maravall & Przeworski, ibid.
227 I am grateful to David Dyzenhaus for his assistance in formulating the summary of the arguments of Przeworski and Maravall in this paragraph.
229 The process of cultivating such support typically begins during the peace process. The international community must generally take the lead in promoting the norms of inter-ethnic social capital to the masses. The peace process affords the international community an opportunity to pressure elites to agree to procedures and processes that can actualize the norms of inter-ethnic social capital in the experience of the masses. The
existence, and the rule of law, it is possible to change the relative costs and benefits of various strategies such that there is a strong preference for using institutions to advance the elites’ agendas. Robust adherence to the norms of inter-ethnic social capital (typically when the civic compact has emerged) makes the adoption of radical, extra-institutional strategies such as violence virtually unthinkable.

The impact that norms can have on the strategic calculus of elites stems largely from the commitment of the citizenry to the norms of inter-ethnic social capital. In Chapters Four and Five, I will focus on the cultivation of social capital at the level of the masses, including the internalization of the norms of inter-ethnic social capital on a broad, nation-wide level. To be clear, however, the norms of inter-ethnic social capital can have a broader impact on elites than just the alteration of the elites’ strategic calculus. Once internalized, these norms sets boundaries for what the elites themselves are willing to do to advance their own agendas. Przeworski and Maravall appear to suggest that norms like the rule of law are discarded by powerful, self-interested groups when even these norms are not advantageous to the groups. This view discounts the moral sway that norms can exert over elites.

While it would be naïve to suggest that ruthless elites who have little regard for morals do not exist, it is overly cynical to believe that all elites fall within this ruthless category. It is likely that there will be at least a few leaders who will internalize and remain committed to normative principles. Axelrod’s theory of cooperation suggests that even a few individuals can create a cooperative dynamic so long as they have at least some interactions together and act on the actualization of the norms, in turn, initiates the internalization of these norms. I discuss how support for these norms among the masses can be cultivated below and in detail in Chapters Four and Five.
basis of reciprocity. This suggests that a cooperative coexistence between ethnic groups could emerge in a polity if even a few elites remain committed on a personal basis to the norms of inter-ethnic social capital and if these elites have some contact with each other.

My disagreement with scholars like Przeworski, Maravall, and Holmes about the role of norms extends beyond the question of whether norms can have a meaningful impact on the management of violent ethnic conflict. I consider that not only can robust attachment to the norms of inter-ethnic social capital at the levels of elites and the masses have a positive impact on managing violent conflict, but even more, that such attachments are necessary to maintaining long-term peace and stability. While pragmatic considerations related to the relative balance of power provide the impetus for elites to enter into peace negotiations, it is widespread attachment to the norms of inter-ethnic social capital that provides the basis for an enduring peace. Accordingly, one of the central goals of the peace process should be to set the foundation for the cultivation of inter-ethnic social capital. Although the civic compact is not likely to emerge immediately following the peace process (indeed, it may take many years before the civic compact matures), a peace process that originates in a hurting stalemate offers an excellent, though fragile, opportunity to begin building inter-ethnic social capital. One of the central themes of this dissertation is how the peace process can be structured, particularly in its early stages, to promote inter-ethnic social capital.

The idea that the cultivation of inter-ethnic social capital should be a major dimension of peace processes is novel. In many cases, transition strategies focus heavily on designing the “right”

kind of institutions and drafting good constitutions. Thus, peace talks have frequently centred on developing institutional structures that reflect “best practices” in ethnic conflict management. These “best practices” frequently include various forms of power-sharing (e.g., federalism, multi-party cabinets, and/or proportional representation), language and cultural protections, human rights reforms, rule of law reforms (e.g., judicial reforms), and, in some cases, mutual vetoes. Broadly-speaking, the overarching goal is to institute forms of consociational or consensus democracy, as well as to introduce rule of law reforms.

Experience in countries that have successfully managed to avoid violent ethnic conflict, such as Canada, Belgium, the Netherlands, Switzerland, and the United Kingdom (with respect to Scotland and Wales), suggest that these best practices should provide good institutional frameworks for handling inter-ethnic rivalries. From the perspective of Realpolitik scholars like Przeworski and Maravall, one could argue that the adoption of these best practices is warranted on the basis that these practices have a proven record in the aforementioned countries of aligning political incentives in a manner that reduces the risk of violence.

I recognize the central importance of well-designed institutions to political, social, and economic development. Moreover, I consider that institutions play an essential role in the cultivation of inter-ethnic social capital. Institutions should be structured on the basis of the norms of inter-ethnic social capital so that the elites’ and the public’s interactions within institutions reinforce these norms, thereby facilitating the internalization of the norms. By integrating the norms of inter-ethnic social capital into institutions, these norms can be brought into the central structures of public life. This is an important step towards the emergence of the civic compact insofar as the civic compact represents widespread attachment to these norms and a sense that these norms should form the basis for the governance of the polity.
The best practices for institutional design that are typically advocated for ethnically divided countries emerging from periods of violence are generally consistent with the norms of inter-ethnic social capital. Efforts to adopt power-sharing mechanisms, for example, re-enforce the right to participation. Similarly, cultural and language protections and human rights reform promote the right to continued existence. The rule of law has gained recognition as an important norm for the political, social, and economic development of countries. Thus, many of the institutional reforms that occur after periods of violent conflict do integrate the norms of inter-ethnic social capital into the structure of institutions. Yet problems remain. It appears that adopting the “right” kind of institutions after a civil war is not enough to prevent a fall back into violence. Collier, for example, presents evidence that approximately one-half of countries emerging from civil war will fall back into violent conflict within ten years.\footnote{Collier, \textit{Bottom Billion}, supra note 163 at 34.}

Moreover, approximately half of all civil wars are post-conflict relapses.\footnote{\textit{Ibid.}} There are a variety of cases involving ethnic conflict where peace agreements and institutional reform failed to provide a sufficient basis for transitioning out of violence.

In Cyprus, for example, the provisions of the 1960 Constitution were designed to institutionalize power-sharing between Greek and Turkish Cypriots.\footnote{For a good discussion of attempts to implement power-sharing in Cyprus, see Susanne Baier-Allen, ”The Failure of Power-sharing in Cyprus: Causes and Consequences” in Ulrich Schneckener and Stefan Wolff, eds., \textit{Managing and Settling Ethnic Conflicts: Perspectives on Successes and Failures in Europe, Africa and Asia} (New York: Palgrave MacMillan, 2004) 77. The description of the provisions of the 1960 Cypriot Constitution that follow in this paragraph are taken from this article.} The structure of the Presidency, the seats in the House of Representatives, the Constitutional Court, the security forces, and the army, for example, divided power between Greeks and Turks. Moreover, the
Constitution contained important collective rights with respect to language and culture of both Greeks and Turks. In many respects, the Constitution reflected compromise, a balancing of interests, power-sharing, and respect for the right of each community to its own cultural existence. Nevertheless, within four years, the Constitutional order had collapsed and inter-communal violence re-commenced, necessitating the intervention of the United Nations.

The Fijian experience also illustrates that institutions alone are not sufficient to move a country past violence and instability. Negotiations in Fiji in 1996 and 1997 resulted in the adoption of a constitution in 1998 that was by most accounts fair and balanced. While the constitution protects the major interests of the native Fijians, it also extends key protections to Indo-Fijians. In a number of key respects, this constitution contains textbook examples of how institutions may be structured to mitigate violent conflict. Yet, approximately one year after elections were first held under this constitution, the government, headed by an Indo-Fijian Prime Minister, was overthrown in a coup instigated by a native Fijian ethno-nationalist. Although this coup was relatively short-lived, Fiji’s returned to democratic governance under the 1998 constitution was subverted by another military coup in 2006.

In Northern Ireland there have been repeated attempts since 1972 to negotiate a peace settlement on the basis of power-sharing. Many of these attempts failed at an early stage. The Good Friday Agreement of 1998 ultimately established the framework for peace and

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235 For a good overview of these negotiations, see Sean Byrne, “Consociational and Civic Society Approaches to Peacebuilding in Northern Ireland” (2001) 38 Journal of Peace Research 327.
power-sharing in Northern Ireland. The Good Friday Agreement provided for the restoration of local governance through the devolution of political power to a parliament in Northern Ireland under the leadership of a power-sharing executive. This ended British direct rule, which had been imposed in 1972. However, the power-sharing executive in Northern Ireland’s parliament collapsed in 2001. Direct rule was once again imposed in 2002 and continued until 2007. While local governance through the parliament of Northern Ireland has since resumed, the slow move to restore local governance and the early collapse of Northern Ireland’s parliament after the adoption of the Good Friday Agreement illustrate that the adoption of power-sharing institutions is neither a simple task nor a ready solution to the problems in a divided polity.

There are many other examples of countries whose institutions have failed to prevent violence and instability. In Spain, constitutional devolution of political and administrative powers has not prevented the rise of extremist Basque nationalists who use terrorism to advance their agenda. In Lebanon, although a consociational governance structure had mitigated violence for approximately three decades, it was not enough to prevent descent into civil war in 1975.\textsuperscript{236} The Ta’if Accord restored a consociational governance framework to Lebanon in 1989. However, by 2006, the Ta’if Accord had broken down, largely as a result of conflict between Israel and the Lebanon-based, radical Islamic group Hezbollah. In Burundi, the restoration of democracy in 1993 was cut short after the Hutu president elected in the first set of elections was assassinated by Tutsi military leaders. This assassination triggered outbreaks of violence between Hutus and Tutsis. Following the death of the second Hutu president in a plane crash

\textsuperscript{236} For a good discussion of the Lebanese consociational arrangements that existed between 1943 and 1975, the collapse of these arrangements in 1975, and the subsequent Ta’if Accord, see Daniel L. Byman, \textit{Keeping the Peace: Lasting Solutions to Ethnic Conflicts} (Baltimore: The Johns Hopkins University Press, 2002) at 139-149.
and the appointment of a third Hutu president in 1994, the Tutsi-dominated Union for National Progress Party withdrew from the government and from parliament. This withdrawal catalyzed existing tensions into a brutal civil war that claimed an estimated 300,000 lives.\(^{237}\)

These examples suggest that the adoption of well-designed institutions is not a panacea for violent conflict. *Realpolitik* scholars like Przeworski and Maravall might argue that the above examples illustrate that what matters most for stability is the relative balance of power, not the design of institutions. Yet other empirical evidence supports the assertion that there is a correlation between institutional design and political stability.\(^{238}\) I argue that the above examples are better understood as instances of failed peace processes rather than as instances of failed institutions. Peace processes involve more than the reform of institutional structures, although the adoption of institutions is among the more tangible outcomes of peace processes. Institutions embody a set of principles that reflect normative understandings about how the polity should be governed. Thus, the reform of institutions or the adoption of new institutions involves a paradigm shift. Fundamental institutional change extends beyond the functional dimension (how will collective decisions be made) into the normative realm (what is the basis for legitimacy in the polity). New or reformed institutions carry new normative understandings about how the polity should be conceived and governed. Problems arise when institutional structures change, but the underlying normative framework in the polity does not. A dissonance arises between the normative understandings held by the majority of the players in


the polity and the normative framework represented by the new institutional structures; this
dissonance results in institutional dysfunction and ongoing instability and violence.\textsuperscript{239} Even
the best designed institutions cannot break the cycle of violence if the members of the polity
are locked into a normative framework associated with survival politics.

At first glance, the problem of normative dissonance may seem impossible to resolve. There
appears to be a “chicken and egg” problem associated with institutional reform: certain kinds
of institutions can promote the norms of inter-ethnic social capital, but the success of these
institutions requires a break from survival politics and an embrace of the norms of inter-ethnic
social capital. In other words, the promotion of inter-ethnic social capital appears to require
that inter-ethnic social capital already exists. Nevertheless, the inherent difficulties posed by
the problem of normative dissonance may be resolved through the careful design of peace
processes.

Peace processes that originate in hurting stalemates can serve as transitional periods in which
the cultivation of the norms of inter-ethnic social capital is initiated. The dynamics of the
relationship between ethnic groups during a peace process that follows a hurting stalemate
creates a fragile opportunity to begin to alter the norms that govern the groups’ coexistence
within the polity. First, provided that the peace process emerges from a hurting stalemate,

\textsuperscript{239} Ehrenreich Brooks discusses the problem of normative dissonance in terms of culture. She considers law to be
a part of a country’s culture, and argues that legal reform cannot be successful without a culture that recognizes
the importance of law and that is receptive to legal reform. Legal reform therefore requires cultural change. See
of Law Building: The Need for a Multi-Layered, Synergistic Approach” (2008) 49 Wm. & Mary L. Rev. 1443;
Amir N. Licht \textit{et al.}, “Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance”
none of the ethnic groups in the polity have the capacity to dominate other groups. The incentive structure of elites thus begins to align with at least a degree of compromise and cooperation, if only because the preferable option—dominance—is not possible. As I have argued above, the norms of the right to participation and the right to continued existence offer ethnic elites the security of continued relevance and access to a degree of influence in the polity. In the context of a hurting stalemate, then, the incentive structure of elites is conducive to nurturing openness and even some attachment to the norms of inter-ethnic social capital. To be clear, not every peace process affords this opportunity. The existence of a hurting stalemate is pivotal since the conditions of the hurting stalemate result in elite incentive structures that make radical institutional change and the cultivation of new norms possible.

The nature of elite incentive structures is important to understanding why I suggest that it is possible to foster attachment to the norms of inter-ethnic social capital while at the same time maintaining that cultivating civic nationalism is unlikely to be successful. The development of inter-ethnic social capital bears some similarities to the cultivation of civic nationalism in so far as both arguably involve a cultural shift. Why is it possible to foster an attachment to the norms of the right to participation, the right to continued existence, and the rule of law, but not possible to foster a sense of nationalism and political loyalty based on attachment to the civic institutions of the state? The answer to this question lies in elites’ instrumental use of ethnic affiliation as a basis for mobilization.

In a polarized society, ethnicity serves as powerful tool for mobilizing the masses, particularly in developing societies where the ethnic group has been the provider of most of the socio-
economic services that are typically provided by the state in developed countries. The salience of ethnic identity and its value as a means of mobilizing support suggests that elites have ongoing incentives to maintain the relevance of ethnic affiliation rather than to promote a supra-ethnic civic identity. At the same time, the instrumental value of ethnic affiliation to elites suggests that elites may have reason to support the norms of inter-ethnic social capital, at least in the context of a hurting stalemate. As I have discussed above, these norms offer elites a guarantee of at least some access to power. Moreover, these norms affirm the place of each constituent ethnic group in the polity. The right to participation, for example, affords each constituent ethnic group the right to participate in key decision-making processes in the polity. The right to continued physical and cultural existence affirms that constituent ethnic groups enjoy certain collective rights in the polity such as the right to cultural preservation, as well as language rights. Indeed, a norm that seeks to entrench the continued existence of the ethnic group has inherent appeal to elites who have relied on ethnic affiliation as their primarily basis for political mobilization. In essence, elites have incentives rooted in the instrumental value of ethnic affiliation as a means of mobilizing support to resist the cultivation of civic nationalism and to favour the norms of the right to participation, the right to continued existence, and the rule of law.

Second, the peace process offers an opportunity to re-constitute the relationship between ethnic groups and the state. During periods of violent conflict, almost all ethnic groups have a dysfunctional relationship with the state and its institutions. Dominant ethnic groups typically have appropriated the power and resources of the state for their own benefit; such groups have abused the authority of the state and have stripped the state and its institutions of their independence. Weaker ethnic groups have suffered at the hands of the state. Though in reality
the dominant ethnic group controls the state, it is the state that arrests and harasses the members of the weaker ethnic group, excludes the weaker group from meaningful political participation, limits economic opportunities, and compromises human rights. Although members of the weaker ethnic groups understand that the dominant ethnic group is ultimately responsible for their suffering and exclusion, nevertheless, because the dominant group has acted through the auspices of the state, the state is implicated. Thus, both dominant and weaker ethnic groups have a dysfunctional relationship with the state: the former appropriates and abuses the authority and resources of the state, while the latter suffers abuse and exclusion at the hands of the state. These dysfunctional relationships impede the development of inter-ethnic social capital. Norms such as the rule of law, the right to participation, and the right to continued existence can have little meaning when the state has been co-opted by one group to the detriment of others. However, the peace process signals a break with past practices and offers a chance to begin to rehabilitate the relationship between ethnic groups and the state and its institutions. The peace process can serve to clean the slate and so create a foundation for conceptualizing the state as a shared polity and the state’s institutions as the arenas in which the coexistence of ethnic groups is managed.

Finally, the peace process creates a legitimate role for third parties such as other countries to intervene in the domestic politics of a conflict-ridden country. I consider that in most cases the intervention and active participation of a neutral third party such as a peacekeeping force is essential to the successful transition out of violence. I will explore the role of third parties in more detail in subsequent chapters. For the present purposes, it suffices to note that third parties often play a pivotal role in establishing and maintaining ceasefires, facilitating the decommissioning of weapons and the demobilisation of armed forces, and providing the security
guarantees necessary to move the peace process forward. Without the involvement of third parties to monitor ceasefires and to provide assurances of safety, the elites of different ethnic groups will find it very difficult to make the types of concessions that are necessary to advance the peace process. Moreover, third parties can offer incentives to elites to act in a manner consistent with the norms of inter-ethnic social capital. For example, other states may offer to restore diplomatic relations with the government of a country embroiled in violent ethnic conflict if the government takes steps to restore the rule of law in a country. Third parties also can provide critical guidance about how to structure the peace process in a manner that promotes the development of inter-ethnic social capital.

Although the assistance of third parties is generally essential to the transition out of violence, the intervention of such third parties in civil conflict within a country is often viewed as an illegitimate interference in the domestic affairs of a country (unless such third parties have been invited by the government to enter the country to provide assistance). The peace process is a unique period since the involvement of third parties such as peacekeeping forces has become a common and accepted dimension of the process. Indeed, third parties are often invited to assist the parties to the conflict negotiate and implement the terms of a peace agreement. Insofar as the peace process tends to create a legitimate opportunity for third parties to intervene in the conflict, the peace process involves circumstances that are conducive to initiating the cultivation of inter-ethnic social capital.

Peace processes, then, offer windows of opportunity to begin the development of inter-ethnic social capital. Several key factors come together during a peace process, including a greater
willingness among elites to compromise and to cooperate due to the existence of a hurting stalemate, the opportunity to re-constitute the relationship between the state and ethnic groups, and the creation of a legitimate role of third parties to intervene in the domestic affairs of a conflict-ridden country. In combination, these factors make it possible to disrupt the dynamics of survival politics and to cultivate the norms of inter-ethnic social capital. Yet, there is often a failure to capitalize upon the opportunities to build up the norms of inter-ethnic social capital during the peace process. This failure is not altogether surprising in light of the fact that there has been very little consideration of the nexus between peace processes and the emergence of inter-ethnic social capital. Neither scholars with an interest in peace processes nor those with an interest in social capital have explored how peace processes may be structured to promote the cultivation of inter-ethnic social capital. In the remainder of this dissertation, I will attempt to advance scholarship on both peace processes and social capital by drawing attention to how inter-ethnic social capital can be developed in the peace process. I argue that the cultivation of inter-ethnic social capital can be initiated by structuring the peace process in a manner that is consistent with the norms of inter-ethnic social capital. There are two key dimensions to integrating the norms of inter-ethnic social capital in the peace process in a manner that lays the foundation for the emergence of inter-ethnic social capital. These two dimensions correspond to the strategies for building up inter-ethnic social capital at the level of the elites and at the level of the masses.

First, the strategy for building up social capital at the level of the elites centres on ensuring that the structure of peace initiatives reflects the norms of inter-ethnic social capital. In other words, the structure of peace initiatives must respect the rights of each group to continued
existence and to participate in the peace process. Processes and procedures adopted during transition periods must therefore assure groups of their security (both physical and cultural) and engage the elites from each group in decision-making. Peace initiatives must also integrate values and processes associated with the rule of law into the structure of the transition period as much as possible. As elites interact with each other in the peace process, typically with the assistance of a neutral third party, elites slowly begin to internalize these norms. Moreover, there is a higher likelihood that the institutions that emerge from the peace process will embody the norms of inter-ethnic social capital if these norms are reflected in the peace process itself. Integrating these norms into the peace process also increases the perceived legitimacy of the decisions taken during the peace process, including decisions about institutional structures.

Second, at the level of the masses, the process and procedures adopted during the transition out of violence must lay the foundations for the emergence of the civic compact. Laying this foundation is accomplished in part in the same way as inter-ethnic social capital is cultivated at the level of the elites, namely, by integrating the norms of inter-ethnic social capital into the peace process as much as possible. In addition to increasing the perceived legitimacy of the peace process, integrating these norms into the structure of the peace process fuses the creation of key state institutions with the norms. The reconstitution of the state thus becomes closely associated with the right to continued existence, the right to participation, and the rule of law. This enhances the possibility that the norms of inter-ethnic social capital will emerge as the key values of the state, paving the way for the development of the civic compact.
An important dimension of developing inter-ethnic social capital at the level of the masses relates to rehabilitating the relationship between the masses and the state and its institutions. As I have indicated above, institutions play a central role in the cultivation of inter-ethnic social capital and the emergence of the civic compact. However, after periods of protracted conflict, there are at least two impediments to the ability of institutions to serve as arenas in which the masses may be exposed to the norms of inter-ethnic social capital and subsequently to begin to internalize these norms. First, the relationship between the state and various ethnic groups (both dominant and dominated) has typically been dysfunctional prior to the peace process. The state has served as an instrument of oppression. Past acts of atrocity and the involvement of key arms of the state, such as the police or the army, in routinely perpetrating injustices undermine the legitimacy of the state.

The civic compact includes a deep commitment to resolving inter-group conflict exclusively through the institutional arenas of the state and a rejection of radical, extra-institutional strategies to advance the interests of the group. This commitment includes implicit recognition that the state alone may use deadly force in society and that the use of this force is extremely circumscribed. The attitudes and normative commitments associated with the civic compact can only emerge if there is a widespread recognition of the legitimacy of the state’s authority. Rehabilitating the legitimacy of the state’s authority involves cultivating a widespread rejection of the norms of survival politics, as well as promoting the norms of inter-ethnic social capital as the basis of the legitimate exercise of power in the polity. The peace process must include measures to address both of these dimensions of rehabilitating the state’s legitimacy. These measures should include truth commissions and accountability proceedings. As I will argue more fully in Chapter Four, truth commissions serve to instil within the population a sense of
that the events of the past must never again be permitted to occur and that conflicts between
groups must be resolved through institutions. In this regard, truth commissions help to foster a
rejection of the norms of survival politics. Accountability proceedings are directed to restoring
the rule of law within the state and to ensuring that individuals who have participated in the
commission of acts of atrocity and the gross violation of human rights are punished and can no
longer pose a threat to the welfare of the citizenry. Accountability proceedings thus promote
the norms of the rule of law and the right of each group to its continued physical and cultural
existence. Accountability proceedings also offer a means of sanctioning those who have used
violence to advance the agenda of the ethnic group or abused their public powers in other
respects. Accountability mechanisms thus signal that reliance on the norms of survival politics
and extra-institutional violence will not be tolerated again. The process and procedures used in
both truth commissions and accountability proceedings must actualize the norms of inter-ethnic
social capital so that the masses may begin the process of internalizing these norms.

The second impediment relates to a lack of engagement by the public in the institutions of the
state. Because the ethnic group tends to be the main provider of many social and economic
goods for its members in developing societies, there tends to be a disconnect between the
public and the state and its institutions. For many, the ethnic group and its social structures
hold primary importance in their lives, while the institutions of the state are distant and often
irrelevant. This sense of irrelevancy undermines the role that institutions can play in
transmitting the norms of inter-ethnic social capital. Moreover, the lack of a sense of public
ownership of institutions makes it difficult for groups to conceptualize the polity as being
shared by them and other groups.
For reform to be successful, the population at large must be a part of the process so that the masses understand, however crudely, key dimensions of reform. It is particularly important that the masses develop an understanding of how proposed reforms will protect their interests. Such an understanding helps to offset the risk that extremists can disrupt the peace process by claiming that the interests of their ethnic group have been sold out. Engaging the masses in the peace process, for example, through wide-spread consultations and through public ratification of constitutions through referenda, also ensures that there is a greater sense of ownership over the peace process and, congruently, greater pressure on elites to adhere to the institutional arrangements that emerge from the process. The participation of the masses also facilitates the internalization of the norms of inter-ethnic social capital. The peace process thus offers an opportunity to begin to build patterns of interaction based on these norms and so lays the foundation for their internationalization as part of the civic compact.

The success of the peace process depends not only on what is done during the process, but also on what is not done. The prospects for peace are increased if no formal efforts are taken in the immediate post-conflict period to promote inter-personal connections between individual members of different ethnic groups. In this regard, I disagree with the many peace and conflict scholars who argue that the peace process should include mechanisms designed to promote reconciliation and forgiveness between groups. A peace process that is structured with a view to promoting the cultivation of inter-ethnic social capital should not include formal measures designed to bring individual members of different groups together for the purposes of building inter-personal relationships between those members. As I will discuss in detail in Chapter 5, increasing contact between individual members of different ethnic groups threatens the status of elites who have relied on shared ethnicity to solidify their support. These elites respond to
increasing contact by emphasizing the unique elements of their group’s ethnic identity and, hence, the group’s separateness from other groups. Elites also attempt to “rally the faithful”, that is, to mobilize individual members of the ethnic group on the basis of their ethnic identity and of increasingly radical claims. The ultimate result of contact between individual members of different ethnic groups is almost always a move away from moderation towards more hard-line positions. As I will argue, it is preferable to delay formal efforts to promote inter-personal contact between individuals from different ethnic groups until at least a full generation (21 years) has passed after the end of violent conflict. This delay allows elites to solidify their constituencies and increases the likelihood that contact will occur after the norms of inter-ethnic social capital begin to emerge, thereby minimizing the risk that contact will trigger a radicalization of ethnic claims.

My argument that formal efforts to promote inter-personal contact across ethnic groups should be delayed raises a question about whether and how ethnic groups can be reconciled and transition into peace after periods of violent conflict and atrocity. I contend that the immediate priority in the period following the cessation of violence is the rehabilitation of the relationship between ethnic groups and the state and not reconciliation between groups. Of central importance is that elites and the masses of all groups understand and accept the norms of inter-ethnic social capital as the basis of the coexistence of ethnic groups within the polity. It is reasonable to believe that it is possible to cultivate an adherence to these norms for at least two reasons. First, the cultivation of these norms begins in a context where no group has the ability to impose its own agenda on the others. Second, there are inherent strategic benefits associated with governance mechanisms that embody these norms, such as the guarantee of access to some degree of power (the norm of the right to participation) and protections against arbitrary
exclusions from power and other forms of discrimination (the norms of the rule of law and the right to continued cultural existence). On the other hand, as I will argue in Chapter Five, attempts to reconcile ethnic groups to each other at an early stage in the peace process have not been very successful. Under the circumstances, it is important to conceptualize the peace process as being a transition to a new set of “rules of the game” in the polity, facilitated and possibly enforced (at least for a period of time) by a neutral third party. The peace process must initiate the cultivation of inter-ethnic social capital, thereby laying the foundation for the emergence of the civic compact. We should not view the peace process as the means through which tension between groups will be completely resolved or as setting the foundation for the integration of ethnic groups into one “civic nation”. Instead, the peace process should be understood as the first step in a long process of building up inter-ethnic social capital.

7. Conclusion
At this point, a summary of my principal arguments concerning the relationship between institutions, the peace process, and the cultivation of inter-ethnic social capital may be useful. Institutions that embody the norms of inter-ethnic social capital—the right to participate, the right to continued existence, and the rule of law—can act as forums for conveying and re-enforcing these norms. As elites and the masses manage their public lives through such institutions, they begin to internalise the norms of inter-ethnic social capital. Over time, these norms become deeply embedded in the social fabric of a country, and the civic compact begins to emerge. However, something more than just good institutional design is necessary to realize the potential of institutions for building up inter-ethnic social capital. Good institutional design must be complemented by a normative shift in the polity away from survival politics. Without a normative shift away from survival politics and at least a tentative step towards the norms of inter-ethnic social capital, problems of normative dissonance will subvert the functioning of
even the best designed institutions. Herein lays a major challenge for transitioning into peace: in order to adopt the types of institutions that can help to develop inter-ethnic social capital, it appears that the norms of inter-ethnic social capital must already exist to some degree. The response to this challenge is found in the peace process itself.

When a peace process follows a hurting stalemate, it offers a fragile opportunity to begin to nurture new dynamics of ethnic interactions in the polity. In the particular context of a hurting stalemate, no ethnic group is able to impose its will on others, the need for change is clearly evident, and there is scope for the intervention of the international community to assist in peace keeping. These circumstances combine to align elite incentive structures to favour the adoption of institutions that embody the norms of inter-ethnic social capital. Moreover, these circumstances open a small window of opportunity to begin to engage the elites and the masses in processes that are structured in a manner that reflect the norms of inter-ethnic social capital. Structuring the peace process in a manner consistent with the norms of inter-ethnic social capital promotes the development of inter-ethnic social capital in two important ways. First, as noted, the elites and the masses are engaged in processes that reflect and re-enforce the norms of inter-ethnic social capital; repeated interactions that are structured on the basis of the norms of inter-ethnic social capital facilitate the internalisation of these norms. Second, processes that embody the right to participation, the right to continued existence, and the rule of law tend to generate outcomes that are more likely to be viewed as legitimate. Accordingly, the institutions that are ultimately adopted in peace processes that have been structured on the basis of the norms of inter-ethnic social capital are more likely to enjoy a perceived legitimacy. This legitimacy, in turn, enhances the ability of institutions to serve as forums for the further cultivation of inter-ethnic social capital.
A key factor related to the success of the peace process is the involvement of neutral third parties in peace-making and peace-keeping. Neutral third parties serve to maintain stability, order, and peace during the early and middle stages of transition, when the levels of inter-ethnic social capital are low and still developing. Neutral third parties must also take the lead in encouraging the parties to adopt a structure for peace negotiations that maximizes the opportunity for the cultivation of inter-ethnic social capital. Third parties can provide security guarantees to all ethnic groups and can bridge the so-called credibility gap by providing independent verification that each ethnic group is honouring its commitments under the peace process. In this regard, third parties can create a context in which ethnic groups can begin to give meaning to the values of the right to participation, the right to continued existence, and the rule of law without risking their own security. In the vast majority of cases, without the involvement of a neutral third party, it is unlikely that inter-ethnic social capital will develop.

Ultimately, it is likely that there are various ways to induce elites to adopt rule of law-type, power-sharing institutions. My approach focuses on laying the foundations for cultivating inter-ethnic social capital in the peace process since I consider that low levels of this form of social capital are materially implicated in the creation and perpetuation of the destructive dynamics of survival politics. In some respects, a peace process that is structured to cultivate inter-ethnic social capital resembles conventional peace processes. Some of the mechanisms that I identify as being important aspects of the peace process are generally components of

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240 Collier, for example, argues that technical assistance and aid from other countries, in addition to peacekeeping support, is essential to a successful transition out of conflict. He also argues that foreign governments should be prepared to commit to staying in a country transitioning out of violent conflict for at least ten years. See Collier, *Bottom Billion*, supra note 163 at 152 and 177-178.
conventional peace processes. For example, broad participation of elites of all groups within
the polity, truth commissions, trials and war crimes tribunals, and the engagement of the
masses in the peace process are frequently parts of peace processes around the world. At a
macro-level, then, it may appear that a peace process that is designed to cultivate inter-ethnic
social capital is similar to conventional peace processes, with the notable exception that the
former should not incorporate formal efforts to promote reconciliation and forgiveness, as I
have argued above.

Nevertheless, as the following chapters will illustrate, at a micro-level, a peace process that is
designed to cultivate inter-ethnic social capital may differ in material respects from
conventional peace processes. At a micro-level, structuring a peace process in a manner that
promotes inter-ethnic social capital requires careful attention to issues that may not garner as
much or any attention in conventional peace processes. For example, most peace processes are
concerned with restoring the rule of law to a country; in many cases, the focus on restoring the
rule of law is on the adoption of institutions that are central to the rule of law. Peace processes
that are designed to cultivate the rule of law must focus on the internalization of the norm of
the rule of law at the levels of the elites and the masses, in addition to the formal adoption of
rule of law institutions. That is, peace processes that are designed to cultivate inter-ethnic
social capital must attend to the challenge of changing the normative foundations of the polity.
I argue that normative change can be initiated by actualizing the norms of inter-ethnic social
capital into the experiences of the elites and the masses in all aspects of the peace process.
Thus, my approach to the peace process emphasizes integrating the rule of law, the right to
continued physical and cultural existence, and the right to participation in all of the procedures
and mechanisms that form the peace process as a whole. The peace process must be about
more than reaching settlement on contentious issues and ensuring the adoption of good institutions. The peace process must achieve settlement and the adoption of good institutions through procedures and mechanisms that are carefully designed to move the polity away from the dynamics of survival politics and towards the norms of inter-ethnic social capital. The process of negotiations is as important as the end result of negotiations.

My approach is not designed to offer easy answers. On the contrary, my focus on inter-ethnic social capital suggests that transitioning into peace is a long, arduous process since the cultivation of inter-ethnic social capital takes years, even generations. Moreover, my approach is rooted in the reality that peace initiatives are fragile opportunities that are easily subverted by one of the many pitfalls of the peace process. Nevertheless, my approach has value in that it offers a realistic assessment of why so many peace processes fail to deliver a lasting peace in polarized societies, as well as some suggestions about how the odds of negotiating a successful, lasting peace can be increased. In this regard, I add to existing scholarship on institutional and constitutional design in ethnically polarized countries by highlighting the process of reform as a key variable affecting the success of transition strategies. The balance of this dissertation will focus on dimensions of the process of transition that materially impact the prospects for the emergence of inter-ethnic social capital. In particular, I will consider how elites can be engaged in the peace process and how the masses can be engaged in the process. I will also consider why attempts to reconcile individual members of different ethnic groups should not be undertaken in the early to mid-stages of transition. I will conclude this dissertation by examining the incentives that the international community may have to intervene in countries emerging from periods of violence and instability.
1. Introduction

This chapter considers how inter-ethnic social capital can be cultivated at the level of the elite. I focus specifically on how the norms of inter-ethnic social capital—the right to participation, the right to continued existence, and the rule of law—can be cultivated. Drawing on Robert Axelrod’s theory of cooperation, I argue that when formal institutions are structured on the basis of the norms of inter-ethnic social capital, elites will gradually internalize these norms as they interact with each other on a repeated basis within these institutions. The foundation for the internalization of the norms of inter-ethnic social capital is created by integrating these norms into the structure of the peace process itself. I argue that peace processes offer fragile opportunities to initiate the difficult process of developing social capital. Incorporating the norms of inter-ethnic social capital into the structure of the peace process also increases the perceived legitimacy of institutions, making it more likely that elites will continue to work through the institutions in the later stages of the transition to peace and stability.

This chapter will contribute to existing scholarship in two ways. First, I will add a new dimension to the study of how social capital, especially between groups, can be cultivated. There is a growing body of literature studying how social capital evolves. Most of this literature, however, focuses on civic associations and networks between individuals.

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Scholarship in this regard includes study of what kinds of associational memberships and activities promote the growth of bridging social capital.243

Scholars have also begun to study how the state can contribute to the growth of bridging social capital. Fukuyama, for example, suggests that “[w]here there is a deficit in social capital, the shortfall can often be made good by the state, just as the state can rectify a deficit in human capital by building more schools and universities.”244 Fukuyama discusses how the state can promote social capital through education, through the efficient provision of necessary public goods, and by not interfering with matters best left entirely in the private sector.245 Scholars have also explored how institutional design246 and specific types of policies247, e.g., welfare-state policies, impact the government’s ability to shape the development of social capital.

While scholars have recognized that the government may have a role to play in developing social capital, they have also sounded caution on the potential consequences of government intervention in this regard. For instance, Fukuyama notes that “[g]overnment often has to step in to promote community when there is a deficit of spontaneous sociability. But state intervention poses distinct risks, since it can also too easily undermine the spontaneous


communities established in social society." Ostrom highlights concerns that external actors may not realize that they are destroying existing social capital combinations (that is, the complementary and constantly evolving array of relationships, norms, and interactions that together form social capital) even as they try to build up social capital. She also argues that government initiatives may crowd out private investments in social capital. Carilli, Coyne, and Leeson echo these concerns. They point out that government-created social capital combinations interpose a new set of signals that disrupts the ability of individuals to rely on existing signals to judge credibility and trustworthiness. Such government initiatives thus risk causing individuals to significantly decrease their level of interaction and exchange, resulting in an overall decrease in the levels of social capital. Carilli, Coyne, and Leeson conclude that government-sponsored efforts to create social capital combinations may have real and possible negative consequences for the social and economic order.

The exploration of both the potential avenues for developing social capital and the risks and limits associated with those avenues reflects a growing maturity in the scholarship on social capital. Yet a critical gap in the scholarship remains. While there has been much study of how to grow the networks (or “social capital combinations”) inherent in social capital, there has been comparatively little study of how to cultivate the norms inherent in social capital. This chapter seeks to contribute to the ongoing study of social capital by examining how attachment to the norms of inter-ethnic social capital can be cultivated at the level of the elite. In so doing, I will begin to fill the existing gap in the scholarship on social capital.

248 Francis Fukuyama, *Trust*, *ibid.* at 27.
My contribution to the study of social capital has particular relevance for ethnically polarized developing societies. Increasing levels of social capital has become an accepted objective of development policy. The World Bank, for example, identifies social capital as one of its thematic work programs in its Social Development department. Cultivating social capital as part of a development strategy for ethnically polarized countries, however, requires special consideration due to the deep divisions, profound mistrust, and dynamics of survival politics that characterize such countries. As I discussed in Chapter Two, the nature of elite incentive structures in polarized societies is such that increasing general contact between members of different ethnic groups at an early stage in the transition process will likely trigger radical, ethno-centric responses by elites. Such responses can be tempered, however, if efforts are made to cultivate adherence to the norms of inter-ethnic social capital before attempting to develop inter-ethnic networks and organizations. These norms place limits on the types of strategies and rhetoric that are acceptable in the polity. Accordingly, the first priority in an ethnically polarized society should be on building the civic compact—the societal-wide adherence to and internalization of the norms of inter-ethnic social capital. By offering insight into how the norms of inter-ethnic social capital can be cultivated at the level of the elite, this chapter contributes to the dialogue on how to advance development through the growth of social capital.

My second contribution to scholarship relates to the study of institutions and the impact that they have on development and on managing ethnic conflict. There is general consensus that
institutions have a material impact on development outcomes.\textsuperscript{253} There has also been considerable study of the types of institutions that are conducive to managing tensions in an ethnically divided polity.\textsuperscript{254} My contribution to this scholarship is aimed at considering how a normative foundation for these institutions may be developed. Although the scholarship on institutional design is extensive, there has been minimal consideration of how the norms underlying these institutions are generated. Yet the normative foundations of these institutions are as important as the technical design of the institutions themselves.


Experience has shown that formal institutional structures for sharing power, protecting the interests of ethnic groups, and upholding the rule of law are insufficient to make power-sharing, the security of interests, and the rule of law a reality. Countries such as Fiji, Burundi, Lebanon, Spain, and Northern Ireland have at various times adopted institutions that feature power-sharing mechanisms and protections of the interests of ethnic groups. Many of these countries have also adopted rule of law-type institutions. Yet the technical strengths of the institutions in these countries have not been enough to create a peaceful and stable coexistence among ethnic groups. Other conflict-ridden countries such as Sri Lanka and Cyprus seem stubbornly resistant to institutional reform. For all of the scholarship on institutional design, a great deal of violent conflict still occurs in polarized countries around the world.

Rosa Ehrenreich Brooks’s study of rule of law reform offers insights into a missing dimension in the study of institutional design. She comments on the failure of well-intentioned international interventions to create the “rule of law”. Despite a surge of interest in the rule of law in both scholarship and development practice, efforts to implement rule of law reforms have had disappointing results. Reform that focuses on institutional prescriptions and substantive law (e.g., implement judicial reform, strengthen legislatures, modernize substantive law, support the legal profession, and improve access to justice) fail to recognize that “creating the rule of law is most fundamentally an issue of norm creation”. Ehrenreich Brooks further comments that the rule of law “is not something that exists “beyond culture” and that can be

256 See Michael Trebilcock & Ronald J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (Cheltenham: Edward Elgar, 2008) [Trebilcock & Daniels, Rule of Law Reform].
257 Brooks, supra note 255 at 2285.
somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture…”  

Ehrenreich Brooks’s observation that the rule of law is culture can be extended to the concepts of the right to participation (or power-sharing) and the protection of the physical and cultural existences of ethnic groups. Power-sharing and the protection of each ethnic group’s vital interests must extend beyond institutional structures and must become integrated into the culture of a society. There has, however, been little study of how the norms underlying institutions are cultivated. This chapter offers insight into how the normative foundation for institutions can be created. My focus on peace processes as fragile opportunities to begin the process of cultivating the norms of inter-ethnic social capital will thus supplement the existing literature on institutional design.

This chapter begins by setting out an overview of the process through which the norms of inter-ethnic social capital are cultivated. In this section, I describe how elite interactions in the peace process and subsequently through the institutions of the polity can engender an attachment to the norms of inter-ethnic social capital over time. I also discuss this process in light of Axelrod’s theory of cooperation. I argue that the foundation for cultivating inter-ethnic social capital is set in the peace process. The norms of inter-ethnic social capital must be integrated into the structure of the peace process in order to begin the process of culti
elite attachments to these norms and to bolster the legitimacy of institutions adopted in the peace settlement.

I then move to a more detailed discussion of how the foundation for cultivating the norms of inter-ethnic social capital can be set in the peace process. I specifically consider how the norms of the right to participation, the right to continued physical and cultural existence, and the rule of law can be integrated into the structure of the peace process. I also analyze the pivotal role that third parties have in the peace process. I argue that third party intervention is necessary to create conditions that alter elite incentive structures so that elites can begin to interact on the basis on the norms of inter-ethnic social capital. This chapter concludes by discussing how efforts to cultivate inter-ethnic social capital at the level of the elite must be complemented by efforts to build inter-ethnic social capital among the masses.

2. An overview of the process of cultivating inter-ethnic social capital

The process of cultivating inter-ethnic social capital between elites centres on structuring repeated interactions between elites on the basis of the norms of inter-ethnic social capital. As elites engage with each other over and over again in contexts that re-enforce these norms, elites slowly begin to internalize these norms.259 The norms of inter-ethnic social capital gradually

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259 This process of internalization occurs through “institutional learning”. Sidney Verba, a pioneer in the area of institutional learning, argued that individuals within a polity absorb the operational norms and values upon which the institutions of the polity are based. See Sidney Verba, “Conclusion: Comparative Political Culture” in Lucian W. Pye & Sidney Verba, eds., Political Culture and Political Developments (Princeton: Princeton University Press, 1965). Institutional learning is considered particularly important in the context of civil liberties because political restraint is difficult to conceptualize and must be experienced in order to understand and to acquire. See Paul M. Sniderman, Personality and Democratic Politics (Berkeley: University of California Press, 1975). Institutional learning stands in contrast to a “value diffusion” model which argues that people acquire democratic preferences through the diffusion of democratic values through the media, personal contacts, and education. See, for example, Lucian W. Pye, “Political Science and the Crisis of Authoritarianism” (1990) 84 American Political Science Review 3; Guiseppe Di Palma, To Craft Democracies (Berkeley: University of California Press, 1990); and Harvey Starr, “Democratic Dominoes: Diffusion Approaches to the Spread of Democracy in the International System” (1990) 35 Journal of Conflict Resolution 356. Studies of the attitudes of East and West German elites following the re-unification of Germany suggest that while a value diffusion model can account for general
become accepted as the framework for how elites interact with each other and, more broadly, for how the ethnic groups that these elites represent coexist in the polity.

My approach to cultivating inter-ethnic social capital is based in part on observations made by Robert Axelrod in his influential book, *The Evolution of Cooperation*\(^{260}\). In this book, Axelrod studies whether cooperation can ever emerge among self-seeking egoists who do not answer to a central authority. Axelrod uses game theory\(^{261}\) to study this question, as well as two case studies: one from life in the trenches on the front lines of World War I and one from evolutionary biology.

Axelrod argues that “cooperation can emerge even in a world of unconditional defection.”\(^{262}\) Cooperation can emerge as long as there are small clusters of individuals who base their cooperation on reciprocity and who have even a small proportion of their interactions together.\(^{263}\) Decision-making strategies based on reciprocity are robust and can thrive in complex environments where many different types of strategies are used.\(^{264}\) Moreover,

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\(^{261}\) Axelrod studies the results of a computer tournament that tested strategies for effective choice in an iterated Prisoner’s Dilemma game. Axelrod invited professional game theorists to submit a program that embodied a rule for selecting the cooperative or non-cooperative choice on each move. The tournament was a round robin such that every entry played every other entry, in addition to its own twin (i.e., each entry played a match against a program identical to the entry itself) and a program designed to cooperate or to defect randomly with equal probability. The entire round robin tournament was run five times to get a more stable estimate of the scores for each player. Ultimately, a strategy called TIT FOR TAT won the tournament. This strategy is simple: it begins with a cooperative choice, and after that, it does whatever the other player did on the previous move. Axelrod analyzes aspects of TIT FOR TAT that make this strategy so effective in iterated Prisoner’s Dilemmas. See Axelrod, *ibid.* at 27-54, especially at 30-31.

\(^{262}\) *Ibid.* at 68.

\(^{263}\) *Ibid.* at 21, 68, 124-141 and 177.

cooperation based on reciprocity can trigger a dynamic that allows this strategy to protect itself from invasion from other, less cooperative strategies.\textsuperscript{265}

According to Axelrod, the prospects for cooperation can be enhanced by ensuring that interactions between players are iterated and not one-off transactions. Axelrod refers to this strategy as part of “enlarging the shadow of the future”. In other words, the future must be sufficiently important relative to the present. Axelrod observes that “the players can each use an implicit threat of retaliation against the other’s defection—if the interaction will last long enough to make the threat effective.”\textsuperscript{266} Thus, an important means of promoting cooperation is to arrange for the same individuals to meet each other again and again, and to ensure that each individual understands that he or she will continue to interact with the other person.\textsuperscript{267} My approach to cultivating inter-ethnic social capital centres on repeated interactions between elites. The iterated nature of elite interactions fosters more cooperative attitudes since elites understand that their reluctance to cooperate, stubbornness on various issues, and other defections may be punished in subsequent interactions.

Axelrod’s theory of cooperation regards reciprocity as a necessary condition for the emergence of cooperation. Reciprocity involves a mirroring on a player’s actions: if a player cooperates, then the player’s opponent will also cooperate. But if a player defects, the player’s opponent will also defect. Over an iterated series of interactions, where players recognize each other and the pattern of other player’s moves, players learn that if they cooperate, they will be rewarded with mutual cooperation and that defection is punished by mutual defection. Reciprocity is

\textsuperscript{265} Ibid. at 21 and 68-69.
\textsuperscript{266} Ibid. at 126.
\textsuperscript{267} Ibid. at 125.
thus essential because it establishes predictable results for strategic decisions and creates incentives for cooperation, while discouraging defection.

The norms of inter-ethnic social capital incorporate elements of reciprocity. These norms are premised upon the coexistence of ethnic groups in the polity. The norms of the right to continued existence and the right to participate in decision-making affirm the rights and status of all ethnic groups in the polity. These norms cannot be applied selectively to circumstances that favour only one group’s right to continued existence or to make decisions at the expense of other group’s rights. A group that asserts its right to continued cultural existence must therefore also recognize the rights of other groups to their continued cultural existences. Similarly, a group that asserts its right to participation implicitly recognizes that it has the right to participate in decision-making processes with other groups, but not to make decisions acting unilaterally. Both the right to participate and the right to continued existence thus embody a “cooperation for cooperation” sensibility.

Defections can be punished by structuring interactions between groups on the basis of the norms of inter-ethnic social capital. The norm of the rule of law has a central role to play in this regard. As I discussed in Chapter 2, the rule of law includes the idea that the government, the bureaucracy, public institutions, the military, and the police are all subject to the law and accountable for violations of it. Accountability in this context implies that there must be a legal remedy in cases where the government has violated the law. Violations of the law, including breaching the norms that underpin the law, do not go unsanctioned. Each group has the right to seek a legal remedy if another group abuses its position and power in the polity. The rule of law thus gives each group a non-violent means of punishing defections.
It is possible that ethnic groups may seek to punish defections using self-help mechanisms such as violence. One of the core purposes for cultivating inter-ethnic social capital is to provide incentives for groups to use institutions to protect their interests and to limit conflict between groups to institutional arenas. However, at the early stages of cultivating inter-ethnic social capital, it is likely that institutions will lack core competencies. Institutions may also be vulnerable to capture by particular ethnic groups. The initial weakness of institutions creates a risk that groups will regress to using violence if they find that the institutions that are supposed to uphold the norms of inter-ethnic social capital are unable to function effectively. This risk can be mitigated with the assistance of third parties who assist in the transition to peace.

Axelrod suggests that cooperation based on reciprocity can be made more stable by changing the pay-offs for either cooperation, defection, or both. Axelrod notes that even relatively small changes in the pay-offs for cooperation and defection can make cooperation based on reciprocity stable even though the players are still caught in a Prisoner’s Dilemma.\(^{268}\) In the case of ethnically polarized countries in the process of transition, adherence to the norms of inter-ethnic social capital can be made more stable through the intervention of a third party that has the capability of changing the pay-offs for cooperation and defection. Once the civic compact begins to take root, it becomes too costly for elites to disregard the norms of inter-ethnic social capital. Until then, third parties can offer incentives to adhere to the norms of inter-ethnic social capital such as normalized diplomatic relations and assistance with reconstruction and development. Third parties can also make defection most costly by threatening sanctions such as the loss of international aid and prosecution before international

\(^{268}\) *Ibid.* at 135.
war crimes tribunals. The intervention of third parties to change the pay-offs associated with adhering to and defecting from the norms of inter-ethnic social capital is almost always necessary during the transition period.

2.1. Elite interactions in the peace process

The process of cultivating inter-ethnic social capital begins during peace processes and other key moments that involve fundamental institutional reform. The development of a hurting stalemate or the excessive costs of maintaining dominance drive elites to engage in peace negotiations and discussions about fundamental institutional reform. Prior to this point, successfully negotiating a peace settlement, much less cultivating inter-ethnic social capital, will be very difficult since elites will have incentives to fight so long as they believe that they can achieve complete victory. The assistance of third parties such as other countries, global or regional organizations, or non-governmental organizations (NGOs) is generally required to facilitate negotiations and to help the country transition to peace and stability. These third parties are in a position to structure peace negotiations in a manner that reflects the norms of the right to participation, the right to continued existence, and the rule of law. Integrating these

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269 For a discussion of such key moments, or “critical junctures”, see Trebilcock & Prado, Path Dependence”, supra note 253.

norms into the structure of peace negotiations centres largely on selecting processes and procedures that reflect these norms. 271

As the peace process unfolds with the assistance of third party intermediaries, elites have various opportunities to interact with each other in contexts that re-inforce the norms of inter-ethnic social capital. Repeated interactions between elites in the peace process help them become accustomed to engaging with each other on the basis of the norms of inter-ethnic social capital. The peace process thus offers a chance to begin to change the dynamics of how elites interact with each other.

Integrating the norms of inter-ethnic social capital into the peace process serves another important purpose: it sets the foundation for the adoption of institutions that reflect these norms. Since elite interactions will mostly occur through the institutions of the state once the peace process has concluded, it is essential that institutions are structured on the basis of the norms of inter-ethnic social capital. It is also crucial that elites perceive that these institutions are legitimate. Institutions are more likely to be structured in accordance with the norms of inter-ethnic social capital and to enjoy elite “buy-in” if the institution building process is framed on the basis of these norms.

Empirical evidence suggests that there is a correlation between the structure of a peace process and the nature of the institutions that result from the peace process. The International Institute for Democracy and Electoral Assistance (“IDEA”) conducted a study in 2004-2005 that assessed 12 case studies of constitution-building during times of transition from civil conflict

271 I will return to how the peace process can be structured to reflect these norms later in this chapter.
or authoritarian rule. An external consultant to this study comments that although the cases were complex and a wide variety of factors impacted their outcomes, there are a few interesting trends, namely:

In the study, the more representative and more inclusive constitution building processes resulted in constitutions favoring free and fair elections, greater political equality, more social justice provisions, human rights protections, and stronger accountability mechanisms. In contrast, processes dominated by one interest or faction tended to result in constitutions favouring that interest or entrenching power in the hands of certain groups. Moreover, the more participatory processes initiated a dialogue and began a process of democratic education in societies that had not had political freedom or the chance to shape the governance of their state in the past. The participatory processes seemed to have empowered the people.272

In light of this empirical evidence, the adoption of institutions that reflect the norms of inter-ethnic social capital can be made more likely by incorporating these norms into the structure of the institution building process. Integrating these norms into the framework of the peace process also increases the perceived legitimacy of institutions. Empirical evidence suggests that people are much more likely to accept the outcome of a process if they perceive that they have been treated fairly in the process.273 An important component of the rule of law involves

natural justice (or procedural fairness). By integrating elements of the rule of law, particularly with respect to natural justice, into the framework of the peace process, the process as a whole and the institutions that are created in it are more likely to be viewed as legitimate.\textsuperscript{274} The right to participation complements the norm of the rule of law in this regard. As I will discuss in greater detail below, the right to participation implies that elites from each ethnic group and sub-group should be included in negotiations and given the opportunity to take part in the institution building process. Facilitating broad participation helps to ensure that the natural justice principle of the “right to be heard” is incorporated into the peace process. This participation also gives elites a stake in the outcome. The resulting sense of ownership of the process helps to foster a greater perception of legitimacy of the process and the institutions that are created in it.

Integrating the right to continued existence into the framework of the peace process also promotes a greater sense of confidence in the outcome of the process. In the context of the peace process, the right to continued existence requires both physical protection of groups and sensitivity to their cultural existence. Where efforts are made to take into account local cultural sensitivities, there is a greater likelihood that the institutions created in the process will feature elements of local traditions. It is also more likely that institutions will incorporate mechanisms to recognize and to protect key dimensions of a group’s cultural existence such as language, religion, and symbols. Consequently, institutions will have a greater resonance with elites and the local population. The fact that institutions incorporate aspects of local traditions and display sensitivity to local concerns bolsters the perceived legitimacy of the institutions.

\textsuperscript{274} I will discuss how elements of natural justice can be integrated into the peace process below.
2.2. *Elite interactions through the institutions of the state*

After the peace process concludes, the process of cultivating inter-ethnic social capital occurs largely through repeated elite interactions with each other through the institutions of the state. The institutions of the state must be structured on the basis of the norms of inter-ethnic social capital so that elites have further opportunities to internalize these norms as they engage with each other through the state’s institutions. Accordingly, the norms of the right to participation, the right to continued existence, and the rule of law must be integrated into institutional design.

2.2.1. *The right to participation*

In practical terms, the right to participation can be fostered by creating power-sharing institutions that ensure that all ethnic groups have the ability to participate meaningfully in the decision-making process.²⁷⁵ Schneckener describes power-sharing as follows:

> The key idea of any power-sharing structure is that two or more ethnic groups have to rule the common polity jointly and take decisions by consensus. No single group can decide important matters without the consent of the other(s). On the basis of informal or formal rules all groups have access to political power and other resources.²⁷⁶

Power-sharing, by its very nature, incorporates the right to participation since it is premised upon the principle that the decision-making process must engage all constituent ethnic groups. The classic approach to power-sharing in the polity focuses on consensus democracy. Consensus democracy refers to any political system in which the main parties *de facto* rule together.²⁷⁷ The form of consensus democracy that is most commonly applied to ethnically-

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polarized societies is consociation. Consociational democracies are marked by four main cooperation-based institutional arrangements in the polity: government by a “grand coalition”; mutual veto; proportionality as the principal standard of political representation, civil service appointments, and allocation of public funds; and a high degree of autonomy for each segment to manage its own internal affairs.278

In the context of an ethnically polarized country, government by a grand coalition implies that the government consists of representatives from all of the constituent ethnic groups in society. There are two options for structuring the grand coalition: a cabinet or a presidential system.279 The governance structure set out in Fiji’s constitution includes a grand coalition-type cabinet, although the cabinet has not functioned on a democratic basis since the 2006 coup. The Presidency of the Republic of Bosnia-Herzegovina is an example of a grand-coalition; this Presidency consists of three members: one Bosniac, one Croat, and one Serb, each of whom is elected from the respective ethnic group’s territory.

The institutional arrangements surrounding government by grand coalition may be formalized in legislation or in the constitution or they may be informal practices. While informal norms may include an entrenched practice of inviting representatives from all major political parties to participate in a governing coalition, in the case of ethnically polarized countries that lack a long democratic tradition, it is advisable to entrench the requirement to form coalition

278 Lijphart, Democracy, supra note 254 at 5. Lijphart originally developed consociational theory to explain stability in a few deeply segmented European democracies. See Arend Lijphart, “Typologies of democratic systems” (1968) 1 Comparative Political Studies 3 [Lijphart, “Typologies”]. However, his arguments have gained a normative overtone and consociational engineering (which seeks to integrate the features of consociation into the design of the political institutions of the state) is now viewed by many as a way to achieve stable democracy in deeply divided societies. See Ralph Premdas, “Ethno-Racial Divisions and Governance: The Problem of Institutional Reform and Adaptation”, Research Project on Racism and Public Policy, United Nations’s Research Institute for Social Development (2001).
governments in the constitution. Such entrenchment institutionalizes the right to participate in the governing coalition and provides legal recourse if elites of a group are excluded.\textsuperscript{280}

The mutual veto gives each group the power to block decisions taken by the grand coalition where such decisions threaten the vital interests of the group. There are three types of vetoes: a delaying veto, a direct veto, and an indirect veto.\textsuperscript{281} Veto powers force ethnic groups to take decisions by consensus and to respect the right of each group to participate in the decision-making process since the failure to reach agreement on legislation can result in the exercise of the veto power.

The risk of institutionalizing veto powers is that ethnic groups will use them to frustrate legislative initiatives of each other, which could result in the paralysis of the legislature. This risk can be mitigated by limiting the issues to which veto powers may apply to those that engage the major interests of each ethnic group (e.g., language rights, education, and territory). This requires a strong court system to address disputes about whether a particular piece of legislation may be subject to veto powers. Another approach to mitigating this risk is to provide ethnic groups with only a delaying veto on all but the most significant issues. A delaying veto allows groups to delay the taking of a decision in order to reconsider the matter, but not to negate the decision. A delaying veto often involves the use of a special parliamentary mediation procedure or the referral of the matter to a committee or a

\textsuperscript{280} For legal remedies to be effective, there must be recourse to independent courts that have the authority to issue constitutional judgements and the power to enforce those judgements. The norm of the rule of law is closely linked to the existence of such courts. I will therefore address the existence of independent courts below, in the context of the discussion of the rule of law.

\textsuperscript{281} Schneckener, “Models”, \textit{supra} note 254 at 28-29.
constitutional court for resolution. The Belgian “alarm bell” procedure is an example of a delaying veto.

Proportionality serves as a principle of allocation. Key political positions, civil service appointments, and scarce financial resources in the form of government subsidies should be distributed to competing ethnic groups on the basis of their numerical representation in society as a whole. This ensures that all groups have access to some of these critical resources, a factor that reduces the marginalization of ethnic groups in society. The adoption of proportionality in the legislature, the government and the bureaucracy promotes the right of all ethnic groups to participation in the governance of society by ensuring that ethnic groups are represented in positions that allow them to participate in governance. The Good Friday Agreement in Northern Ireland incorporates the principle of proportionality in the allocation of Committee Chairs, Ministers and Committee Membership.

Certain types of institutions are necessary in order to implement proportionality effectively. First, a robust bureaucracy is needed to administer the allocation of resources on a proportional basis. The bureaucracy must set up the procedures and regulations that govern the proportional allocation of resources such as government subsidies or government staff positions. Second, a

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282 Ibid.
283 The Belgian alarm bell procedure was introduced in 1970. It allows each language group in the Belgian parliament to stop a draft law if at least three-quarters of the language group’s members in the parliament sign a resolution. If a language group succeeds in triggering the alarm bell procedure, the draft law is referred to the Council of Ministers, who must search for a compromise. The Council of Ministers must then table a new proposal within 30 days of the resolution. See Schneckener, “Models”, Ibid. at footnote 8, citations omitted.
284 Lijphart, Democracy, supra note 254 at 38.
285 Ibid.
286 In this regard, proportionality serves to promote the norm of the right of each group to its continued physical and cultural existence. This aspect of proportionality will be discussed below.
287 See section 5, Good Friday Agreement, which stipulates that the allocation of Committee Chairs, Ministers and Committee Membership will be in proportion to party strength in the Assembly, the parliament of Northern Ireland.
strong court system is necessary to settle disputes that may arise. Third, provision must be made for adjusting the formulae for proportional representation in government decision-making and proportional allocation of government resources. As noted above, it is generally preferable to formalize consociational arrangements, for example, in the constitution. However, there must be a mechanism for adjusting these formalized arrangements since changes in the demographics of society can alter perceptions of the fairness of political representation, civil service appointments, and the allocation of scarce government resources. The failure to have a mechanism for making such adjustments can cause the system to irreparably break down under increasing pressure for change. In Lebanon, for example, the inability to adjust the National Pact between Christians and Muslim groups, which governed the allocation of parliamentary seats, played a material role in the outbreak of a brutal civil war in 1975, after 32 years of peace.\textsuperscript{288} The National Pact was based on a 1932 census and made no provision for changing demographics in society. Lijphart points to the “inflexible institutionalization of consociational principles” as the Achilles heel in the Lebanese system.\textsuperscript{289}

The fourth and final characteristic of a consociational democratic system is a high degree of autonomy for each segment (or ethnic group) to manage its own internal affairs. Decision-making authority should be delegated to the groups so that the groups have as much autonomy as possible to address matters that are of the group’s exclusive concern.\textsuperscript{290} Matters that are of common interest, however, should be addressed through decisions made by all groups together,

\textsuperscript{288} For a discussion of the collapse of the National Pact and the outbreak of civil war in Lebanon, see Daniel L. Byman, \textit{Keeping the Peace: Lasting Solutions to Ethnic Conflicts} (Baltimore: The John Hopkins University Press, 2002) at 139-142.

\textsuperscript{289} Lijphart, \textit{Democracy}, supra note 254 at 149-50.

\textsuperscript{290} \textit{Ibid.} at 41.
with roughly proportional degrees of influence. In general, the grant of segmental autonomy to ethnic groups is done through a federal system of governance.

Territorial federalism is generally used where ethnic cleavages coincide with regional cleavages, although its desirability is highly dispute in the academic literature. In societies where groups are geographically integrated, non-territorial federalism or personal group autonomy may be adopted. In the case of non-territorial federalism, power is devolved to ethnic groups such that the groups have autonomy over non-geographic matters such as culture, language, education, or health care. Belgium has developed a unique system that blends both territorial and non-territorial forms of federalism.

The delegation of decision-making powers in a federal system may trigger power-struggles and competition between the centre and the segmental units (i.e., the ethnic groups). It is essential to provide as much clarity as possible about the spheres of authority of each level of government. It is also helpful to make advance provision for dispute resolution procedures relating to questions of legislative competence, as well as fiscal transfers from the central government, such as the creation of a constitutional court. By extension, federal systems generally require the existence of an effective judicial system to function given that it is highly likely that disputes over jurisdiction will arise.

\[291\] Ibid.

\[292\] Lijphart, Democracy, supra note 254 at 42.

\[293\] See the discussion of the debate concerning the desirability of federalism below.

There is debate in the academic literature about the desirability of federalism in ethnically divided polities. A number of scholars argue that decentralization and federalism help to mitigate inter-ethnic tensions by devolving power to local governments and by granting greater levels of political, economic and social autonomy to ethnic groups concentrated in a certain geographic area. However, other scholars suggest that decentralization and federalism carry the risk of increased fragmentation and heightened ethnic tension. Ultimately, devolving power to certain regions may engender more demands for power. When the demands for greater autonomy are refused, “secession and civil war may follow”.

In the context of cultivating inter-ethnic social capital, federalism is a desirable mechanism for actualizing the norm of the right to participation since it devolves power to ethnic groups and thus allows them to participate directly in governance. The reality in many cases is that there is already a high level of inter-ethnic tension and fragmentation. Federal structures do not create or aggravate this tension in most cases. On the contrary, federalism offers a release valve for the pressure that builds when ethnic elites are denied access to power and autonomy.


297 Nordingler, *supra* note 254 at 32.

298 *Ibid.* at 32.

299 McGarry, for example, argues that the view that federalism contributes to increased inter-ethnic tensions and greater demands for autonomy is premised on a flawed assumption, namely that inter-group tension and conflict would not exist in the absence of a federal grant of autonomy. He further argues that empirical evidence suggests that “[c]onflict and instability often pre-date concessions of autonomy, and they are frequently a reaction to a lack of autonomy in minority regions or to a process of centralization (i.e., a move by the centre to tighten its control of minority regions).” See McGarry, *supra* note 275 at 435.
and thus, in many cases, alleviates conflict rather than causes it.\textsuperscript{300} Perhaps most importantly, by promoting the development of inter-ethnic social capital, federalism helps to ensure that if claims for full independence are made\textsuperscript{301}, these claims will be addressed and resolved through democratic institutions.

Although I have discussed government by grand coalition, mutual vetoes, proportionality, and segmental autonomy and federalism in the context of consociation, each of these mechanisms can also stand alone as a means of institutionalizing the right to participation. Where the adoption of a full consociational system is not possible, the right to participation can still be promoted if one or more of these power-sharing mechanisms is featured in the governance structure of the polity. Furthermore, as I will illustrate below, mutual vetoes and proportionality also have additional value in terms of their ability to promote the norm of the right to continued existence.

\textit{2.2.2. The right to continued existence}

The right to continued existence can be cultivated by adopting institutions that protect the cultural and physical existence of each ethnic group. There are two broad categories of mechanisms that promote the right to continued existence. First, there are mechanisms that affirm the status of each ethnic group in the polity and that seek to create conditions for the flourishing of each group. Second, there are mechanisms that are designed to protect each ethnic group from the dominance of other ethnic groups.

\textsuperscript{300} \textit{Ibid.}

\textsuperscript{301} Lijphart argues that “secession should not be regarded as an undesirable result of the tensions in a plural society under all circumstances”. (Lijphart, Democracy, supra note 254 at 44.) Assuming that geographic cleavages overlap with segmental cleavages such that groups are geographically segregated from each other, secession may be an appropriate response if it becomes impossible for groups to manage their coexistence within the state any longer. (\textit{Ibid.} at 45.) The issue then becomes how to explore the option in a fair and democratic manner and without plunging a country into violence.
The first type of mechanism for promoting the right to continued existence is aimed at helping ethnic groups to preserve their physical and cultural existence through positive measures. The governance structure of the polity should affirm the collective ethnic identities of the constituent ethnic groups within the state, preferably in a manner that associates the groups with the state in some official way. The state should also adopt measures to facilitate the social, political, and economic growth of all constituent ethnic groups. Language policies are an example of a mechanism which consists of a positive measure aimed at affirming the status of groups in the polity and at creating conditions for their flourishing.

Language policies recognize certain rights associated with the use of each ethnic group’s language. At minimum, these types of policies establish the right of ethnic group members to speak their own language. Many language policies go beyond this, however. A common form of language policy is the designation of the languages of the constituent ethnic groups within a state as being one of the “official” languages of the state. Designation as an official language generally implies that the language may be used in interactions within official state institutions, including, for example, the courts, the legislature, and the bureaucracy. It also implies that documents issued by the state must be printed in all of the official languages of the state. Significantly, education is often available in any of the official languages of the state.

Language is an important dimension of the collective identity of ethnic groups and tends to have important symbolic value for the group. Language also has significant instrumental value in terms of employment, social mobility, personal security, and economic

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302 Johann G. Herder, Briefe zu Beförderung der Humanitat, 1783, as cited in Joshua A. Fishman, Language and Nationalism: Two Integrative Essays (Rowley: Newbury House Publishers, 1972) at 1. See also King, supra note 254 at 494.
Policies that protect and promote an ethnic group’s language thus affirm the right of the group to its continued cultural existence and facilitate greater opportunities for group members. Recognizing the language of an ethnic group as an “official” language of the state has particular value in promoting the right of the group to its continued existence. This recognition not only safeguards a fundamental part of the group’s collective identity, but also signals that the ethnic group is a stakeholder and partner in the state and its institutions. A major disadvantage associated with this type of recognition, however, is the cost involved. Administering a bilingual or tri-lingual state significantly increases the cost of governance since services and information must be provided in multiple languages. The cost and logistical issues associated with conferring official recognition on the languages of constituent ethnic groups can be crippling to developing countries.

The second type of mechanism for promoting the right to continued existence protects the negative liberties of ethnic groups, that is, the freedom from discrimination, dominance, and threats to cultural and physical extermination. Antidiscrimination legislation and mutual vetoes are examples of institutions designed to provide ethnic groups with this type of negative freedom and so to protect their right to continued existence. Antidiscrimination legislation protects the right to equal treatment, without discrimination based on ascriptive characteristics, including the right to equal access to scarce resources. Antidiscrimination legislation thus protects ethnic groups from unequal treatment on the basis of ethnic identity or the components of ethnic identity such as race, religion, language, or place of origin. This type of legislation

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303 King, ibid.
helps to ensure that ethnic groups are not forced to assimilate in order to have access to scarce resources in society such as jobs, housing, and education.

To be effective, antidiscrimination legislation requires a high level of institutional capacity so that the legislation is implemented and enforced effectively. Often, antidiscrimination legislation must be complemented by public education campaigns to teach people both their rights and their responsibilities. Moreover, government agencies require special training to ensure that the bureaucracy, the courts, and other branches of government are administered in a manner that adheres to the high standards of antidiscrimination practices. The judiciary, the police, and the military in particular must be cognizant of what the law requires and how to enforce the antidiscrimination legislation. Procedures for dealing with complaints must be established. In addition, special tribunals or commissions are generally necessary to administer the legislative and regulatory framework governing antidiscrimination legislation.

A mutual veto is primarily a mechanism of minority protection. Democratic reforms can trigger a “tyranny of the majority” problem, especially where an ethnic majority population has been subject to the political or economic dominance of an ethnic minority population. The ethnic majority may use its newfound political clout to strip the ethnic minority of its assets, restrict access to opportunities, and/or roll back the political and civil liberties of the ethnic

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305 Brazil is a good example of the importance of strong institutional competence to the effective implementation of antidiscrimination law. Benjamin Hensler has attributed the failure of anti-discrimination laws to be an effective tool in combating racism within Brazil in part to how racial issues are treated by the judiciary and other legal institutions. See Benjamin Hensler, “Nao Vale a Pena? (Not Worth the Trouble?) Afro-Brazilian Workers and Brazilian Anti-discrimination Law” (2007) 30 Hastings Int’l & Comp. L. Rev. 267.

306 Lijphart, Democracy, supra note 254 at 36-37. See also John C. Calhoun, A Disquisition on Government, ed. C. Gordon Post (New York: Liberal Arts Press, 1953) at 28 and Nordlinger, supra note 254 at 24-25. Nordlinger notes that the mutual veto ensures that major governmental decisions cannot be taken unless they are acceptable to all major ethnic groups in society. Calhoun argues that a mutual veto places the rights and safety of a group where they are most securely placed: under the group’s own guardianship.
minority. Although power-sharing mechanisms give minorities a voice in governance, the decisions of government are made ultimately on the basis of the “majority rules” principle, even where there is an emphasis on consensus.

The veto allows a minority to protect its vital interests when legislative decisions pose a threat to these interests. In this regard, the mutual veto actualizes the right to continued existence by giving ethnic groups an institutional mechanism to delay or to prevent the enactment of legislation that subverts their vital interests as a group.

2.2.3. The rule of law
Actualizing the rule of law requires that there are institutions in the polity that can resolve disputes between private citizens and between citizens and the government in a credible and fair way. All actors in the polity, including the government, the bureaucracy, regulatory institutions, the military and police forces, must be subject to the operation of the law. There must therefore be institutions that are capable of holding these actors to account and to settle disputes that may arise concerning the legitimate extent of the authority of these actors. Actualizing the rule of law thus requires, at minimum, that there is an effective legal system, including a competent and independent judiciary, trained lawyers to prosecute and to defend cases, and independent and competent police forces to maintain order. In addition, there must be mechanisms within the legal system to hold the judiciary, lawyers, and police officers accountable. Structuring these accountability mechanisms can be challenging since a balance

308 See Chapter Two for the definition of “rule of law” adopted for this dissertation.
must be struck between ensuring accountability and protecting the independence of the judiciary, the bar, and police services.\textsuperscript{310}

Countries emerging from periods of violent ethnic conflict face numerous challenges in establishing an effective legal system. Some of the challenges are logistical: courthouses may have been destroyed and many (or even most) judges and lawyers may have either been killed in the conflict or have fled the country. After the Rwandan genocide, for example, the physical infrastructure of the legal system had been largely destroyed\textsuperscript{311} and only 40 of the 800 lawyers and judges that had been practising in Rwanda were still present in the country in July 1994.\textsuperscript{312} Other challenges are more deep-seated, and relate to lingering mistrust of the courts, the police, and military forces and concerns about the impartiality of these actors. Addressing these types of challenges generally requires major reform of these institutions. In Northern Ireland, for example, reform of state policing structures was a critical issue in the peace process.\textsuperscript{313} Efforts must also be made to ensure that these institutions are representative of the population as a whole so that no single ethnic group has or is perceived to have dominance over the institutions.

Regional appellate courts could bolster the rule of law. By “regional appellate courts”, I mean courts of appeal that serve various countries within a geographic region. Countries that have

\begin{itemize}
  \item\textsuperscript{310} For an excellent analysis of the role of the judiciary, the bar, and the police in promoting the rule of law, including the challenges associated with ensuring that each of these actors is legitimate, independent, and accountable, see Trebilcock & Daniels, \textit{Rule of Law Reform}, ibid.
  
  
  
\end{itemize}
similar legal systems (e.g., common law systems or civil law systems) could pool their resources to create a high court of appeal that would be the final court of appeal in each country. The judiciary would be drawn from judicial representatives of each country, with the proviso that a judge would not be permitted to hear an appeal that originates in his or her home country. This proviso would enhance the independence of the court and the legitimacy of the court’s decisions. In ethnically polarized countries, recourse to a final court of appeal in which cases are heard by a panel of judges drawn from outside of the country provides a greater guarantee of a neutral and fair hearing than if parties had to rely on domestic courts alone. The ability to appeal to a regional court would therefore insert much-needed legitimacy into the legal system. Regional appellate courts would also help countries to manage the high cost of administrating a legal system since the countries could share resources. The Caribbean Court of Appeal (CCJ) is an example of a regional court of appeal, although at present only three countries (Belize, Guyana, and Barbados) have formally designated the CCJ as the final court of appeal in their jurisdiction. Examples of regions that could be well-served by regional appellate courts include the Great Lakes region of Africa, southern Africa, and portions of South America.

Cultivating the rule of law also engages issues related to accessibility to justice. Ordinary citizens must be able to access the legal system to seek redress for wrongs that they have suffered, whether the wrongs were suffered at the hands of another private citizen or at the hands of the government. Indeed, integrating accountability into the public sphere requires that

314 Regional appellate courts would not, however, be an absolute guarantee of a neutral and fair hearing since judges from other countries could still have a stake in local matters. Moreover, in some regions, ethnic divisions spill across national borders. A good example is the Great Lakes region of Africa, which includes Rwanda, Burundi, Uganda, and the Democratic Republic of the Congo (DRC). In both Rwanda and Burundi, the major ethnic groups are the Tutsi and the Hutu. Furthermore, the conflicts in Rwanda and Burundi have created displaced populations of Tutsis and Hutus in both Uganda and the DRC.
citizens have a means of challenging the decisions and actions of government institutions. Moreover, there must be legal protection of human rights and mechanisms for enforcing human rights in order to safeguard the rights of citizens\(^\text{315}\) and to impose accountability on the government for its actions. While the courts have an important role to play in providing citizens with an avenue for seeking justice, the cost and complexity of court proceedings obstruct the ability of some members of the population to use the courts to seek redress. Countries can address this issue by creating a legal aid system and by establishing institutions that operate parallel to the courts to provide remedies in certain types of cases.\(^\text{316}\) For example, access to justice can be bolstered by adopting national human rights institutions that have the responsibility of investigating and prosecuting human rights violations in order to provide citizens with an avenue for seeking justice for human rights violations.\(^\text{317}\) In addition, ombudsmen may be created to address complaints of citizens vis-à-vis the government.

There are challenges related to establishing a legal aid system and institutions such as national human rights institutions and ombudsmen. The cost of providing these services can be prohibitive, for example. However, there is international consensus that the international community has a responsibility to provide an increased level of financial and technical

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315 There is strong international consensus on the importance of ensuring that there is an effective framework for the provision of remedies for human rights violations. See e.g. section 27 of the *Vienna Declaration and Programme of Action*, UNHCHR, World Conference on Human Rights, 23 June, 1993, A/CONF.157/23 (the *Vienna Declaration*). Section 27 of the *Vienna Declaration* provides in part:

> Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development…


assistance to help countries establish an effective framework of remedies to address human rights violations.  

Information-communication technologies (ICTs) have important instrumental value in promoting the rule of law. ICTs can facilitate better accessibility to justice and can provide a means of bolstering accountability and improving the transparency of government. ICTs have revolutionized the distribution of information and have greatly enhanced the ability of governments to communicate with their citizens using the Internet. Information about human rights, new and existing legislation, the legal system, the functioning of government and regulatory agencies, and judicial and regulatory decisions should be made available on the Internet in order to enhance accessibility to justice and transparency. The accountability of government is also enhanced when citizens are better able to track the government’s activities using online resources. In order to reap the benefits of ICTs with respect to promoting the rule of law, however, countries must strengthen their national ICT infrastructure and facilitate the roll-out of ICT services through universal access policies. Although ICTs are often not considered part of rule of law reform strategies, in light of the instrumental value of ICTs, the development of the ICT sector should be a priority for countries seeking to enhance the rule of law.  

2.2.4.  *A virtuous circle: elite interactions, institutions, and the norms of inter-ethnic social capital*  

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318 See section 27, *Vienna Declaration*, supra note 315.
319 There are many reasons why ICTs should be part of a development strategy. However, ICTs are not usually considered part of the strategy for advancing rule of law reforms. Nevertheless, as I argue above, the instrumental value of ICTs suggests that support for rule of law reform is among the many benefits associated with the development of a healthy ICT sector.
As inter-ethnic social capital begins to develop in the polity at both the level of the elite and the masses\textsuperscript{320}, the incentives to adopt strategies consistent with the norms of inter-ethnic social capital grow. As these incentives grow, elites become more and more committed to pursuing their agendas through institutions rather than through radical extra-institutional strategies such as violence. The increased willingness to work through institutions creates further opportunities to deepen elite attachments to the norms of inter-ethnic social capital. In effect, as levels of inter-ethnic social capital begin to rise in the polity, a virtuous circle emerges where the norms of inter-ethnic social capital strengthen the willingness of elites to work within institutions and the institutions, in turn, re-enforce these same norms.

As this discussion illustrates, the process through which inter-ethnic social capital alters elite incentive structures is not a straightforward causal process. There is a dynamic element to the relationship between inter-ethnic social capital and elite incentive structures such that cultivating inter-ethnic social capital and altering elite incentive structures become mutually re-enforcing processes.\textsuperscript{321} Nevertheless, the cultivation of inter-ethnic social capital ultimately drives the process. Formal institutional structures are necessary but not sufficient to alter elite incentive structures. These institutions must be supported by a firm normative commitment held by the elites and the citizenry at large to a cooperative, democratic coexistence within the polity. This normative commitment (which I discuss in Chapter 4 in terms of the “civic compact”) arises from inter-ethnic social capital and ultimately makes the costs of radical, extra-institutional strategies too high for elites.

\textsuperscript{320} The cultivation of inter-ethnic social capital at the level of the masses is addressed in Chapters Four and Five.

\textsuperscript{321} See Prado & Trebilcock, “Path Dependence,” supra note 253 for a discussion of self-reenforcing processes in the context of institutional reform and path dependence.
3. Integrating the norms of inter-ethnic social capital into the peace process

3.1. The right to participation

3.1.1. Representation

Structuring peace negotiations to reflect the right to participate in decision-making requires that each constituent ethnic group and subgroup in the polity have representation in the process. Accordingly, there must be a broad invitation to elites from all constituent ethnic groups to take part in negotiations. Moreover, since ethnic groups are rarely, if ever, monolithic, the peace process should also engage elites from the different subgroups within an ethnic group.

Admittedly, accommodating the participation of elites from all ethnic groups and subgroups with an interest in the peace negotiations may complicate the process. As many as two dozen participants have claimed a stake over the years in negotiations in Spain concerning the Basque conflict, for example. In Burundi, 17 political parties claimed the right to participate in negotiations in 2000, some of which had constituencies that did not extend beyond friends and family. Nevertheless, practical experience has demonstrated that the failure to ensure that a process is representative of all key stakeholders critically undermines the peace process. The issue of who is invited to join peace talks and who chooses to attend such talks has been a critical issue in Lebanon since the mid-1970s, for example.

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exclusion of both Protestant and Catholic armed extremists from negotiations in 1991 and 1992 undermined the significance of the peace talks notwithstanding the fact that both sides had agreed to a ceasefire. Representation has also been an issue in Sri Lanka, where the extremist Liberation Tigers of Tamil Eelam (the LTTE or the Tamil Tigers) have used violence and intimidation to eliminate or exclude their more moderate rivals in the Tamil community. The ability of moderate Tamil groups to advance a peaceful and democratic solution to the tensions in Sri Lanka has therefore been critically undermined.

An inclusive process promotes the cultivation of inter-ethnic social capital in a number of ways. Broad participation facilitates the widespread diffusion of the norms of inter-ethnic social capital among all elites. It also fosters the buy-in of all groups to the formal institutions that result from the reform process, a factor which increases the prospects for long-term stability. In cases where the participation of a particular group is essential to a successful transition, the exclusion of this group or its refusal to participate in the negotiations will likely subvert the peace process. For example, in Sri Lanka, negotiations between Prime Minister Wickremesinghe and the LTTE floundered in 2004 in part because President Kumaratunga was not brought into the process. The President’s exclusion from the process undermined the

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327 ICG, Sri Lanka Failure, ibid. at 13-14.
The participation of a range of different sub-groups may allow for the creation of strategic alliances that can play a key role in brokering a settlement. There is usually a range of views held by the elites of an ethnic group. While some elites may be hard-liners, others are likely to be moderates. Some elites may be associated with groups that use violence, while others may represent groups that reject the use of violence to achieve their ends. In some cases, the moderates of each ethnic group may have more in common with each other than with other elites from their own ethnic group who espouse hard-line views and tactics. These groups of moderate elites may serve as a bridge between the elites of the different ethnic groups. If the moderate elites can come to a consensus with each other on some key items as a starting point for negotiations, these elites may then be able to bring other elites from their own ethnic group into the process by leveraging their connections. Building up a critical mass of agreement among moderate elites and then moving the process outward to engage more radical elites can serve as an effective technique to move beyond roadblocks in the process caused by stubborn refusals of extremists to make concessions.

One of the thorniest issues related to the right to participation concerns the participation of rebel groups such as guerrillas and insurgents in reform processes. On the one hand, some consider it anathema to negotiate with groups that use violence, particularly when this violence is directed against civilians. Since the terrorist attacks on the United States on September 11, 2001, there has been increasing pressure not to extend any form of legitimacy to such groups

328 Ibid. at 17.
by negotiating with them. The Spanish government, for example, attempted to limit the impact that *Euskadi ta Askatasuna* (ETA or Basque Country and Freedom) can have in mainstream politics by passing the controversial Law on Political Parties in June 2002. The primary goal of the Law was to render *Batasuna*, the party that most consider to be ETA’s political arm, illegal and ineligible to participate in Spanish elections.

There is also concern that allowing former insurgents to participate in a newly constituted democratic governance structure allows such groups to legitimate their activities. Similarly, deposed authoritarian cliques may use such structures to regain power and then to continue their repressive style of governance under a democratic façade. These types of concerns have been raised in Afghanistan, for example. In the parliamentary elections held in Afghanistan in 2005, it became evident after the votes were tallied that at least half of the seats had been won by ex-Taliban mujahideen fighters and other warlords.329

Notwithstanding these concerns, there is a good case to be made for allowing extremist rebel groups to participate in the peace process. The failure to include extremists creates the possibility that they will act as “spoilers” in the process since they have been given no stake in the negotiations.330 As Downs and Stedman comment, “[t]he presence of spoilers in peace agreements poses daunting challenges to implementation.”331 Moreover, it can be difficult to

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determine which groups are acceptable participants and which are not, since many groups
engage in some form of civil disobedience. It is not always easy to discern whether a group is
more akin to terrorists or to freedom fighters. The experience in countries like Northern
Ireland and Rwanda also demonstrates that the exclusion of some groups from reform
processes renders these processes virtually meaningless due to the central role that the
excluded groups play in society and their capacity to disrupt the peace process.332

Ultimately, determining whether an armed rebel group ought to be permitted to participate in
peace talks must be made in view of the specific circumstances. Where a rebel group has a
legitimate stake in the settlement process or may act as a spoiler, the group likely should be
included in the process. However, conditions should be attached to this participation in order
to avoid creating the perception of an endorsement of violence as an acceptable means of
advancing a political agenda. For example, participation should be predicated on a ceasefire
and the involvement of other, moderate groups in the process. Third party interveners such as
a peacekeeping force will likely be necessary to oversee such a ceasefire.

3.1.2. Modalities of participation
The peace process should be structured in a manner that allows elites to participate
meaningfully in decision-making and that moves the process forward. “Meaningful
participation” implies that elites must at some stage of the process be engaged directly in

332 See, e.g., Lemarchand, “Consociationalism”, supra note 323; Bloomfield, supra note 325; and Byrne, supra
note 325. But see Desiree Nilsson, “Partial Peace: Rebel Groups Inside and Outside of Civil War Settlements”
making substantive decisions about the terms of the peace settlement, including the design of institutions. The peace process must unfold in a manner that ensures that the concerns and proposals of elites are heard and taken seriously. This demonstrates to elites that the right to participation has real value and will allow them to advance the interests of the group in the polity. Moreover, the failure to engage elites in the process in a meaningful way alienates elites from the process. Such alienation undermines the legitimacy of the peace settlement and the institutions that emerge from the process.

The imperative of ensuring that elites can participate meaningfully in the peace process requires that the process is “owned” by local elites. That is, local elites must have direct and significant influence in determining how the negotiations are structured, the types of decision-making mechanisms that are used, and the substantive terms of settlement and institutional design. Local elites must also have responsibility for the peace process such that the momentum for moving the process forward comes from elites, although mediators and other intervenors may assist elites to continue to move forward with negotiations. Ownership helps to ensure that the peace process and the institutions created in the process reflect local concerns and values. The sense of ownership gives elites a stake in the outcome of the peace process and increases the likelihood that the peace settlement will be viewed as legitimate.

As a means of enhancing local ownership over the peace process, traditional modes of decision-making should be integrated into the peace process wherever possible so that local elites feel that they have more control over the peace process. Similarly, traditional approaches
to governance should be integrated into formal institutional structures where possible.\textsuperscript{333} Values like power-sharing, accountability, and transparency ought to be interpreted with a view to local culture and traditions. By integrating traditional approaches to governance and local understandings of key values into the institutional framework, it is possible to reduce the switching costs of institutional reform and thus overcome embedded resistance to such reform.\textsuperscript{334} Moreover, integrating traditional approaches to governance and local understandings of key values into the new institutional framework creates interconnections between existing informal institutions and the new formal institutions.\textsuperscript{335} These interconnections facilitate the process of institutional reform by providing a strong informal support structure for the new formal institutional arrangements. This is not to suggest that traditions that have been overtaken by more modern practices should be resurrected or that traditions that violate basic human rights should be perpetuated. However, local traditions that

\textsuperscript{333} Although Botswana is not an ethnically polarized country, an example from its governance structure is instructive. Traditional leaders (chieftainships) have played a central role in the Botswana governance structure. Although the authority of the institution of the chieftainship was substantially reduced at independence, a role was preserved for traditional leaders. The continuing recognition of the chieftainship may have contributed to Botswana’s successful transition to an independent, democratic country. For a discussion of the role of the chieftainship in Botswana, see Keshav C. Sharma, “Traditional Leadership and Rural Local Government in Botswana” in Donald I. Ray & P.S. Reddy, eds.,\textit{ Grassroots Governance: Chiefs in Africa and the Afro-Caribbean} (Calgary: University of Calgary Press, 2003) 249. Retaining traditional leadership has proven problematic in South Africa, however. See Lungisile Ntsebeza, “Traditional Authorities, Local Government and Land Rights” in Ray & Reddy, \textit{ibid.}, 173 and P.S. Reddy & B.B. Biyela, “Rural Local Government and Development: A Case Study of Kwazulu-Natal: Quo Vadis?” in Ray & Reddy, \textit{ibid.}, 263.

\textsuperscript{334} The path dependence literature highlights the role of self-reinforcing mechanisms and switching costs in generating resistance to institutional reform. Path dependence theory describes how a given set of institutional arrangements are reinforced over time and, as a result, become difficult to change. Self-reinforcing mechanisms exist when the belief systems and patterns of behaviour of internal and external actors are adapted to established institutions. These belief systems and patterns of behaviour are not readily adapted to new institutional arrangements. The adoption of new institutional arrangements generates switching costs associated with adapting beliefs and behaviour to the new arrangements. As switching costs increase, resistance to institutional change grows and it becomes more difficult to introduce institutional reform. By integrating traditional forms of governance and local understandings of key values, it is possible to build upon existing informal institutions and thus reduce the switching costs associated with institutional reform. This reduces the resistance to reform and smooths the path to introducing new institutions. See Prado & Trebilcock, “Path Dependence,” \textit{supra} note 493.

\textsuperscript{335} Douglass North observed that there is an important link between informal institutions (based on cultural norms and social dynamics) and formal institutions. While it may be possible to change formal institutions through fiat, informal institutions are much more difficult to change. See Douglass C. North, \textit{Understanding the Process of Economic Change} (Princeton, N.J.: Princeton University Press, 2005. See also Prado & Trebilcock, “Path Dependence”, \textit{ibid.}.}
continue to have resonance ought to be built into the structure of the peace process and, where appropriate, integrated into institutional design.

The South African Truth and Reconciliation Commission (TRC) is a good example of how indigenous values can be incorporated into the peace process. The TRC was created in 1995 as a judicial structure designed to address injustices and violations of human rights committed by both the supporters and the opponents of the apartheid system. The TRC was a central part of the strategy to promote national unity and reconciliation in South Africa. The legislative act that established the TRC makes specific reference to *ubuntu*[^336], a concept that exists in various forms in Africa that reflects a cultural world-view about what it means to be human.[^337] Archbishop Desmond Tutu, the chair of the TRC, made constant references to *ubuntu* when he was overseeing hearings and guiding witnesses, victims, and perpetrators through the TRC process.[^338] Although the concept of a truth commission is not unique to South Africa, the creation of the TRC and its operation under the leadership of Archbishop Tutu were infused with an important local value around which leaders sought to move South Africa forward to unity and reconciliation.

The South African elite also grafted traditional authority structures and customary law into the modern democratic governance framework established in the Constitution. The Constitutional Principles that elites agreed would guide the Constitutional Assembly and the Interim

[^336]: *Ubuntu* does not readily translate into other languages. *Ubuntu* engages the idea that a person finds her humanity in other people (“a person is a person through other people”). Archbishop Desmond Tutu describes *ubuntu* in part as the idea that “we belong in a bundle of life”. *Ubuntu* also engages the idea that when one member of a community suffers, all members suffer and that when one member of a community does something wrong, all members of the community are guilty. See Desmond Tutu, *No Future Without Forgiveness* (London: Rider, 1999) at 34-35. For further discussions of this concept, see also Justice Yvonne Mokgoro, “Ubuntu and the Law in South Africa” (1998) 4 Buff. Hum. Rts. L. Rev. 15 and Timothy Murithi, “Practical Peacemaking. Wisdom from Africa: Reflections on Ubuntu” (2006) 1:4 Journal of Pan African Studies 25.


Constitution both affirmed that there should be a role for traditional leadership and customary law in the South African governance framework. The terms of the final Constitution provides that Provincial Houses of Traditional Leaders may be created at the provincial level. The role of such Provincial Houses is to advise the local provincial government on matters that affect traditional leadership, customary law, and the customs of communities that observe customary law. The Constitution also provides that a National Council of Traditional Leaders, which is comprised of representatives from the Provincial Houses, may be created at the national level. The role of the National Council is to advise the national government on national matters that involve traditional leadership, customary law, and the customs of communities that observe customary law. The Provincial Houses and the National Council must be created by legislation and they do not have the power to veto or amend legislation. The Constitution further provides that a traditional authority may adjudicate disputes on the basis of customary law, subject to any applicable law, including the Constitution. Moreover, the South African courts are required to apply customary law where applicable, subject again to the Constitution and any legislation that deals specifically with customary law.

Although the recognition of the institution, status, and role of traditional authority and customary law has had important symbolic value, this recognition has not been without controversy. As van Kessel and Oomen note, traditional leadership and customary law raise difficult issues for the creation of a non-racial, non-sexist democracy. For example, most

340 Ibid.
341 Ibid., s. 211.
342 Ibid.
chiefs are male and unelected.344 Moreover, only Africans can become chiefs. These dimensions of the institution of the chieftainship do not accord with the goal of creating a democratic polity that upholds racial and gender equality.345 The application of customary law raised similar concerns. Under customary law, African women fall under the guardianship of their fathers or, after marriage, their husbands.346 African women have no independent contractual capacity and cannot appear in court without the assistance of their guardians.347 Moreover, African women are excluded from tribal political processes and sometimes are restricted from obtaining land rights.348 Customary law thus stands in conflict with the equality rights enshrined in the South African constitution. The application of customary law thus attracted fierce debate during the constitutional negotiations in South Africa.349

Putting the Constitutional provisions concerning traditional authority and customary law into practice has proven difficult in some respects. For example, recognizing a role for traditional leadership raised the question of who were the rightful chiefs since colonial governments disposed of chiefs who were non-compliant and appointed new chiefs who were willing to be loyal to the colonial power. The practice of appointing chiefs continued through apartheid.350 Disputes also arose concerning the issue of who had the responsibility to pay traditional leaders and, perhaps most significantly, the appropriate scope of the role of the chief in local government.351 In 1995, local elections in KwaZulu Natal had to be postponed because of disagreement concerning the role of the chiefs in local government. As van Kessel and Oomen

344 Ibid. at 572. The institution of chieftainship features hereditary leadership and, thus, chiefs are not elected.
345 Ibid.
346 Ibid. at 574.
347 Ibid.
348 Ibid.
349 Ibid.
350 See e.g., W. Beinart & C. Bundy, Segregation and Apartheid in Twentieth Century South Africa (London: Routledge, 1987).
351 See e.g. Ntsebeza, supra note 573 and van Kessel & Oomen, supra note 583.
note, “while the ANC believed that chiefs should play some part in local government, Inkatha maintained that chiefs are the local government.”

The difficulties experienced in attempting to give practical effect to the recognition of traditional leadership appear to have had an impact on the provisions of the final Constitution that address traditional leadership. While the Interim Constitution stipulated that there shall be legislation establishing Provincial Houses and a National Council of Traditional Leaders, the final Constitution provides only that legislation may provide for the creation of these institutions. Van Kessel and Oomen speculate that the terms of the final Constitution had to be weakened in response to problems in establishing the Provincial Houses. They note that by December 1996, Houses of Traditional Leaders had only been established in four of the six provinces that have state-appointed traditional leaders; disputes related to the role of traditional leaders impeded the establishment of Houses in the remaining two provinces. Thus, while traditional leadership in South Africa has been constitutionalized (i.e., recognized in the constitution), it has not yet been put into full operation. A lack of clarity and a lack of consensus about the role of traditional leadership and the general functioning of this institution of governance have impeded the full implementation of the institution of traditional leadership.

Nevertheless, the South African government has worked to resolve the issues surrounding the institution of traditional leadership. In 2000, the South African government commenced a

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352 Ibid. at 575, emphasis in original.
353 Compare ss. 183 and 184 of the South African Interim Constitution with s. 212 of the final South African Constitution.
354 van Kessel & Oomen, supra note 583 at 573-574.
355 Reddy & Biyela, supra note 573 at 273.
356 Ibid.
public policy process that involved a study of the institution of traditional leadership and the
issues surrounding this institution, consultation with a wide range of stakeholders, and a two
day national workshop involving all stakeholders. This process resulted in the White Paper on
Traditional Leadership and Governance357 and, ultimately, the enactment of a legislative
framework governing traditional leadership in 2003.358 In 2009, legislation was passed that
created the National Council of Traditional Leaders.359 Although recognizing and
implementing a role for traditional leadership in South Africa has not been easy nor without
controversy, South Africa has made substantial progress towards realizing these ends. The
South African case illustrates that while it is desirable to incorporate indigenous values and
practices into the peace process and into the governance framework of the polity, it may take
some time to finalize the institutionalization of traditional forms of governance. The initial
commitment to incorporate traditional forms of governance into the political structure of the
polity still has value if concrete and progressive steps are taken at regular intervals to translate
this commitment into reality.

The importance of ensuring that elites can participate meaningfully in the peace process
suggests that there ought to be limits on the influence of third parties on negotiations. While
the assistance of third parties is necessary for a successful transition to peace, this assistance
should not provide an avenue for third parties to co-opt the process. The co-option of the
peace process allows third parties to superimpose their interests on the peace process. The

Gazette 2003, vol. 459: 25438 at 2 (Ministry for Provincial and Local Government & Department of Provincial
and Local Government) [South African White Paper].
358 See *Traditional Leadership and Governance Framework Act 2003*, No. 41 of 2003, as amended by
peace settlement and institutional design then become functions of external interests rather than of the concerns and input of local elites.\textsuperscript{360} The interjection of the interests of international actors into the process risks alienating local elites from the peace process. This undermines the legitimacy of the peace settlement, making it easier for elites to defect and to subvert the functioning of institutions.

In Cyprus, for instance, the 1960 constitutional arrangements were a product of a negotiated compromise between Greece and Turkey rather than an agreement built by local elites. Consequently, there was only a weak sense of ownership of the constitution by local elites. In late 1963, a major dispute arose between the Greek and Turkish communities over constitutional amendments proposed by the Greek President. In January 1964, the Turkish members of the Cypriot government withdrew and set up their own parallel administration. Both the proposal of the contentious constitutional amendments and the withdrawal of the Turkish members from the government reflect a disassociation between local elites and the national constitution.

The participation of elites in the peace process may take various forms as the process unfolds. Initially, negotiations may be held in secret between a few high level elites. These secret meetings allow elites to communicate their willingness to enter into peace talks and to set out certain basic conditions for their participation, free from allegations of having sold out their respective groups. In this context, elites can begin to make small gestures of cooperation. In South Africa, the initial peace talks were bilateral, consisting of negotiations between F.W. de

Klerk (for the National Party) and Nelson Mandela (for the African National Congress).

These peace talks were really pre-negotiations—negotiations about how the actual negotiations surrounding institutional reform would occur. Eventually, the process broadened to include more radical groups. By the time the peace process culminated in elections in April 1994, all major political forces were participating in the process. Secret, high level negotiations also played a role in Northern Ireland; these negotiations began in 1988 and continued for the next five years.

As the South African case illustrates, it is often desirable to limit the involvement of extremist groups in the early stages of the process. The possible opposition of such groups to the process and their hard-line positions often make it difficult to achieve progress on even small matters. Allowing more moderate groups to lay the foundation for the structure of the process as a whole increases the overall possibilities of success.

Once high level elites have agreed to the basic framework and guiding principles for the peace process, consensus can be consolidated by engaging low level and mid level elites in the peace process. Teams of low and mid level elites from different moderate groups can be assigned to work together on various tasks and issues related to the peace process. Engaging these elites in this manner increases their sense of ownership of the process and re-enforces the cultivation of the norm of the right to participate among these elites. The tasks assigned to the teams of low and mid level elites should be organizational in nature (e.g., organizing summit meetings or all-party congresses) or involve matters on which there is a relatively high level of consensus.

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These types of tasks are relatively un-contentious in nature and thus likely to result in the emergence of at least a working cooperation. The more intractable issues should be left to upper level and high level elites who have the authority to negotiate and to make concessions on these matters.

As the peace process unfolds and as consensus builds on at least the broad approach that will be taken to negotiating a settlement and designing institutions, efforts should be made to widen participation in negotiations to include more radical groups. Timing is important at this stage. Radical groups must not be brought into the process too soon lest they subvert the efforts of more moderate groups to build a basic foundation of consensus. However, if radical groups are brought into the process too late, they will not have the opportunity to participate meaningfully in the process. At minimum, radical groups should be invited to participate in negotiations about the specific details of the peace settlement and institutional design, although the general structure of the peace process and the guiding principles may be determined without such groups. This ensures that radical groups can assert their concerns and views about the details of the peace settlement in a context where key principles (e.g., power-sharing) have already been determined and the peace process itself set in motion.

As the peace process widens, the modalities of participation will evolve to accommodate the increasing number of elites.\footnote{363 For an overview of different negotiation structures, see Bloomfield, Nupen & Harris, \textit{supra} note 322.} While the peace process may begin with secret meetings, large, congress-style meetings may be featured toward the end of the process. One way to continue to re-inforce the norm of the right to participation and to engage elites meaningfully in the
process is to balance larger meetings with “break-out” sessions or subgroup meetings.\textsuperscript{364} The larger meetings, such as congress-style meetings, bring a large group of elites of various ranks together for discussion and, in some cases, major decision-making. The break-out sessions involve assigning elites from different groups to work together as a team on various aspects of the peace settlement and institutional design. The teams are limited in size in order to foster direct dialogue and inter-personal interactions. Each team is assigned a specific task or issue and must work together to develop a proposal or report on the matters that they have been assigned. This team approach creates opportunities for iterated interactions between various sets of elites in a context that allows for real dialogue and joint problem-solving. The delegation of tasks to these teams re-enforces the collective ownership of the process and puts the norm of the right to participate into practical action.

\textbf{3.2. \textit{The right to continued existence}}

\textbf{3.2.1. Protecting groups and engendering respect among groups for each other}\n
The peace process must be structured in a manner that offers the promise of continued physical and cultural existence to ethnic groups. Integrating the norm of the right to continued existence into the peace process has two dimensions: protecting groups and engendering respect between groups for each other. Neutral third parties play a significant role in both of these dimensions.

In terms of protection, the peace process must offer a reprieve from violent conflict. Moreover, from the outset, the peace process must be designed to offer assurances to ethnic groups that their cultural identities and physical safety will be respected and protected throughout the process. Without such assurances, ethnic groups have little incentive to enter

\textsuperscript{364} For a discussion of subgroup meetings, see Bloomfield, Nupen & Harris, \textit{ibid.}
into negotiations, particularly if their participation makes them more vulnerable. Moreover, ethnic groups are likely to have little confidence in institutions if other groups have run roughshod over their right to continued existence during the institution building process.

Cultivating the norm of the right to continued existence also involves promoting respect among groups so that each group not only enjoys protection but also recognizes the right of other groups to their continued existence. Engendering this respect is a challenging task. Given the profound distrust that exists between groups and the dynamics of survival politics, affirming the right of other groups to continued coexistence often seems foolhardy and a strategic blunder. The peace process must therefore incorporate assurances to groups that recognizing the right of other groups to continued existence will not prejudice the group’s own survival.

Cultivating the norm of the right to continued existence in the peace process is hampered by a credibility gap between groups and a security gap. The “credibility gap” refers to the difficulty that each group has in convincing the other of its *bona fides* in the peace process.\textsuperscript{365} Due to the profound mistrust between ethnic groups, the steps that one group takes to signal its willingness to cooperate are discounted by the other group as not credible or even viewed with suspicion. For instance, in some cases, a ceasefire declaration is met with scepticism and concern that the group’s rival is using the opportunity to rearm itself. Given the distrust between the groups and their history of violent conflict, a group may have ample reason to

doubt that its rival is truly committed to discussing the prospects for peace. In Sri Lanka, for example, the government did not reciprocate when the LTTE announced a unilateral ceasefire in 2001 since it suspected that the LTTE had announced the ceasefire to give itself time to rearm and to rebuild its forces.\(^{366}\) Although the government and the LTTE eventually entered into a ceasefire agreement in 2002, the government terminated the agreement in January 2008 amid rising levels of violence. The government again accused the LTTE of using the ceasefire to rearm and to regroup.\(^{367}\) Similarly, ETA is frequently suspected of using the ceasefires it has called as opportunities to rearm itself.\(^{368}\)

The “security gap” refers to the lack of a guarantor of each group’s security outside of its own forces in the peace process. Because the military and police forces are usually co-opted by one side or another during periods of conflict, there is usually no neutral force within a country that can offer protection to groups in the peace process. Each group is responsible for protecting itself. The security gap thus increases the risk associated with ceasefires and demobilization. Accordingly, it is difficult for groups to make concessions during the peace process since they...


<http://news.bbc.co.uk/2/hi/south_asia/7190209.stm>. See also “Chronology-Collapse of Sri Lanka’s troubled ceasefire” *Reuters* (16 January 2008), online: Reuters  

<http://query.nytimes.com/gst/fullpage.html?res=9B04EFDA1F3BF930A25756C0A9679C8B63&sec=&spon=&pagewanted=all>; Edward Owen, “ETA explodes ceasefire hopes with five bombs in Spanish capital” *Times Online* (4 December, 2004), online: Times Online  
<http://www.timesonline.co.uk/tol/news/world/article398923.ece>; “ETA fears increase after police find big cache of explosives” *Times Online* (5 January, 2007), online: Times Online  
<http://www.timesonline.co.uk/tol/business/markets/europe/article1289574.ece>; Michael Buchanan, “Basque country’s broken peace” *BBC News* (13 January, 2007), online: BBC News  
fear that their rivals will exploit these moments of vulnerability. The credibility gap compounds the security gap since each group is likely to discount other groups’ assurances that concessions will be reciprocated. Moreover, even if groups manage to agree begin demobilizing, the process can trigger a security dilemma in the reverse. Walter describes the situation as follows:

The need for competing groups to consolidate power at time when they can neither defend themselves against attack nor rely on a central government to do this for them greatly complicates their ability to cooperate. By requiring demilitarization under what are essentially conditions of anarchy, civil war peace treaties promise to create security dilemmas in the reverse. As groups begin to disarm, they create an increasingly tense situation. The fewer the arms they have, the more vulnerable they feel. The more vulnerable they feel, the more sensitive they become to possible violations. And the more sensitive they become to violations, the less likely they are to fulfill their side of the bargain. The ultimate challenge facing civil war opponents at the negotiating table therefore is not simply how to stop the fighting but how to design a settlement that convinces the groups to shed individual defenses and submit to the rules of a new political game at a time when no government or police force can either protect them or guarantee compliance.

The security gap contributed to delays in the peace process in Northern Ireland. Pre-negotiations between the British government and Sinn Fein stalled in December 1994 over the issue of whether the Irish Republican Army (the IRA, the radical, armed rebel group associated with the political party, Sinn Fein) would hand over its weapons before talks began. The British and unionist supporters demanded that the IRA surrender its weapons in return for all

370 The security gap also compounds the credibility gap since each group’s fear for its own safety increases the risk associated with trusting the other group. Since each group is responsible for its own security, each group must take extra caution to ensure that overtures made by other groups are not ploys to dupe the group into lowering its guard.
372 Ibid. at 134.
party talks that would include the participation of Sinn Fein. Sinn Fein and the IRA, however, insisted that progress in the peace talks be made before any weapons were surrendered.\textsuperscript{373} For both sides, the issue was security. The British and unionist supporters did not want to begin to discuss peace with Sinn Fein without some meaningful gesture substantiating the IRA’s commitment to a ceasefire. For their part, Sinn Fein and the IRA did not want to make themselves vulnerable by surrendering weapons before they had some guarantee that the peace process would bring the parties closer to settlement.

The credibility gap and the security gap combine to make conciliatory measures that would bolster the security of a rival group, such as full or partial disarmament, too great of a risk for groups to take. The structure of the peace process must address the credibility gap and the security gap in order to create conditions where it is possible to promote adherence to the norm of the right to continued existence. A number of scholars argue that the difficulty of making credible commitments and concerns about security make the cultivation of trust between groups essential to the peace process. Some scholars focus on structural “confidence-building” mechanisms. Weingast observes, “[t]rust results when institutions make it far less likely that one group will be able to capture the state and take advantage of the other. Trust can therefore be constructed and institutionalized…”\textsuperscript{374}

Lake and Rothchild identify four major trust-building mechanisms that can mitigate the concerns of ethnic minorities for their security: demonstrations made by the state of respect for

\textsuperscript{373} See Sisk, “Peacemaking Processes”, supra note 361 at 77.

the minority; power-sharing; elections; and regional autonomy and federalism.375

Demonstrations of respect made by the state for the minority convey that the state views the concerns of the minority as legitimate; such demonstrations lessen the fears of minorities that they will be relegated to second-class citizens.376 Minorities therefore become more willing to reciprocate and to view the concerns of the majority as legitimate. By engaging in power-sharing (e.g., by ensuring that minorities are represented proportionately in the cabinet, civil service, and the military), the government “voluntarily reaches out to include minority representatives in public affairs, thereby offering the group as a whole an important incentive for cooperation.”377 Elections, when combined with other mechanisms that provide security guarantees to minorities such as multi-party coalitions or federalism, can provide assurances to minorities that they have the opportunity to gain power in the future through institutionalized mechanisms of power-sharing. Regular elections give minorities opportunities to advance their individual and collective interests and are a demonstration of the majority’s commitment to democratic rule.378 Finally, decentralizing power through federalism and regional autonomy allows elites at the centre to build confidence among local leaders.379 Decentralization of power places institutional limitations on unbridled central authority; these institutional limitations safeguard minorities against domination by the majority and thus act as a confidence-building mechanism.380 While I concur with the prescriptions of Lake and Rothchild for institutional design, these structural recommendations do not provide guidance on how to address the credibility gap and the security gap in the peace process.

375 Lake & Rothchild, “Containing Fear”, supra note 365.
376 Ibid. at 57-58.
377 Ibid. at 58.
378 Ibid. at 60.
379 Ibid at 61.
380 Ibid. at 62.
Other scholars focus on building up a “working trust” during the peace process. Kelman describes “working trust” as a “trust in the other side’s seriousness and sincerity in the quest for peace—in its genuine commitment, largely out of its own interests, to finding a mutually acceptable accommodation.”\textsuperscript{381} Working trust is not the equivalent of inter-personal trust based on good will and an investment in the other party’s welfare.\textsuperscript{382} Rather, it speaks to the existence of a functional working relationship that allows parties to negotiate together, however guardedly.

Working trust is based on a rational evaluation of interests: groups act on the basis of their own interests and assume that their rivals do likewise. If a group can be convinced that its rival genuinely considers peace to be in its interest, the group can assume that its rival will act reasonably to achieve a settlement.\textsuperscript{383} Working trust is build up gradually in the peace process through a series of successive, reciprocated gestures that each group makes to signal its desire to reach a settlement. These gestures typically begin with acts that are relatively low-risk and move to initiatives that involve more risk (and hence more trust in the other group) as the process unfolds.\textsuperscript{384} Over time, sufficient levels of working trust may grow so as to facilitate settlement.


\textsuperscript{382} ibid.

\textsuperscript{383} ibid.

\textsuperscript{384} Osgood developed a strategy for progressively signaling conciliatory intent to other parties to a conflict. This strategy, called “graduated and reciprocated initiatives in tension reduction” or GRIT, aims at triggering a de-escalatory spiral of positive action and reaction. See Charles Osgood, \textit{An alternative to war or surrender} (Urbana: University of Illinois Press, 1962) and \textit{Perspectives in foreign policy}, 2\textsuperscript{nd} ed. (Palo Alto, CA: Pacific Books, 1965).
The development of working trust is an important part of the peace process. However, the existence of working trust does not necessarily imply that the credibility gap and the security gap have been addressed in a manner that promotes the cultivation of inter-ethnic social capital. Working trust does not require a shared commitment to a set of norms. It relies on the rational pursuit of self-interest. The promotion of the norms of inter-ethnic social capital thus requires a strategy that goes beyond facilitating the emergence of working trust.

I propose that the credibility gap and the security gap can be addressed by creating trust and confidence in the peace process itself as a means of securing each group’s interests in a fair way. This approach can exist alongside efforts to build working trust. The emphasis of this approach, however, is on designing a process that elites trust will protect the interests of their respective groups. Ensuring that the peace process reflects the right to participation and the rule of law helps to generate confidence among elites that their concerns are heard and addressed in negotiations.

The participation of a third party in the peace process also provides important assurances to ethnic groups that their interests (including their physical security) will be protected. Indeed, the peace process generally must involve a neutral third party to assist groups in overcoming the credibility gap and the security gap. The involvement of a third party (or parties) changes the pay-offs associated with cooperation and defection in a manner that offsets the risks that a group must take in order to make concessions. By reducing the potential costs of cooperation and increasing the costs of defection (e.g., through sanctions imposed by the international community), the peace process can generate incentives for groups to act in a manner consistent
with respect for the norm of the right to continued existence. I discuss how different forms of third party intervention can change the pay-offs for cooperation and defection below.

3.2.2. Structuring the peace process to promote the right to continued existence

Structuring the peace process in a manner that cultivates the norm of the right to continued existence generally begins by incorporating measures designed to minimize the use of violence. At the early stages of the peace process, violence may be minimized through a ceasefire. In some cases, an armed group will unilaterally announce a ceasefire as a goodwill gesture and an indication of its desire to enter into peace negotiations. However, as indicated above, such declarations may be met with scepticism. Ideally, all groups should commit to a ceasefire agreement since such an agreement engages the groups in a joint exercise to protect the physical safety of members of all the groups in conflict. While a unilateral ceasefire declaration is a positive step, an agreement goes further in building interactions between elites that promote the right to continued existence.

As peace negotiations progress, issues related to physical security and the prevention of violence should remain priority items on the negotiating agenda. Planning for demobilization and decommissioning should begin at an early stage in the peace negotiations even though

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385 But see Douglass North, John Wallis & Barry Weingast, Violence and Social Order: A Conceptual Framework for Understanding Recorded Human History (Cambridge University Press, 2009). North, Wallis, and Weingast argue that rule of law reforms actually trigger violence in natural states (or limited access orders) since such reforms threaten the distribution of rents that have previously provided powerful incentives for individuals who enjoy these rents to cooperate rather than to compete. (See my discussion of the arguments of North, Wallis, and Weingast in Chapter Two, footnote 64.) The analysis of North, Wallis, and Weingast assumes, however, that violence in limited access orders is contained prior to the introduction of rule of law reforms; it is the fact that violence is successfully managed that provides incentives for both elites and the general population to support the existing regime and to resist rule of law reforms. This situation is materially different than the circumstances surrounding the peace processes that form the basis for my analysis. I focus on peace processes that emanate from hurting stalemates in countries where violence has been endemic. In these situations, the incentives that elites and the general population have for supporting the old order and resisting reform erode because the old order no longer successfully manages violence. Instead, as I discussed in Chapter Two, incentives exist for reform, particularly for reform along the lines of the norms of inter-ethnic social capital. Thus, there is reason to believe that peace processes that originate in hurting stalemates afford an opportunity, fragile though it may be, to introduce various reforms, including rule of law reforms and measures designed to prevent a return to violence and that these reforms will not, as North, Weiss, and Weingast suggest, trigger violence.
ethnic groups are not likely to consent to begin decommissioning and demobilization until the peace process is quite far advanced. Engaging elites at an early stage about demobilization and decommissioning gives ample time to negotiate these critical steps in the peace process. Moreover, beginning discussions early on in the process gives elites time to adjust to the reality that they are no longer “at war” with their rivals. Helping elites transition to a “ballots, not bullets” mindset is an important part of creating a normative foundation for the right to continued existence.

While elites are negotiating the logistics of decommissioning and demobilization in the early and middle phases of the peace process, it may be possible to engage elites constructively on other matters aimed at preventing violent clashes. For example, it may be possible to establish some de-militarized zones within the country. Since the groups are not required to disarm or to demobilize outside of these zones, groups are able to consent to establishing demilitarized zones without fear of compromising their security. Interactions between elites on the matter of creating demilitarized zones help to reinforce the norm of the right to continued existence. These interactions also lead to productive outcomes that underline the rejection of violence as an acceptable strategy.

In addition to demobilization, demilitarization, and creating demilitarized zones, the negotiating agenda should include establishing plans for the re-integration of former soldiers and rebels into society. Equally important is the reform of the national army and police forces since they are often dominated by members of one ethnic group.\textsuperscript{386} These matters are an important part of the transition into peace. Careful planning of the re-integration process and military and police reform is necessary in order to create a sound foundation for stability and

\textsuperscript{386} I discuss the reform of the national armed forces and police forces in Chapter 5.
peace. This foundation, in turn, provides conditions that are conducive to cultivating the norm of the right of each group to continued existence.

Beyond working towards controlling and eventually ending the violence, the structure of the peace process must also incorporate practices that reflect the right of each group to continued cultural existence. The principles that are adopted to guide negotiations, for example, should recognize and affirm the existence of each of the ethnic groups in the polity. In Burundi, the initial peace agreement set out key principles to guide the transition into peace, stability, and a constitutional democracy. The Constitutional Principles of the Post-Transition Constitution included a statement that both re-enforces the unity of Burundi and recognizes its constituent ethnic groups: “Burundi shall be a sovereign independent nation, united but respecting its ethnic and religious diversity and recognizing the Bahutu, the Batutsi and the Batwa, who make up the one nation of Burundi.” Including this type of statement in the principles that will guide negotiations sets the tone for how ethnic groups will relate to each other throughout the peace process and transition period. Incorporating a statement into the guiding principles that affirms the physical and cultural existence of all constituent ethnic groups is thus an important first step in cultivating the right to continued existence.

From the outset of the peace process, the interactions between elites must be designed to affirm that each constituent ethnic group has a legitimate claim to certain group rights within the polity. Meetings between elites must re-enforce the idea that the polity is shared by the ethnic groups and not the exclusive domain of one or another. Thus, meetings between elites should

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occur in a place viewed as neutral by all parties. This may at times require that elites meet outside of the country. For example, many of the negotiations to end Burundi’s civil war occurred in Tanzania and South Africa. In Northern Ireland, the St. Andrew’s Agreement, which lays the foundation for implementing the power-sharing executive envisioned in the Good Friday Agreement, was negotiated in Scotland.

Small details can carry symbolic weight in meetings between elites. Care should be taken to manage elite interactions in manner that re-enforces the idea that the elites meet as partners in the process. To avoid the perception that one group controls meetings between elites, it is helpful to have a neutral third party act as a mediator or facilitator. The third party should take the lead in chairing meetings between elites. Elites should be able to communicate in their native language; translators should be available to the parties, including any third party participating in the meetings, to ensure that all parties can communicate with each other in their language of choice. Even seemingly minor details like the set-up of a meeting room can be important. Wherever possible, tables around which elites meet should be round so that there is no head of the table or power position. Catering arrangements should be sensitive to religious or cultural dietary restrictions, while meetings should be planned to allow elites time for religious or cultural observances. While these matters may seem trite or trivial, they are among the myriad of ways that elites can subtly project dominance over others. They must therefore be carefully managed in order to ensure that the subtext of elites’ negotiations reflects respect for each group’s cultural existence.

3.2.3. The role of third parties in promoting the right to continued existence

The involvement of a third party in the peace process is instrumental in controlling levels of violence. Third parties can play a variety of roles. There is, for example, the traditional role of
the peacekeeper. Peacekeeping is aimed at guaranteeing ceasefires and peace settlements through the deployment of neutral inter-position forces. United Nations international peacekeeping forces have been deployed in a number of ethnically polarized countries to maintain fragile ceasefires. One of the most successful examples of peacekeeping in this regard is the UN mission in Cyprus. There have been moments of spectacular failure in peacekeeping, however. The UN peacekeeping force deployed to Rwanda was rendered virtually impotent by restrictions placed on the force’s mandate, the withdrawal of most of the peacekeeping force shortly before the genocide began, international ambivalence, and other problems.

Where such peace does not yet exist, third parties may act as peacemakers. Traditionally, peacemaking focused on diplomatic efforts. However, more recently, the concept of peacemaking has grown to include multilateral military intervention aimed at stopping violent conflict, particularly violence targeted against civilians (i.e., the duty to protect). Peacemaking sometimes evolves into peace enforcement. Unlike peacekeeping, peacemaking and peace enforcement often feature a more active use of force to prevent and contain violence. The NATO Implementation Force (IFOR) and Stabilization Force (SFOR) deployed in the former

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389 For an excellent account of the UN peacekeeping mission in Rwanda, see Lieutenant General Romeo Dallaire (ret’d), *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Canada, 2003).

Yugoslavia and the United Nations Interim Administration Mission in Kosovo (UNMIK) are examples of peacemaking and peace enforcement roles played by NATO and the UN. 391

Another important role often played by third parties is observation and monitoring of the conflict. International monitors investigate, report, and record incidents of violence. Monitoring can move peace negotiations past the point where ethnic groups are locked into mutual recriminations about the use of violence since the third party monitors provide an unbiased account of various incidents. The risk of being caught using violence and possibly facing sanctions as a result can deter groups from using force. The presence of international observers and monitors from the UN, the Commonwealth, the EU, and Organization of African Unity, in addition to a wide range of non-governmental organizations (NGOs), played a pivotal role in keeping the South African peace process on track, for example. 392 In addition to monitoring, international observers also mediated between local groups and provided guidance on occasion to local officials and Peace Committee members on how to defuse various situations. 393 Third party monitors have also been used in Northern Ireland to oversee the decommissioning process and to observe the implementation of the Good Friday Agreement and the St. Andrew’s Agreement.

Third parties can offer various incentives to elites of ethnic groups embroiled in conflict to enter into ceasefires or to disassociate themselves from radical subgroups. Although the incentives may be largely symbolic, they can have tremendous effect, particularly because these gestures can have a legitimizing effect on the group to which they are made. One of the

391 Ouellet, supra note 388.
393 Ibid.
more controversial examples of a symbolic reward proffered to an ethnic leader is President Clinton’s decision to approve a visa to enter the United States for Gerry Adams, the leader of Sinn Fein. President Clinton’s decision came after the IRA announced a unilateral ceasefire.

Sanctions create incentives for groups to refrain from the use of violence by raising the cost associated with violent strategies. Economic sanctions may include trade sanctions and restrictions on foreign aid. South Africa, for instance, was subject to wide-ranging trade sanctions and restrictions on foreign aid during the apartheid regime. The coup in Fiji in 2006 sparked a similar response from Australia, New Zealand, and the United States. Aid from the United States alone covered $2.5 million in mainly military-related assistance. Another approach is to freeze the assets of extremist groups and to prevent their diaspora from funnelling funds to these groups. For instance, the assets of a Canadian charitable organization alleged to have ties to the LTTE were seized and are now held in trust by the Canadian government pending an investigation.

Sanctions may also include suspension of a country from a regional or global organization. For example, the British Commonwealth of Nations suspended Fiji’s membership shortly after the 2006 coup. Similarly, regional leaders in Africa condemned Forces nationales de liberation (FNL), the remaining rebel group still waging war in Burundi, in 1994. At a summit meeting in 2004, leaders from the Great Lakes region in Africa pronounced the FNL a terrorist

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Ibid.} Burundi, Rwanda, Uganda, and the Democratic Republic of Congo (DRC) began to coordinate security activities in 2004 under the framework of the “Tripartite Plus Joint Commission,” which remains active. The activities of the Tripartite Plus Joint Commission include setting up joint border verification measures in order to curb the movements of armed groups from one country to another; coordinated efforts to pressure organizations such as the United Nations and the African Union to impose sanctions (e.g., travel restrictions) on members of armed rebel groups; and cooperation in arresting and extraditing members of such groups. In the case of the FNL, for example, the DRC arrested FNL combatants found in Congolese territory and handed them over to Burundi.\footnote{Great Lakes: Ministers want illegal armed groups sanctioned” IRIN News UN Office for the Coordination of Humanitarian Affairs (21 April, 2006), online: IRIN News <http://www.irinnews.org/Report.aspx?ReportId=58812>.

Ibid.}

Individual countries may also cut ties with a repressive regime, leaving the regime in diplomatic and political isolation. New Zealand and Australia cut military and sporting ties with Fiji after the 2006 military coup, for instance.\footnote{Phil Taylor and agencies, “NZ suspends aid and sport contacts with Fiji as state of emergency declared” The New Zealand Herald (6 December, 2006), online: The New Zealand Herald <http://www.nzherald.co.nz/section/2/story.cfm?c_id=2&ObjectID=10414072>.

Ibid.} Diplomatic sanctions may also include restricting the travel of extremists by refusing them entry into other countries. The EU has banned members of the LTTE from visiting any EU member state, for instance. Similarly, after the 2006 coup in Fiji, the government of New Zealand banned those who took part in the coup from entering New Zealand.\footnote{Ibid.} This type of sanction may be more or less effective, depending on whether rebels are in a position to travel. Although some of these suspensions are symbolic in nature, they send a clear message to the leaders of repressive regimes that there
are diplomatic and political costs to their actions. These “naming and shaming” sanctions make it more difficult for repressive regimes to establish international legitimacy.

3.3. The rule of law

If the relationship between ethnic groups is to be mediated by the rule of law in the polity, then it is essential that the process leading up to a peace settlement incorporate elements of the rule of law. Integrating the rule of law into the peace process requires more than placing rule of law reforms on the negotiating agenda. Agreeing to substantive reforms to the legal system does not imply that a normative commitment to the rule of law exists.\(^{400}\) This normative commitment can be cultivated, however, by structuring the peace process in a manner that reflects two key dimensions of the rule of law, namely, natural justice and accountability.

3.3.1. Natural justice

Incorporating natural justice (or procedural fairness, as it is sometimes called) into the peace process requires that the process should comply as much as possible with the requirements of natural justice, \textit{i.e.}, the right to be heard and the rule against bias. This dimension of the rule of law is particularly important to establishing the legitimacy of the peace settlement since empirical evidence suggests that people are much more likely to accept the outcome of a proceeding if they perceive that they have been treated fairly.\(^{401}\)

In the context of a peace process, the right to be heard requires that all key stakeholders have an opportunity to participate in a meaningful way in the process. At the level of the elites, the right to be heard involves many of the considerations discussed above in regard to the right to

\(^{400}\) See Ehrenreich Brooks, \textit{supra} note 255.

\(^{401}\) See, for example, Thibault & Walker, \textit{supra} note 273; Tyler, “Psychological perspectives”, \textit{supra} note 273; and Tyler & Lind, “Fraternalistic Deprivation”, \textit{supra} note 273. See also Tyler, “Public Trust and Confidence”, \textit{supra} note 273.
participation. In order to cultivate a broad sense of fairness in the process, the general populace must also have the opportunity to participate in peace process. I discuss the participation of the masses in the peace process in Chapter 4.

The rule against bias is often described by the maxim, “nemo debet esse judex in propria sua causa”, or “no one shall be a judge in his own case”. In a narrow sense, this rule aims at preventing bias in decision-making. In a broader sense, the rule against bias protects the integrity of a decision. Ideally, decisions ought to be made on the basis of reason, the evidence before the decision-maker, and the application of the principles of the law rather than on the basis of personal preference or private interests. Natural justice requires that decisions are not arbitrary or capricious.

While elites do not play a role akin to a judge or tribunal member in the peace process, the underlying concern about preventing arbitrary outcomes remain. The peace process must be structured in a manner that is consistent with natural justice’s requirement that decisions are based on reason and principle. Realistically, however, peace settlements are the products of political compromise, incentives, and often the adaptation of “best practices” to local circumstances. Nevertheless, there are procedures that guard against ill-conceived and arbitrary settlements. These procedures offer a means of ensuring that the peace settlement is not merely an agreement among key elites on how they will wield power in the polity, but rather the basis for a new constitutional order. There are two principal types of procedures that serve to reduce the risk of arbitrariness in the peace process: ratification procedures and review or oversight procedures.
Ratification procedures are mechanisms that bring the final peace settlement to a body larger than just the elites who negotiated the settlement for approval. These procedures may engage the entire citizenry or a set of elected delegates/representatives. For instance, both Rwanda and Burundi held nation-wide referenda on the proposed constitutional framework in each country. The Rwandan referendum was preceded by an intensive education campaign, but the Burundian referendum was not. Nevertheless, in both cases, the constitutional frameworks received overwhelming public support. Since the referenda, both Rwanda and Burundi have gone on to hold democratic elections and have not slipped back into civil war.

In other cases, the peace settlement is ratified by an elected body. The South African Constitutional Assembly exemplifies this approach. The Constitutional Assembly consisted of representatives democratically elected to the parliament of South Africa in 1994 pursuant to the terms of an Interim Constitution. The Constitutional Assembly was responsible for drafting the terms of a new constitution. The Interim Constitution stipulated that the text of the new constitution had to be ratified by a majority of two-thirds of the Constitutional Assembly.402

Ratification procedures contribute to the perceived legitimacy of the peace settlement and new constitutional arrangements. By linking the adoption of the settlement and constitutional framework back to the citizenry either directly through a referendum or indirectly through elected representatives, ratification procedures re-enforce the principle that the basic authority to govern comes from the people. Ratification procedures thus underline the fact that elites do

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402 The interim constitution set out a procedure that would have applied if a simple majority of the Constitutional Assembly had approved the draft constitution. This procedure included referring the draft text to a panel of South African constitutional experts for suggested revisions. Ultimately, if the two-third majority approval of the Constitutional Assembly was not obtained after the constitutional panel had offered its advice, the draft constitution was to be decided by the electorate through a national referendum. See South Africa, Constitution of the Republic of South Africa, Act 200 of 1993, Chapter 5 (the Interim Constitution).
not have arbitrary power to impose institutional arrangements on the polity. Rather, elites are subject to the rule of law and must exercise their authority in accordance with it.

Peace processes may also contain oversight or review procedures. These oversight mechanisms act as controls on the power of elites to impose a settlement or set of institutional arrangements on the polity. As such, these mechanisms re-enforce the principle that governing elites do not act above the law, but rather must respect the limits of the law. Although it is not always clear what the “law” is when a country is transitioning out of a period of intense conflict, the key point is that elites are held accountable to a standard external to their own individual preferences. The set of principles which elites have agreed should guide the peace process can serve as a reference point for reviewing the final settlement and constitutional arrangements. Oversight procedures that assess the peace settlement on the basis of these principles reflect the idea implicit in the rule of law that law must be enacted in society in accordance with the norms adopted in society for the creation of law.

The South African constitutional certification process is a good example of how oversight procedures can incorporate the rule of law into the peace process. The South African Interim Constitution set out 34 binding Constitutional Principles. These principles included statements related to the recognition and protection of the diversity of language and culture⁴⁰³; the recognition and protection of collective rights of self-determination⁴⁰⁴; the recognition and protection of the institution, status, and role of traditional leadership and indigenous law⁴⁰⁵; and power-sharing⁴⁰⁶. The Interim Constitution required that the text of the final constitution

proposed by the Constitutional Assembly comply with these Constitutional Principles. The South African Constitutional Court had the responsibility of reviewing the draft text of the final constitution to ensure that the text did comply with the Constitutional Principles. The Constitutional Court thus held hearings and received both oral and written submissions on whether the draft text should be certified.

The first certification proceeding was highly participatory: in total, at least 47 advocates representing 29 political parties, organizations, and individuals made representations to the Court about whether the constitutional text should be certified.\textsuperscript{407} Significantly, all major political parties participated in the hearing, including the more extremist parties. In September 2006, the Constitutional Court released its decision, finding that the draft text of the final constitution failed to satisfy the Constitutional Principles and therefore could not be certified. The unanimous decision, \textit{Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996}\textsuperscript{408} (\textit{Certification Reference No. 1}), identified the key points of failure and also expressed the view that these points of non-compliance should not present a significant obstacle to the reformulation of a text that would comply with the Constitutional Principles.\textsuperscript{409}

In its decision, the Constitutional Court underlined that it had a judicial mandate, not a political one.\textsuperscript{410} While recognizing that constitution-making engages various political issues, the Court emphasized that its task was to ascertain whether the proposed constitutional text complied

\textsuperscript{409} See para. 482 and 483, Certification Reference No. 1, ibid.
\textsuperscript{410} Para. 27, Certification Reference No. 1, ibid.
with the Constitutional Principles. Beyond this task, the Constitutional Court stated that it had no power, right, or mandate to assess the political choices made by the Constitutional Assembly. The Court thus emphasized its independence from the state and other powerful political actors and set out clear parameters for its role in the constitution-building process. This emphasis was necessary to establishing a definitive break from South Africa’s past, where judicial and legal power had been used by the state as blunt instruments of repression.

The Constitutional Court’s decision included a detailed analysis of the draft text, reasons for the Court’s findings, a background to the case itself, a summary of the procedures applied in the hearing, and a summary of the submissions made by various parties. The decision thus provided a good record of the certification process and set out clear and detailed reasons for the Court’s decision not to certify the final text. Given the repressive history of South African apartheid, the thoroughness and detail of the decision helped to signal a departure from the arbitrariness and bias of previous courts. This decision manifested in a tangible way efforts to restore the rule of law to South Africa.

After the Constitutional Court released its decision, the Constitutional Assembly reconvened to revise the text of the constitution. By early October, the parties had reached an agreement on the amendments necessary to address the deficiencies identified by the Constitutional Court. The second certification hearing began in November, 2006. Two political parties (the Democratic Party and the Inkatha Freedom Party, both hardline parties) and the province of KwaZulu-Natal, in addition to several organizations and private individuals, opposed the certification. The Constitutional Court received both written and oral submissions.

411 Ibid.
On December 4, the Constitutional Court released its unanimous decision, *Certification of the Amended Text of the Constitution of the Republic of South Africa*412 (“Certification Reference No. 2”), that the text of the constitution satisfied all of the Constitutional Principles. In its decision, the Court carefully detailed its mandate, noting the importance of close examination of each objection raised to the amended text given the finality of the certification decision.413 The Court also reiterated its comments in *Certification Reference No. 1* regarding the judicial rather than political nature of its mandate.414 These comments reinforced the independence of the Constitutional Court and indicated that the Court had given fair consideration to the submissions it had received. The detailed reasons given by the Court in support of its decision are further evidence that the certification was not arbitrary or unfair.

The involvement of the Constitutional Court in the constitution-making process in South Africa added legitimacy to the process. It also put the rule of law close to the centre of the process, thereby allowing the norm of the rule of law to take root. A comment made by Ziba Jiyane, the secretary general of the Inkatha Freedom Party (IFP), is telling in this regard. The IFP had argued before the Constitutional Court that the text of the constitution should not be certified. In the face of the Court’s decision in *Certification Reference No. 2*, Jiyane stated, “We [the IFP] will live by the constitution even as we seek all legal means to try to change aspects of it that we don’t agree with.”415 Although inter-ethnic social capital in South Africa

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413 See para. 8-10 and 12, Certification Reference No. 2, ibid.
414 Para. 12, Certification Reference No. 2, ibid.
is still in the process of growing today, this comment made in 1996 illustrates that a foundation for that growth had been set in the peace process.

The participation of a judicial body like the South African Constitutional Court in the process of constitutional ratification has clear benefits in terms of increasing the perceived legitimacy of the process. However, in most cases, there is no local equivalent to the South African Constitutional Court. Moreover, given the fact that the physical infrastructure of the legal system may be in tatters and given that there may be a critical shortage of credible judges after periods of violent conflict, many countries are not in a position to create a constitutional court to oversee the ratification of the constitution. Nevertheless, functional alternatives to a constitutional court may be available. Such alternatives (“oversight bodies”) should be marked by four key characteristics: their expertise; independence from the political actors involved in negotiations; their authority to oversee the ratification process; and a participatory process.

Oversight bodies must be composed of members who have legal expertise and experience in the area of administrative and constitutional law. This expertise will ensure that the members are able to guide the ratification process and to provide direction as necessary. This expertise also ensures that the oversight body is qualified to certify the final version of the constitution. The members of an oversight body need not be judges. They could be academics or practitioners, for example. Members may also be drawn from outside of the country in question. What is crucial is that the expertise of the members is recognized by the representatives of all ethnic groups so that the decision of the members carries legitimacy and credibility.
An oversight body must be independent of the political processes surrounding the drafting of the constitution and/or peace settlement. This requirement flows from the natural justice principle of the rule against bias. The independence of an oversight body adds further credibility and legitimacy to the final ratification of the constitution since ethnic groups cannot later claim that another ethnic group imposed a settlement on them. Moreover, the independence of the oversight body provides ethnic groups with greater confidence that the process of ratifying the constitution will be fair, which in turn increases the confidence of ethnic groups in the final outcome of the process.

Oversight bodies must have the authority to monitor and to certify the ratification process and the final version of the constitution. This authority should stem from the consent of the ethnic group elites to the participation of the oversight bodies. In other words, ethnic elites should agree either to recognize the authority of an existing body such as a regional appellate court or to create a special body such as a panel of experts to oversee the ratification process. In essence, elites attorn to the jurisdiction of the oversight body, thus giving the oversight body authority to issue binding decisions concerning the ratification process and the draft constitution. The authority of the oversight body plays a material role in lending legitimacy to its decisions and to the ratification process as a whole since attorning to the jurisdiction of the oversight bodies effectively implies a willingness to be bound by its decisions.

Finally, the process employed by the oversight body must be participatory. The importance of a participatory process to the perceived fairness of the outcome was discussed above. The importance of participation is directly linked to the natural justice principle of the right to be heard. In order to ensure that the process adopted by the oversight body accords with natural
justice, it is therefore necessary for the oversight body to adopt procedures that provide opportunities to make submissions and to respond to the submissions made by others. When elites negotiate about the role of the oversight body, they should address in a general way what modes of participation will be employed by the oversight body. Once the oversight body is constituted, however, the oversight body should be responsible for administering how it will receive submissions, subject to the guidelines established when the elites agreed to create the oversight body.

Oversight bodies can take different forms. As indicated, a regional appellate court may serve as an effective oversight body provided that the ethnic elites agree to attorn to its jurisdiction. Another alternative is to constitute a special tribunal, panel, or commission whose members are appointed or elected by the ethnic elites. Each ethnic group may have the right to appoint a certain number of members to such a body. Alternatively, the groups may agree to a slate of members. Although it may be difficult to build consensus around a slate of members, it is possible that there are individuals that hold the respect of all ethnic groups; these individuals would be well-placed to serve as members of the oversight body.

3.3.2. Accountability

Integrating accountability into the peace process requires incorporating procedures into the peace process that underline the fact that the government, the bureaucracy, the police and military, and other governmental agencies are all subject to the limits of the law. The government and its associated agencies must therefore be held accountable for violations of the law, including human rights violations. I will discuss this issue in greater depth in Chapter Four, when I consider how the legitimacy of the state may be rehabilitated after periods of oppression and gross violations of human rights abuses. At this stage, I will focus on
mechanisms for holding elites accountable for implementing the commitments made during the peace process. In addition to promoting the norm of the rule of law, these mechanisms play a role in building elites’ trust in the peace process since they provide a means of holding elites accountable for defections from the process.

Building accountability into the peace process requires a balance between transparency and the need for discretion in negotiations. Transparency promotes the rule of law by opening up decision-making processes to scrutiny so that improper exercises of power can be identified and sanctioned. Establishing a clear process and criteria for decision-making in advance promotes transparency. Openness in proceedings and the provision of reasons for decisions also bolsters the transparency of a process. These markers of transparency are not readily incorporated into the negotiating process, however. Negotiations frequently require making difficult trade-offs and can often be facilitated by very candid discussions between parties. Making these trade-offs and holding these discussions generally require considerable privacy. Secret negotiations are often necessary at key junctures in the peace process. Thus, at times, achieving progress in the peace process requires a lack of transparency.

Transparency and the need for discretion in negotiations can be balanced through a mix of open and closed proceedings. Early meetings between elites and “hard” negotiating should be conducted in private (and possibly in secret). However, certain aspects of the negotiations should be made public at appropriate times. For example, while elites may negotiate a set of guiding principles or terms of reference for their negotiations in private, these principles should be made public once an agreement on these principles is reached. Once a final peace
agreement has been reached, these principles can be applied to ascertain whether the elites have continued to act in the spirit of the initial agreement on the peace process.

Similarly, agreements related to ceasefires, demobilization, and decommissioning may be negotiated in private. However, once a firm understanding between elites has been reached, the details of these agreements should be made public. Making elites accountable for their commitments in these agreements requires monitoring by a neutral third party. Observation by a neutral third party helps to foster accountability by providing unbiased and public reports of the actions of the parties to a conflict. The observation of a third party creates incentives to adhere to the commitments made in the peace process since the failure to do so erodes support for the group both domestically and, perhaps as importantly, internationally. Maintaining international sympathy is important for elites in conflict since it contributes to the recognition of the legitimacy of their claims. The threat of being exposed as having used violence during a ceasefire, initiating retaliatory strikes, or attacking or intimidating civilian populations is a powerful incentive for elites to keep their forces disciplined and to adhere to their commitments.

As I discussed above, third parties such as other countries, regional or global organizations, and NGOs can serve effectively as monitors in a peace process. In some cases, special commissions are created by the parties to monitor the peace process or specific dimensions of the peace process such as decommissioning. In Northern Ireland, the British government established the Independent Monitoring Commission (IMC) to monitor the progress of participants in meeting the commitments made during the peace process. The governments of the United Kingdom and the Republic of Ireland also entered into an
agreement creating the Independent International Commission on Decommissioning (IICD) in 1997. Although initial progress on decommissioning was very slow, the IRA did work with the IICD such that by 2005 the IICD reported that the IRA had met its commitment to put all of arms under its control beyond use.

Loyalist paramilitary organizations, however, refused to cooperate with the IICD. While these organizations have announced their intention to cease all military training and action, they stated that they would put their weapons “beyond reach”, but would not decommission them. The refusal of paramilitary groups like the Ulster Volunteer Force (UVF) and the Ulster Defence Association (UDA) to work with the IICD raises the question of what measures can be taken when parties flagrantly refuse to adhere to the terms of a peace agreement. For there to be true accountability, there must be consequences for failures to honour a group’s commitments. The absence of consequences subverts efforts to establish the rule of law for such an absence suggests that parties still regard themselves as above the law and able to do whatever is most expedient to them. In the case of Northern Ireland, loyalist paramilitary groups have been issued an ultimatum: the British government indicated that it would repeal decommissioning legislation that provides amnesty in return for the decommissioning of weapons in cooperation with the IICD.

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416 See Agreement on Independent International Commission on Decommissioning, Ireland and United Kingdom, 26 August, 1997 [the IICD Agreement].
If a country has already advanced to the stage where elections have been or will soon be held, one way to police groups is to make participation in elections contingent on adhering to the terms of peace agreements. For example, in Burundi, the peace agreement required the demobilization of warring factions. Since there were close ties between armed groups and political parties during the civil war, elites agreed that all political parties had to sever ties with armed groups in order to participate in elections. Independent monitoring of the peace process and the elections helped to ensure that political parties did, in fact, sever their ties with armed groups rather than attempt to subvert the process through violence.

The involvement of third parties such as monitoring commissions or regional or global organizations can add transparency to the peace process and create incentives for elites to honour the commitments made in the peace process. Elites thus begin to interact with each other and with their groups in a manner that attaches consequences to their decisions not to comply with the framework governing the relationship between groups. This promotes a sense of accountability in the peace process and accordingly helps to cultivate the norm of the rule of law.

3.3.3. Respect for local values and practices
The rule of law and the associated values of natural justice and accountability are not inherently Western ideas. Most cultures include the norm that power ought to be exercised responsibly, fairly, and not arbitrarily, although the interpretation of what it means to exercise power in these ways may differ. When beginning the process of cultivating the norm of the rule of law, it is important to respect and give meaning to local understandings of the rule of law, fairness, and accountability to the greatest extent possible.
Incorporating local values and practices into the peace process contributes to cultivating the rule of law since these values and practices have authority in the eyes of the local population. Care should be taken to avoid imposing procedures and law that may be offensive to local population. For example, when the United Nations Mission in Kosovo (UNMIK), an international civilian administration, became responsible for governing Kosovo, the region was not subject to any agreed-upon body of law. UNMIK’s first task upon arriving in Kosovo was thus to adopt a body of law so that the region could begin the process of returning to the rule of law. The head of UNMIK decided to apply the law that was applicable before the NATO air campaign had begun, that is, the law that had been imposed by the Serbian authorities after Kosovo’s political autonomy in the Yugoslavian federation had been ended in 1989. The local Albanian population viewed UNMIK’s decision as a deep affront since the laws imposed were considered “Serb” laws that had been instruments of oppression. The body of law imposed by UNMIK had no legitimacy in the eyes of Albanians. Rather than initiate a return to the rule of law, UNMIK’s adoption of the “Serb” laws appeared to be a regression into arbitrary rule.420

While it may not always be possible or appropriate to re-institute local law or traditional governance practices, the UNMIK experience illustrates the importance of cultural sensitivity in integrating the rule of law into the peace process. Decisions about whether to reinstitute traditional governance practices and which practices to employ must be carefully considered. The mere fact that a practice is “traditional” should not be sufficient to justify its reinstitution since this approach risks formalism without any real normative commitment to the rule of law.

420 This discussion of UNMIK’s decision is based on Ehrenreich Brooks’ case study of Kosovo. See Ehrenreich Brooks, supra note 255 at 2290-2295.
Ultimately, such an approach may do more harm than good to efforts to cultivate the norms of inter-ethnic social capital.

4. The role of third parties

Throughout the discussion of how to cultivate the norms of inter-ethnic social capital at the level of elites, I have made reference to the roles that can be played by neutral third parties. Without the intervention of third parties such as other countries and regional and global organizations, countries embroiled in violent ethnic conflict are unlikely to be able to transition successfully to peace and stability. Even if elites have a genuine interest in settling their conflict, the security gap and the credibility gap impose almost insurmountable obstacles to peace in the absence of a third party. The intervention of a third party (or parties), however, changes elite incentives by altering the pay-offs for cooperation and defection. Thus, while the peace process must incorporate local participation, values, and practices as much as possible, third parties must also be engaged actively in the process.

Collier argues that foreign governments should be prepared to commit to staying in a country transitioning out of violent conflict for at least ten years.\(^{421}\) I argue that ten years is a minimum threshold. Ideally, foreign countries should be prepared to assist transitioning countries for a period of between ten to 21 years. Twenty-one years is the length of one generation. It will often take at least one full generation before a solid base of the adult citizenry and its elites have internalized the norms of inter-ethnic social capital. Until this point, it is likely that the presence of third parties will be necessary to maintain incentives to continue to work within the institutions of the polity. However, as time progresses, the extent

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of third party involvement may decline. Thus, while foreign governments should expect to commit troops and other support to assisting transitioning countries for between ten to 21 years, they can also expect to reduce the number of troops gradually over this period.

5. Conclusion
This chapter has presented a strategy for cultivating the norms of inter-ethnic social capital at the level of the elite. This strategy focuses on structuring the peace process in a manner that incorporates the norms of the right to participation, the right to continued existence, and the rule of law. The intervention of a neutral third party (or parties) is essential to creating incentives for elites to interact in the peace process on the basis of the norms of inter-ethnic social capital. As I indicated in this chapter, after elites begin to interact within the institutions of the polity, over time the incentives to work within institutions and the growing attachment to the norms of inter-ethnic social capital build upon each other.

One dynamic that will contribute to the incentives of elites to continue to work within the institutions of the polity rather than defect through the use of violent strategies is the growth of inter-ethnic social capital at the level of the masses. Promoting the norms of inter-ethnic social capital at the level of the elite must be complemented by efforts to generalize these norms throughout the population. When the norms of inter-ethnic social capital have permeated throughout the population, including the elites and masses of all ethnic groups, the civic compact emerges. The existence of the civic compact creates a political market for moderation. With robust attachments to the norms of the right to participation, the right to continued existence, and the rule of law existing throughout society, the costs of radical, extra-institutional strategies become too high. The recommendations made in this chapter for
cultivating inter-ethnic social capital must therefore be read with a view to the discussion that will follow in Chapter Four concerning the promotion of social capital throughout the population.

This chapter must also be read with a view to the analysis that will be presented in Chapters Four and Five concerning the rehabilitation of the legitimacy of the state. The rehabilitation of the state’s legitimacy plays an important role in entrenching the norm of the rule of law in a society transitioning out of a period of violent conflict. Chapters Four and Five will thus build on the discussion of how this norm can be cultivated. Rehabilitating the state’s legitimacy also plays a role in the development of the civic compact. The civic compact includes a generalized understanding among the population that the polity is shared by the constituent ethnic groups in the state. However, in many cases, the state has been dominated by one group, often through the use of force and repression. In order to build the belief that the state can in fact be shared by ethnic groups in a manner that respects each group’s right to participate and right to continued existence, the state’s legitimacy must be rehabilitated. Chapters Four and Five will thus build on the theme of cultivating the norms of inter-ethnic social capital and laying the foundation for the emergence of the civic compact.
Chapter 4
Laying the Foundation for the Civic Compact: Cultivating Inter-ethnic Social Capital at the Level of the Masses

1. Introduction
An important function of the peace process is the laying of the foundation for the civic compact. As I have previously discussed, the civic compact emerges when the norms of inter-ethnic social capital are widely held throughout the population. The civic compact includes a generalized acceptance among the population that the polity is shared by the constituent ethnic groups of the state. It involves a commitment to resolving inter-group conflict through institutional arenas. Congruently, the civic compact involves a rejection of radical, violent extra-institutional strategies as acceptable and legitimate means of advancing collective or private interests.

Laying the foundation for the civic compact involves fostering a sense of ownership of the norms of inter-ethnic social capital among the masses. Accordingly, in order to initiate the development of the civic compact, the peace process must have as one of its ends the promotion of the norms of inter-ethnic social capital at the level of the general population. As with elites, cultivating the norms of inter-ethnic social capital at the level of the masses involves adopting procedures during the peace process that embody the norms themselves. However, there are important differences in the considerations and processes associated with promoting social capital at the level of the elites and at the level of the masses. Elites and the masses do not participate in the peace process in the same way. Elites have a very direct and active role in negotiations and institutional reform processes. Inter-ethnic social capital can be
cultivated by structuring the negotiations, institutional reform processes, and other interactions between elites from different ethnic groups on the basis of the norms of social capital.

Different considerations exist at the level of the masses. Practically speaking, it is not possible for the masses to be as directly involved in negotiations and institutional reform processes as the elites.\textsuperscript{422} From a logistical perspective, not everyone can be involved in negotiations about institutional design and function. As a result, the masses cannot be directly engaged on a repeated basis in interactions with each other and in processes that are structured on the basis of the norms of inter-ethnic social capital. The masses therefore do not have the same opportunity to internalize these norms as do the elites. A different mode of reinforcing the right to participation, the right to continued existence, and the rule of law at the level of the masses is necessary.

A second, important difference relates to interactions between individuals from different ethnic groups. The nature of the elites’ role requires them to interact with their counterparts from other ethnic groups on an ongoing basis. By contrast, I argue that it is not prudent to promote personal interactions at the level of the masses between individuals from different ethnic groups during the early stages of transition. Increasing contact between the individual members of different ethnic groups is likely to trigger a radicalization of ethnic claims and a re-escalation of inter-ethnic tension. While I do not advocate actively segregating the members of different ethnic groups, I also do not advocate the adoption of policies designed to bring

\textsuperscript{422} I will argue in this chapter that the masses must be engaged in the peace process on a much broader scale than that which has often occurred in past peace processes in various countries and regions such as Fiji, Burundi, and the former Yugoslavia; this engagement should occur in a manner that is consistent with the norms of inter-ethnic social capital. Nevertheless, there are inherent limitations on the participation of the general population in negotiations and institutional reform.
members of different ethnic groups together or to promote reconciliation between individuals during the early stages of transition. I will set out my arguments more fully in this regard in Chapter Five. At present, it suffices to note that at the level of the masses, direct and sustained interactions between individuals from different ethnic groups should be not be promoted during the peace process, unlike the situation at the level of the elites.

How then can inter-ethnic social capital be cultivated at the level of the masses? I argue that the norms of inter-ethnic social capital are diffused to and internalized by the general population through their interactions with the institutions of the state. The process of norm diffusion and internalization involves two mutually reinforcing dimensions. First, when the norms of inter-ethnic social capital are integrated into the design of state institutions, then the regular interactions that the general population have with these institutions provide opportunities to reinforce these norms. Each time an individual interfaces with a state institution, for example, through political elections or schooling, the individual should be exposed to processes, policies, and procedures that actualize the right to participation, the right to continued existence, and the rule of law. Over time, the repeated interactions with state institutions facilitate the internalization of these norms in the general population such that the masses come to expect that civic life is and should be patterned after these norms.

Before the norms of inter-ethnic social capital can be promoted through regular interactions with state institutions, however, the relationship between the general population and the state and its institutions must be rehabilitated. As I discussed in Chapter Two, during periods of violent conflict ethnic groups have dysfunctional relationships with the state and its
institutions. It is not uncommon for one ethnic group to exploit its dominance over the state while other groups suffer the consequences of this domination. In Burundi, for example, Tutsis dominated the military and the state apparatus while the Hutus were marginalized. In Sri Lanka, the Sinhalese controlled the government and limited the ability of Tamils to access political power, prompting radical groups within the Tamil population to strike back using terror tactics. In Fiji, while Indo-Fijians dominated the professions like law and medicine, native Fijians owned most of the land in the country and asserted a right to political paramouncy in its governance. Where the state has come to serve as an instrument of domination and repression, the norms of inter-ethnic social capital have little meaning in the lives of the general population. The state and its institutions must be reformed and the relationship between the general population and the state and its institutions must be rehabilitated before the norms of inter-ethnic social capital can be diffused and internalized through interactions with the state.

The rehabilitation of the relationship between the general population and the state and its institutions also plays a central role in setting the foundation for the rejection of radical, extra-institutional strategies for advancing the interests of the ethnic group. The civic compact includes a firm commitment to resolve inter-ethnic conflict through institutional arenas rather than through violence or insurgency. The dysfunctional relationship that ethnic groups have with the state and its institutions subverts this commitment since the ethnic groups have come to experience the state and public institutions as instruments of domination rather than as a neutral arena for resolving conflict. In order to develop an expectation among the general population that elites will (and should) pursue their aims through existing institutional channels, there must be a generalized acceptance of the institutions of the state. Thus, the
general population must perceive the state and its institutions to be legitimate, fair, relevant, and functional.

A central function of the peace process, then, is to rehabilitate the relationship between the general population and the state and public institutions. The process of rehabilitation serves as both a means and an end to cultivating inter-ethnic social capital at the level of the masses. Rehabilitating the relationship between the general population and the state is a means to creating institutions that can serve to cultivate the norms of inter-ethnic social capital at the level of the masses. By integrating the norms of inter-ethnic social capital into the process of rehabilitation, the process of rehabilitating this relationship also directly advances the end of facilitating the internalization of the norms of inter-ethnic social capital. In this chapter, I will explore how the peace process can be structured to rehabilitate the relationship between the general population and the state and its institutions.

Rehabilitating the relationship between the masses and the state and its institutions has two primary dimensions: re-establishing the legitimacy of the state and its institutions and fostering a sense of public ownership of the state and its institutions. This chapter will focus on re-establishing the legitimacy of the state, and Chapter Five will focus on developing a sense of public ownership of the state and its institutions. After periods of violent conflict in which the state is often implicated in human rights violations and sometimes in the commission of atrocities, the legitimacy of the state must be re-established. Building on Weber’s concept of the state as the entity that has a monopoly on the legitimate use of force in the polity, the state’s authority to use force must be rehabilitated. The process of re-establishing the
legitimacy of the state and its institutions involves moving away from the dynamics of survival politics, which materially contributes to the emergence of violent conflict and insurgency, and moving towards the norms of inter-ethnic social capital. Ultimately, the state’s legitimacy must flow from the institutionalization of the right to participate, the right to continued existence, and the rule of law as foundational values in the polity. These norms must be diffused and internalized by the general masses as the key source of the state’s legitimacy. In this chapter, I argue that the processes that are used to address the state’s misuse of power and to re-constitute the state and to reform its institutions are value-laden and can serve to actualize the norms of inter-ethnic social capital in the experiences of the masses. In particular, I focus on truth commissions and accountability proceedings such as criminal prosecutions and lustration as the central processes for re-establishing the legitimacy of the state and for diffusing the norms of inter-ethnic social capital. This dimension of truth commissions and accountability proceedings has not yet been explored in any depth in the existing literature. I will therefore add to the existing body of literature on truth commissions and accountability proceedings by analyzing how these processes can be shaped to cultivate inter-ethnic social capital.

2. Rehabilitating the Legitimacy of the State

The rehabilitation of the legitimacy of the state is closely bound up with the re-constitution of the state as a polity that is shared by its constituent ethnic groups and that is governed by the norms of inter-ethnic social capital. The process of rehabilitating the legitimacy of the state not only results in a restoration of public confidence in the state and its institutions, but the process also gives meaning to the fundamental bases of legitimacy in the polity.423 The

423 My arguments are based in part on Ruti G. Teitel, *Transitional Justice* (New York, NY: Oxford University Press, 2000). Teitel’s central thesis is that the conception of justice in times of political transition is “extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition” (at 6).
methods of addressing past atrocities and abuses of power and of setting the course for how the polity will be governed going forward are value-laden. For example, decisions about how to treat high-ranking instigators of inter-ethnic violence (grant them amnesty, say, or prosecute them for war crimes) carry meaning for how such violence should be regarded. The process through which such decisions are made is also important for it speaks to who in society has the right to make such decisions: to whom should such perpetrators be held accountable?

Similarly, the procedures adopted for re-establishing a “legitimate” set of institutions carry normative significance for understanding what is considered “legitimate” in the polity. The process itself defines parameters for legitimacy since the process purports to create legitimate institutions. Structuring the rehabilitation of the legitimacy of the state thus materially shapes the core constitutional values within the state. By integrating the norms of inter-ethnic capital into the rehabilitation process, it is possible to fuse these norms with the core constitutional values of the state. The general population thus experience and begin to internalize the norms of inter-ethnic social capital through the rehabilitation process, while also coming to view these norms as part of the core values that govern the polity.

The actualization of the norms of inter-ethnic social capital must be mirrored by a collective renunciation of the norms that characterized the polity prior to the peace process. As I discussed in Chapter Two, inter-ethnic relations in polarized polities that have low levels of inter-ethnic social capital, but robust levels of intra-ethnic social capital are typically marked by survival politics. Chief among the norms in survival politics is the “dominate or be
dominated” mentality. This mentality justifies governance by domination and repression, as well as protest and resistance by radical, extra-institutional measures such as violence and insurgency. In addition, prior to the peace process, the polity is often characterized by a pervasive lack of accountability and transparency, made all the worse by a corrupt and/or weak justice system. What is often most troubling is what Hannah Arendt has described as the “banality of evil”: the normalization of violence and atrocities committed against members of other ethnic groups. While the acts of atrocity committed in ethnic conflict are horrific and shocking, it is the widespread participation of the general population in committing these atrocities that is the most confounding. Experience shows that ordinary people are capable of extraordinary cruelty and can be convinced that perpetrating violence against others is part of their patriotic duty. While ethnic elites play a large role in goading the masses into extreme acts, the fact remains that large portions of the population respond to their leaders’ calls to attack members of other ethnic groups. Even those who do not respond directly may still be implicated in the commission of atrocities by their acquiescence.

There must be a repudiation of all of the elements of survival politics in order to move the polity forward towards the emergence of the civic compact. This includes confronting the normalization of violence and atrocity. Before the norms of inter-ethnic social capital can take root, the population as a whole must come to regard collective violence and insurgency as fundamentally unacceptable. The full measure of the atrocities that have been committed in

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424 See Chapter Two for a fuller discussion of the norms that characterize the relationship between ethnic groups in polities where there are low levels of inter-ethnic social capital, but high levels of intra-ethnic social capital. Chapter Two includes a discussion of the “dominate or be dominated” mentality.


the name of ethnic identity must be taken, and there must be a collective acknowledgement of
the inherent wrongfulness of the atrocities committed in the name of the ethnic group. In an
important sense, a polarized society must hold itself to account for what it has become.

There is a risk that addressing the violent acts committed by one ethnic group against another
will deepen schism in society rather than help to establish a foundation for co-existence. Yet,
this risk must be taken, for the alternative is to attempt to re-construct a polity without clearly
rejecting violence as a means of furthering the interests of the ethnic group. The civic compact
cannot emerge in society until society has grappled with its violent past and has committed
itself to pursuing coexistence mediated through institutions rather than more violence.

In the discussion that follows, I will analyze three types of processes that have been used
during transitional periods to restore the legitimacy of the state, namely, truth commissions,
criminal trials, and lustration. I will consider how these processes contribute to re-legitimizing
the state and its institutions and how they play a role in renouncing survival politics and the
normalization of violence. This discussion will include an analysis of how these processes
may be structured so as to actualize the norms of inter-ethnic social capital.

Analyzing the rehabilitation the legitimacy of the state by assessing the capacity of the
rehabilitation process to actualize the norms of inter-ethnic social capital and to renounce
survival politics offers a constructive framework for assessing commonly recommended
transitional justice measures. There is a large body of scholarship on transitional justice and
peace-building. Some of this scholarship focuses on the normative dimensions of responding
to atrocity. Other literature is empirical in nature and focuses on specific case studies. Still other scholars have taken a broader approach to empirical studies and have sought to draw out lessons and “best practices” from a wide array of cases. Some of the prominent themes in this literature are the relationship between peace and justice; the rights of victims and the need for restorative justice; the goal of punishing perpetrators and deterrence (punitive justice); the tension between restorative justice and punitive justice; and the need for “truth-telling” after periods of gross human rights violations. In short, the literature is diverse, and there is no clear consensus on “best practices” other than recognition that transitional processes must be sensitive to the local context. Even truth commissions, which have become a popular mechanism for facilitating transitional justice, have come under increasing criticism. The South African Truth and Reconciliation Commission (TRC), for example, initially received widespread praise from the international community. However, South Africans themselves were more reserved in their praise of the TRC, and it has become apparent that the TRC, for all of its strengths, “did not lead automatically to reconciliation either between blacks and whites or among blacks (“revealing is healing” turned out only to be true sometimes).”

conducted an analysis of public opinion polls taken by South African research institutions between 1994 and 2000. He found that while there was overall support for the work of the TRC by most South Africans, the South African population’s views were divided along racial and political lines before the Commission was officially established and that these divisions deepened over time.\textsuperscript{432} Social and informal contact between racial groups remains low. The 2009 South African Reconciliation Barometer\textsuperscript{433} reports that 25 percent of South Africans never speak to a person from a different historically-defined population group on an ordinary day.\textsuperscript{434} Moreover, nearly half of South Africans indicated that they never socialise with people of other racial groups in intimate settings such in their homes or in the homes of friends.\textsuperscript{435} Notwithstanding the work of the South African TRC, South Africa remains a deeply divided country.

\textsuperscript{432}While white South Africans were pessimistic about the ability of the South African TRC to promote racial reconciliation, black South Africans were more hopeful. See Gunnar Theissen, “Object of Trust and Hatred: Public Attitudes toward the TRC” in Audrey R. Chapman & Hugo van der Merwe, eds., \textit{Truth and Reconciliation in South Africa: Did the TRC Deliver?} (Philadelphia: University of Pennsylvania Press, 2008) 191.

\textsuperscript{433}The South African Reconciliation Barometer is a project of the Institute for Justice and Reconciliation (\texttt{www.ijr.org.za}). The 2009 Reconciliation Barometer Media Report provides the following summary of the South African Reconciliation Barometer:

The South African Reconciliation Barometer (SARB) is a nationally-represented public opinion survey, which has been conducted by the Institute for Justice and Reconciliation (IJR) since 2003. The SARB focuses primarily on public opinion related to socio-economic and political change and, in particular, how these impact on national reconciliation in South Africa. While recognising the conceptual complexity of reconciliation, and therefore the potential limitations of tracking progress through a survey, the SARB does attempt to measure some of its key quantifiable indicators across the South African population.


\textsuperscript{435}\textit{Ibid.} at 25.
The discussion that follows adds to the literature on transitional justice and peace-building by critically assessing transitional justice mechanisms from the perspective of cultivating inter-ethnic social capital. The breadth and diversity of the literature on transitional justice make it difficult to ascertain which transitional justice mechanisms offer promise for peace-building in ethnically-polarized countries. My approach offers a specific set of objectives that transitional justice mechanisms must advance in order to be considered appropriate for the context of an ethnically-polarized country. In this regard, I provide an analytical framework that orients a critical assessment of transitional justice mechanisms for the purposes of better understanding how to support peace-building in ethnically-polarized countries. I also contribute to the scholarship on social capital by considering how to build up social capital after periods of mass atrocity and gross violations of human rights. This section of my dissertation will thus offer a new perspective on transitional justice in ethnically-polarised societies.

2.1. Truth commissions
Truth commissions (TCs) are frequently identified as key parts of a transition process, particularly because they “can play a critical role in a country struggling to come to terms with a history of massive human rights crimes.”436 Although each TC is unique in its structure, mandate, and form, Hayner identities four primary elements common to TCs:

First, a truth commission is focused on the past. Second, it does not focus on just one event, but on the record of abuses over a period of time (often highlighting a few cases to demonstrate and describe patterns or large numbers of abuses). Third, a commission is a temporary body, generally concluding with the submission of a report. And finally, a truth commission is somehow officially sanctioned by the government (or by the opposition, where relevant) to investigate the past.437

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436 Hayner, “Comparative Study” supra note 429 at 600.
437 Priscilla B. Hayner, “Commissioning the truth: further research questions” (1996) 17 Third World Quarterly 19 at 20 [Hayner “Commissioning the truth”].
A number of objectives have been associated with TCs. In addition to establishing a historical record of past abuses of power and the commission of atrocities, TCs are also aimed at promoting reconciliation, facilitating the healing of individual victims, and reinforcing the transition to the new political order. In some cases, TCs are also expected to lay the foundation for other processes in the transitional justice period, such as criminal prosecution, institutional reform, and the payment of reparations to victims. These goals are controversial, however, both in terms of their appropriateness for TCs and the ability of TCs to achieve such goals.

From the perspective of developing a foundation for the emergence of the civic compact, the primary objectives of a TC are narrower and focus on developing an official national account of past violence, human rights violations, and atrocities. Developing this national account serves two, inter-related and important ends. First, the process of developing a national account of the past history of inter-ethnic violence, human rights violations, and atrocities confronts a polarized society with the breakdown of relations within that society. In cases where there has been widespread participation in violence, it is crucial that the population be engaged in a process to drive home the suffering and costs that this violence has caused. The public process of recording deaths, injuries, disappearances, violations of human rights, destruction of property and so on is a necessary step in countering the normalization of violence. This recording must, in part, shock the population at the brutality and inhumanity of

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439 Connolly, ibid. at 403-404 and Hayner, “Commissioning the truth”, ibid. at 19.
440 Connolly, ibid. at 404.
what has transpired in society so as to develop a sense of shame about the violence that has occurred.\footnote{442} Although it may seem strange to advocate a process designed to provoke shame in a population, the real objective is to confront the banality of evil.\footnote{443} By the end of the transition period, there must be a growing sense among the population that “never again” must they allow such atrocities to occur.\footnote{444} Even in cases where the violence has been more contained, it is still important to convey to the general masses the costs and consequences of hostile and tense relations between ethnic groups. A full accounting of these costs and consequences plays an important role in stimulating demand among the general masses for moderation from their leaders.

Second, a TC memorializes the history of human rights abuses perpetrated by the state, intra-state violence, and the commission of atrocities by all parties. The chaos in society during periods of violent conflict, coupled with a state’s history of secrecy and a lack of transparency, may make it difficult for the general public to have a sense of what actually occurred in periods of intense inter-ethnic conflict. For example, in 2000, Druml commented that “[d]espite the public nature of the genocidal violence, there is very little generally accepted truth in Rwanda.

\footnote{442} Minow identifies the exclusion and shaming of offenders for their offences as one of the goals of societal responses to collective violence. See Minow, supra note 427 at 88.

\footnote{443} Druml makes a case for using shame rather than guilt to help restore peace and promote reconciliation in Rwanda. See Mark A. Druml, “Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda” (2000) 75 N.Y.U.L. Rev. 1221 [Druml, “Punishment”]. Note that Druml’s discussion of shame focuses on the shame of individuals who have participated in mass violence rather than the shame of an entire society. Nevertheless, his analysis includes an excellent discussion of the concept of shame and why shame may play an important role in rehabilitating a society when there has been “a failing of conscience on the part of the complicit masses” [at 1262]. One of Druml’s central points is that shame is more effective than guilt, especially legal guilt imposed after a trial, at stirring the conscience of the perpetrators of violence. He comments, “[W]hen aggressors can see the hurt for themselves instead of denying it in the splendid insularity of prison, can hear the words of survivors, and can look at mass graves instead of jail walls, perhaps then their consciences will become troubled” [at 1262].

\footnote{444} Minow suggests that one goal of societal responses to collective violence should be to “express and seek to achieve the aspiration that ‘never again’ shall such collective violence occur”. See Minow, supra note 427 at 88.
as to what exactly happened from April to July 1994.”

Similarly, Minow notes that the El Salvadorian TC “confirmed what some suspected, and what others refused to believe, while separating truth from rampant lies and rumours.” The development of an official national account of past periods of violence and atrocity provides much-needed clarity and certainty about events in these periods. Gibson, for example, found that the South African TRC successfully convinced a majority of South Africans from different communities and political affiliations that all sides had committed human rights violations and that all sides had suffered from such violations. Although Gibson also found that tolerance for those with differing political views remains low in South Africa, at least the South African population developed the basis for a common narrative of apartheid.

As a related matter, the memorialisation of violence, human rights violations, and atrocities prevents leaders from later denying that such events did, in fact, occur. It also helps to prevent

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445 Drumbl, “Punishment” supra note 443 at 1270.

446 Minow, supra note 427 at 76. Although the El Salvadorian case does not involve inter-ethnic conflict, this example is relevant in terms of the clarity that a TC can provide in the face of much uncertainty, rumours, and out-right lies about a country’s past history of human rights violations.


448 Gibson uses political tolerance as one measure of the degree of reconciliation in South African society. In this context, “political tolerance” means a willingness to put up with one’s political foes and with those who hold different, even repugnant views. A politically tolerant society is one in which there is room for respect of political different and where it is possible to debate all political thoughts openly. Gibson tested for political tolerance by asking survey respondents “whether their foes should be allowed to engage in certain types of political activity” including standing as a candidate for an elected position and holding street demonstrations in the respondent’s community. Respondents were also asked whether members of groups disliked by the respondents should be officially banned in the respondents’ communities. See James L. Gibson, “Overcoming Apartheid: Can Truth Reconcile a Divided Nation?” (2006) 603:1 Annals of the American Academy of Political and Social Science 82 at 107. For a major study of political tolerance in South African society, see James L. Gibson & Amanda Couws, Overcoming intolerance in South Africa: Experiments in democratic persuasion (New York: Cambridge University Press, 2003).
the twisting of historical events by leaders and the blending of historical memories\textsuperscript{449} of an ethnic group of past injustices that it has suffered. Exaggerating the nature of past events or collapsing the account of past atrocities with events from other eras can foster a sense that the other group represents a permanent material threat to the continued existence of the group. The perception of such a threat perpetuates the norms of survival politics.

Some scholars have argued that there is a case for not developing a historical record. These scholars suggest that there is value in forgetting, or at least not creating an official historic record of, the horrors of the past. Forgetting may help the victims to heal. It also prevents the on-going moral condemnation of one group and frees the groups to build a new coexistence together on a clean slate. In some cases, there may be a general consensus that reconciliation should be pursued through silence and trying to forget the past. For example, Hayner argues that there was broad agreement among the population in Mozambique to pursue reconciliation and peace through silence and forgetting. The general consensus was that parsing through the horrors of the war in Mozambique might only tear apart the measure of peace and reconciliation that had been achieved.\textsuperscript{450} In cases like Mozambique, it is arguably in the interests of peace to avoid seeking and memorializing the truth.

Notwithstanding these considerations, I consider the costs of not developing such an account (e.g., a failure to confront the normalization of violence and the risk of the manipulation of

\textsuperscript{449} The blending of historical memories occurs when narratives about different past historical events collapse into each other such that it is difficult to determine objectively when a particular event actually occurred. For a discussion of collective memory, see Paul Connerton, \textit{How Societies Remember} (New York: Cambridge University Press, 1989).

historic events) generally outweigh the risks involved with uncovering truths about human rights violations and violence. Moreover, as Hayner notes, “a survey of past truth commissions suggests such commissions’ investigations to date have not worsened human rights situations, even when operating in tense circumstances and with strongly worded reports.”

The ability of a TC to promote the cultivation of inter-ethnic social capital at the level of the masses is not automatically assured. In some cases, governments have used public inquiries to legitimate past abuses of power, with the end result being a deepening of inter-ethnic distrust and the reinforcement of survival politics. For example, Lord Widgery’s 1972 judicial public inquiry into the Bloody Sunday incident in Northern Ireland was marred by a failure to take seriously the task of holding the British government to account for its role in the violence. Lord Widgery’s judicial public inquiry ultimately undermined confidence in the legal process as a means of seeking political change and contributed to the growth of the IRA. However, a well-designed TC with an appropriate mandate and adequate resources can advance the aforementioned objectives and assist in laying a foundation for the civic compact. Hayner has assessed a wide range of TCs, and has identified many procedural and structural elements that promote the general success of a TC, although she emphasizes the importance of the local context in designing the TC. Below, I build on Hayner’s general observations by highlighting several structural and process-related elements of a TC that are particularly relevant to developing inter-ethnic social capital.

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451 Hayner, “Commissioning the truth”, supra note 437 at 23.
2.1.1. Accessibility and the life cycle of the TC

The TC must be “owned” by the general population to the greatest extent possible. The issue of ownership of institutions and transitional processes will be discussed below. At this stage, it suffices to note that the general population must be engaged in the TC process from the beginning to the end so that the masses perceive the relevancy of the TC for them and align themselves with the pursuit of truth and accountability in the aftermath of violence. Moreover, engaging the masses in the TC gives meaning to the right to participation: the masses will have the opportunity to experience what it means to participate in public processes and to have their voices heard.

From a practical perspective, fostering a sense of ownership over the life of the TC begins by consulting the general population at an early stage about the possibility of having a TC. The views of the general population on whether a TC would be helpful, the scope of the TC’s mandate, its structure, and the limits of the TC’s potential authority should be actively solicited. Seeking the views of the masses on these matters may require that community leaders first help the population understand the general nature of a TC and the proposals that are being put to the people. The views of the masses must be taken seriously, and efforts must be made to accommodate reasonable suggestions so that the masses can see from how the TC proceeds that their voices have been heard.

Measures should be taken to facilitate the ability of the masses to participate in TC proceedings. Language and geography both play a role in enhancing the accessibility of the TC. The choice of the language of the TC process has both practical and symbolic
importance.\textsuperscript{454} From a practical perspective, language can be a barrier to participating in the TC and to following the TC process as a whole. The choice of the TC’s language(s) must be made with a view to ensuring that members of the public are able to engage in the TC process with relative ease. Not only will this bolster the transparency of the TC, but it also facilitates the right to participation. The language of public proceedings also reflects judgements about power structures within the polity since language is an important symbol of the state itself. Ensuring that the TC is conducted in a language that is common to all ethnic groups or in all of the languages of the constituent ethnic groups in the polity, or both, conveys the message that the polity is shared by all constituent ethnic groups. It reflects the fact that no single ethnic group has a monopoly on political power or on the TC process itself. The language of one ethnic group should not be given preference over another since this preference may give rise to a perception of bias of the TC. Perceived bias will ultimately alienate one or more groups from the process.

In a similar vein, the TC must be geographically accessible to members of all constituent ethnic groups. Since victims are often impoverished with little ability to travel far, the TC should endeavour to travel to different regions and localities in order to make attending the TC much easier. Moreover, efforts should be made to broadcast the TC proceedings, or at least portions of the proceedings, so that it is relatively easy for the population to follow TC proceedings through news reports and radio and television broadcasts. In South Africa, the holding of TRC hearings in communities across the country, coupled with wide media coverage of these hearings, resulted in “a dramatic increase in awareness about the

\textsuperscript{454} For discussions on the importance of language to ethnic groups, especially with respect to their place in the polity, see e.g., Charles King, “Policing Language: Linguistic Security and the Sources of Ethnic Conflict” (1997) 28 Security Dialogue 493 and Joshua A. Fishman, \textit{Language and Nationalism: Two Integrative Essays} (Rowley: Newbury House Publishers, 1972).
Commission and its work. This, in turn, resulted in a significant increase in the number of victims wishing to provide statements to the Commission.\textsuperscript{455} The wide broadcast of these proceedings also ensured that the violations of human rights by all groups became widely known and afforded the public an opportunity to scrutinize the TRC process. This ultimately made it more difficult to deny the tragic abuses of the apartheid regime and helped to develop a national narrative about what occurred during the apartheid era.\textsuperscript{456}

The conclusion of the TC offers further opportunities for engaging the general population in the process. In general, most TCs produce a report that summarizes their work and findings. In many cases, TCs also make recommendations about what changes may be made to avert future recurrences of violence and human rights violations, although these recommendations are often unheeded.\textsuperscript{457} One option that has not been used in TCs to date is to make the recommendations of the TC tentative and subject to revision following public consultation. In such a case, the factual findings of the TC would be disseminated as widely as possible through various media, along with a set of proposed recommendations and explanations about why these recommendations are appropriate. The public would then have the opportunity to comment on these recommendations. Comments could be received in writing or through “town hall” style meetings. The TC would then issue a final report after the period of public consultation. This final report would contain a set of recommendations that may or may not closely resemble the proposed recommendations. Significantly, the final report should also include a summary highlighting the feedback received about the recommendations and

\begin{itemize}
\item \textsuperscript{455} TRC Report, Volume 1, supra note 447 at 155.
\item \textsuperscript{456} Gibson, “Contributions”, supra note 431 at 417. But see Christie, supra note 447. Christie notes that one study found that 46 percent of white South Africans surveyed thought that the TRC was “an ANC inspired witch-hunt to discredit its enemies” (at 115). The TRC itself takes note of the allegation that it operated as a “witch-hunt of, especially, Afrikaners”. See TRC Report, Volume 1, supra note 447 at 8.
\item \textsuperscript{457} Hayner, “Commissioning the truth”, supra note 437 at 155.
\end{itemize}
explanations about how the TC addressed the concerns and comments received from the public. The final report would also be made widely available to the public using different media.

This process, though lengthy, gives the public the opportunity to participate directly in shaping the policy responses to the evidence received by the TC. Moreover, it includes a mechanism designed to show the public in a tangible way that their views were heard and considered. This enhances the likelihood that the TC, its findings, and its recommendations will be viewed as legitimate. It also fosters a greater sense of public ownership of the TC’s findings and recommendations. This sense of public ownership may, in turn, create greater public pressure to implement the recommendations of the TC. Indeed, the ability of the public to participate in all stages of the life of the TC may help to nurture a sense among the population that they are entitled to be heard in the polity. Developing an expectation of being heard is an important step to building the type of civic engagement that leads to greater calls for accountability and transparency in public decision-making. Thus integrating public consultations into the TC process can serve both to actualize the right to participation and to promote the rule of law.

2.1.2. **Staffing the TRC**

The Commissioners (or Members) of a TC are the public face of the TC. Commissioners and staff should be representative of the constituent ethnic groups in the polity, and should also represent important sub-groups within the population. Ensuring that the membership and staff are representative of the groups in society helps to counter potential allegations that the TC and its findings represent the views of only one group. By avoiding perceptions of bias that may arise from an unrepresentative membership and staff, a TC’s structure can contribute to a sense that the TC proceedings have been fair.
A membership and staff that are representative of ethnic groups in society has important symbolic value that can promote the norms of inter-ethnic social capital. First, a representative membership and staff gives meaning to the right to participate. It illustrates that power in the polity is now shared. Rather than imposing a victor’s justice, a representative TC affirms that all ethnic groups have a right to participate in all aspects of governing the polity, including the development of a national narrative about a country’s troubled past. Second, ensuring that the membership and staff of a TC is representative of ethnic groups in the polity promotes the rule of law. As indicated above, it avoids the perception of bias and strengthens the sense of fairness of the TC proceeding as a whole. Having a representative membership and staff is thus a tangible measure that signifies a step towards integrating the rule of law into social structures and institutions.

The composition of the Eames-Bradley Consultative Group on Dealing with the Past\textsuperscript{458} in Northern Ireland is a good example of a representative membership. The Consultative Group was co-chaired by the Right Reverend Lord Eames OM, former Archbishop of Armagh, and Mr. Denis Bradley, the first Vice-Chairman of the Policing Board. Lord Eames is a well-known Catholic leader, while Mr. Bradley is a well-known Protestant leader. Their co-

\textsuperscript{458} The Consultative Group on Dealing with the Past (CGP or the “Eames-Bradley Commission”) was established in June 2007 to consult communities throughout Northern Ireland about how Northern Ireland can best approach the legacy of violence between Protestants and Catholics. The CGP was also charged with making recommendations on any steps that could be taken to rebuilding a “shared future” in Northern Ireland that is not “overshadowed by the past”. The CGP issued its report in January 2009. Although the CGP was not a TC, its mandate was akin to that of a TC. It was therefore important that the Group’s membership be representative of both communities in order to avoid appearances of bias and to build credibility for its recommendations. The composition of the Group is therefore instructive even though it was not a TC. See Northern Ireland Office, News Release, “Government launches consultation on Eames/Bradley recommendations” (24 June, 2009), online: <http://www.nio.gov.uk>. See also Report of the Consultative Group on the Past (Belfast: Legacy Policy Unit of the Northern Ireland Office, 2009), online: Consultative Group on the Past <www.cgpni.org> [Eames-Bradley Report].
chairship symbolized that the Consultative Group was equally directed by the Catholic and Protestant communities, and fostered a sense of joint ownership over the consultation process on the past. The broader membership of the Consultative Group was equally representative of the Catholic and Protestant communities. While the report issued by the Consultative Group sparked intense public debate, there was no general sense that the Group had been “captured” or overly influenced by one community or other. Instead, public debate focused on the substance of the Consultative Group’s recommendations.

Another means of strengthening the perceived neutrality of a TC is to appoint a Chair who enjoys widespread respect throughout a divided polity. In South Africa, for example, Archbishop Desmond Tutu was highly-respected throughout the country and had the trust of diverse communities. His appointment as Chair of the South African TRC helped to bolster the perceived neutrality of the TRC\textsuperscript{459} and allowed the TRC to report credibly on acts of violence and human rights violations committed by various groups in the country. By contrast, the neutrality of the Commission of Enquiry into Complaints by former African National Congress Prisoners and Detainees (the Skweyiya Commission)\textsuperscript{460}, appointed by Nelson

\textsuperscript{459} This is not to suggest that there was complete accord on the issue of the TRC’s neutrality. In his Forward to the Report of the TRC, Archbishop Tutu comments that there were some who were determined from the outset to discredit the work of the TRC by “painting the Commission as a witch-hunt of, especially, Afrikaners; by claiming that we were biased in favour of the ANC.”. See TRC Report, Volume 1, supra note 447 at 8. Archbishop Tutu further notes that the “Commission has also been harshly criticised for being loaded with so-called ‘struggle’-types, people who were pro-ANC, SACP or PAC.” (See TRC Report, Volume 1, \textit{ibid.} at 9.) Notwithstanding these criticisms of the TRC, however, there is evidence that the TRC did convince a majority of South Africans that violence and human rights violations were committed by all sides and that all sides had suffered under the apartheid regime. See Gibson, \textit{Overcoming Apartheid}, supra note 431 and Gibson, “Contributions,” supra note 431 at 410-411. See also Gibson, “Truth,” supra note 447.

\textsuperscript{460} For a concise overview of the Skweyiya Commission, see Hayner, “Comparative Study”, supra note 429 at 625. Note that the Skweyiya Commission was not initiated by the South African government. Instead, this Commission is a rare example of a TC created by the opposition.
Mandela in 1992, was called into question. The Skweyiya Commission was composed of three members, two of whom were members of the African National Congress (ANC).461

A third option for staffing the membership of a TC in a neutral fashion is to appoint Commissioners from outside the country. The International Commission of Investigation on Human Rights Violations in Rwanda Since October 1, 1990 (the “Rwandan International Commission”) is an example of a TC that was staffed wholly by individuals from other countries. Indeed, the Rwandan International Commission was created, funded, supported, and sponsored entirely by the international human rights community.462 The international character of this Commission contributed to its perceived independence and thus to the credibility of its final report, at least in the international community.463 However, inviting international personnel to lead a TC risks eroding the sense of public ownership over the TC process. A possible compromise is to include some Commissioners from outside the country, while appointing locals to the majority of Commissioner positions. This is the approach that has been taken in the Truth and Reconciliation Commission recently constituted in the Solomon Islands, for example. The Solomon Islands TRC Commission consists of three local members and two members from outside the country.464

The manner in which Commissioners are appointed to a TC contributes to establishing the credibility of the process and to cultivating the rule of law. The process of appointment should be as transparent as possible. The criteria and process used to select Commissioners should be

461 Ibid. at 626.
463 Ibid. at 629.
set out in the legislation establishing the TC and should be made publicly known. If there is an application and screening process, the identity of applicants should not be kept secret. In South Africa, for example, the Promotion of National Unity and Reconciliation Act specified that the commissioners “shall be fit and proper persons who are impartial and who do not have a high political profile”. Commissioners were nominated in a process that was open to anyone interested in participating. Nominees were interviewed in public sessions by a panel on which all political parties had representation. In accordance with the requirements of the Promotion of National Unity and Reconciliation Act, the final selection of Commissioners was made by the President in consultation with his Cabinet of National Unity. This Cabinet included representatives of the ANC, the Inkathka Freedom Party (IFP), and the National Party. The transparency of the appointment process and the fact that all major political parties had opportunity to vet nominees provided Chair Archbishop Tutu with solid grounds to challenge allegations that the TRC’s composition was biased in favour of the ANC.

Integrating transparency into the appointment process aids in avoiding allegations that the appointment process was tainted, for example through bribery or cronyism. This, in turn, bolsters the legitimacy of the TC as a whole. Moreover, a transparent appointment process is a

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465 In some cases, it may be appropriate to keep the identities of potential candidates secret for a time. For example, if candidates are asked to act as Commissioners rather than having to apply for the position, then discretion should be exercised in order to allow candidates to consider privately whether they will accept the appointment. Secrecy may be warranted in such a case in order to allow the candidate to make a decision free from public pressure.

466 South Africa, Promotion of National Unity and Reconciliation Act, Act 34 of 1995, as amended by Act 87 of 1995, s. 7(2)(b) [National Unity and Reconciliation Act].

467 National Unity and Reconciliation Act, ibid. s. 7(2)(a).

468 The IFP refused to participate in the establishment of the South African TRC and did not cooperate with the TRC once it was operational. The IFP’s position was that it had concerns that the TRC would not act in a fair and impartial manner. It was subsequently reported that when the leader of the IFP, Chief Mangosuthu Buthelezi, met with Chair Archbishop Tutu, the Chief indicated that the IFP was waiting for senior members of the party to be charged with participating in the violence. In the IFP’s view, there was no reason to cooperate with the TRC until it was forced to do so. See Jeremy Sarkin, “The Trials and Tribulations of South Africa’s Truth and Reconciliation Commission” (1996) 12 S.A.J.H.R. 617 at 620-621.

469 See TRC Report, Volume 1, supra note 447 at 8-9.
tangible manifestation of the rule of law and thus helps to actualize this norm in the experience of the population. Finally, transparency opens the appointment process up to the public and, in so doing, helps to foster a sense of public ownership over the TC. South African High Commissioner Tony Msimanga underlined this point when he urged the Kenyan government to avoid secrecy in the procedures used to appoint Commissioners to the Kenyan Truth and Justice Reconciliation Commission (TJRC) in 2009. Msimanga commented that, “It (the appointment process) has to come out in the open because you are going to be dealing with human rights violations. … Transparency is quite key because people have to feel they own the process. Otherwise you will have some very serious challenges.”

2.1.3. The TC’s mandate, evidence and procedural fairness

From the perspective of cultivating inter-ethnic social capital, the key function of a TC is to develop a thorough historical record of past inter-ethnic violence and atrocities. The TC’s mandate and its powers should reflect this principal function. Thus, the TC should be equipped to have access to a wide scope of evidence, including witness testimony and government records and reports. In order to facilitate the gathering of evidence, the TC should have the authority to issue subpoenas for witnesses and for documentary evidence. The TC should also be assisted by investigators who enquire into allegations of past atrocities and human rights violations in the field.

The TC should be given the flexibility to “name names” in its final report where the TC finds that a specific individual has materially contributed to the development and/or continuation of inter-ethnic violence or to the commission of atrocities and/or gross violations of human rights.

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However, the TC should be discouraged from casting a wide net in terms of the individuals it specifically identifies as having participated in inter-ethnic violence. The role of the TC is not to bring specific perpetrators of violence to justice; accountability of individuals for their particular role in committing atrocities should occur through separate proceedings, such as a war crimes tribunal. Instead, a TC is an indictment of society as a whole: its actors, its structures, and its institutions that have, in combination, resulted in a profound breakdown of society. In an important sense, many, if not most, people in society will be implicated in the violence in some way, whether in terms of participating in past repression, engaging in violence, or failing to oppose those who pursued violence. Including lists of names of individuals who participated in inter-ethnic violence in some way does not advance the development of a collective sense of shame and may in fact undermine a sense of collective culpability since those who are not specifically named may feel absolved of responsibility.

I do not propose, nor would I recommend, that the TC be vested with the power to make recommendations about who should be prosecuted for their actions during period of violence. I also do not recommend that the record of the TC be admissible as evidence in subsequent criminal proceedings. Proceedings aimed at establishing individual accountability are important and necessary during the transition phase, but they ought to be kept separate from the TC. The task of determining which individuals should be prosecuted for their actions during periods of conflict differs materially from the task of developing a full historical record of those periods of conflict. The former task requires a detailed examination of the actions of certain individuals, while the latter task requires a broader analysis of the conflict and the context in which it arose. Furthermore, as I will discuss below, if the TC could make recommendations about who should be prosecuted or if the TC’s evidence would be admissible
in subsequent prosecutions, the TC would be obligated to extend robust procedural protections to individuals who may be criminally charged. These procedural protections would include, for example, the right to confront one’s accuser, the right to cross-examine witnesses and restrictions on the use of hearsay evidence. From the perspective of many victims, extending these procedural protections would require them to face their past tormentors and be cross-examined by counsel for these tormentors. Such an experience is often highly traumatic. Thus, these procedural protections risk creating disincentives for past victims to testify, which hampers the ability of a TC to develop a full record of past events, and risk re-victimizing victims who do testify.471 For example, the Committee on Human Rights Violations of the South African TRC reported that the formality that was required in its proceedings, including the right of alleged perpetrators of human rights violations to be present and, in some cases, to cross-examine victim witnesses, may have “had a traumatising effect on many victims who had finally found the courage to testify.”472 Restrictions on the use of hearsay evidence may also impair the ability of a TC to develop a full accounting of past events since evidence from victims who have been killed or “disappeared” may only be available in the form of hearsay evidence.473


472 TRC Report, Volume 1, supra note 447 at 185. The Committee on Human Rights Violations was required to extend greater procedural rights to alleged perpetrators of human rights violations after a successful challenge to its procedures on the basis of natural justice rights. See Du Preez v. Truth and Reconciliation Commission [1997] ZASCA 2; 1997 (3) SA 204 (SCA); [1997] 2 All SA 1; (1997) 4 BCLR 531 [Du Preez].

473 Evidentiary rules restricting the admissibility of hearsay evidence are relaxed outside of criminal prosecutions. In many cases, hearsay evidence is admissible. The fact that the hearsay evidence may not be reliable goes to the weight given to the evidence rather than to its admissibility. However, if the TC could make recommendations about criminal prosecutions and/or if the record of TC proceedings were admissible in subsequent criminal proceedings, there would likely be greater restrictions on the admissibility of hearsay evidence before the TC since the individual liberty interests at stake require a robust scope of procedural protections.
The TC’s proceedings must comply with natural justice. Natural justice (or procedural fairness\textsuperscript{474}, as it is sometimes called) is an important dimension of the rule of law. The TC proceedings must be consistent with natural justice if they are to help move the polity towards a return to the rule of law. Natural justice has two broad dimensions: the right to be heard and the right to an unbiased decision-maker. The content of these rights varies with the circumstances, the nature of the decision-making body, applicable statutory provisions, and the matter to be decided.\textsuperscript{475} Proceedings that could have a direct and material impact on a specific individual’s interests should include a robust set of procedural rights for the individual. By contrast, when the subject matter to be decided impacts a class of individuals or when the subject matter does not directly impact a person’s liberty or property rights, the procedural fairness requirements are less stringent than in a criminal trial or a civil proceeding determining a person’s liability. There is therefore a sliding scale of procedural rights, and the procedural fairness requirements in each case must be determined in the particular context of the case. “What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.”\textsuperscript{476}

Given the above conception of the TC’s mandate and authority, the TC would be required to afford at least a minimum degree of procedural rights to those who may be subpoenaed to testify before the TC, those who may be named by witnesses and victims, and those who the TC considers it will specifically name in its final report as having materially contributed to

\textsuperscript{474} Although some scholars distinguish between natural justice and procedural fairness, for the purposes of this discussion, I will use the terms natural justice and procedural fairness interchangeably.


\textsuperscript{476} Doody, \textit{ibid.} at 106 per Lord Mustill. The other Members of the Court concurred in Lord Mustill’s speech.
inter-ethnic conflict. The scope of the procedural rights in question will vary to some degree. As a starting point, the interests of individuals named during the course of the TC (e.g., in the testimony of a witness) are likely sufficient to give rise to a valid claim for natural justice rights. Because most, if not all, hearings of the TC will be public, allegations involving an individual could become widely known. The public dissemination of these allegations will likely impact an individual’s reputation and his or her right to privacy; moreover, these allegations may lead to civil or criminal liability even if the TC does not play a direct role in recommending who should be prosecuted. These interests are sufficient to engage the right to procedural fairness.477 The interests of individuals who are subpoenaed to give testimony and individuals who may be specifically named in the TC’s final report are even greater and thus also engage procedural fairness rights. In South Africa, for example, the Supreme Court of Appeal held that the South African TRC had a duty to act fairly towards individuals who were implicated to their detriment by evidence and information brought before the TRC in the course of its hearings or investigations.478 Nevertheless, the more important question, as the South African Supreme Court of Appeal noted479, is what does the duty of fairness require? In this regard, a number of factors (outlined below) suggest that the duty of fairness may be limited to providing adequate notice to an individual who may be named during the TC’s proceedings and providing a limited opportunity to make submissions. The opportunity to make submissions may be restricted to filing written submissions, and is unlikely to include the right to cross-examine witnesses.

478 See Du Preez, ibid. at 36-37 per Corbett CJ. Note that the South African TRC was specifically charged with determining whether gross violations of human rights occurred and the identity of the individuals involved with such violations. In this regard, the South African TRC was specifically mandated to “name names”. By contrast, I consider that “naming names” should be incidental to a TC’s function and should not be a central part of the TC’s mandate. Nevertheless, there are still sufficient individual interests engaged by the prospect of being identified in witness testimony or by investigators working for the TC to engage the duty of fairness.
479 See Du Preez, ibid. at 37 per Corbett CJ.
There are three factors that limit the scope of procedural fairness rights that the TC must extend. First, the TC is an investigatory body that lacks the power to make final decisions about an individual’s liberty, rights, or other interests. The TC is not a court and is not required to extend the same degree of procedural protections that arise in civil or criminal proceedings. In the American case *Hannah v. Larche*[^480], for example, the United States Supreme Court found it relevant that the US Commission on Civil Rights[^481] did not adjudicate or determine a person’s civil or criminal liability. The Commission had adopted rules of procedure that limited the ability of a person accused of discrimination to know the specific charges against him and that did not include the right to cross-examine witnesses in its oral hearings. The “purely investigative nature of the Commission’s proceedings” played a central role in the Supreme Court’s determination that the commission’s rules of procedure did not violate due process rights.[^482]

Second, the interests at stake are not the sort of interests that tend to give rise to a wide panoply of procedural rights. The duty to act fairly is at its highest when a person’s liberty interests are directly at stake (e.g., in criminal proceedings). This is not the case, however, in TC proceedings, as I have conceived them. The individual interests at stake in TC proceedings are

[^481]: This commission was established by Congress in 1957 to investigate allegations of racial discrimination against black voters.
[^482]: See *Hannah v. Larche*, supra note 480 at 451 per Warren CJ. Arguably, the U.S. Supreme Court’s decision in *Hannah v. Larche* would be decided slightly differently today, particularly if it were heard in a Commonwealth country. The majority of the U.S. Supreme Court considered that any possible adverse consequences with respect to a loss of reputation, a loss of employment, and civil and criminal liability were “conjectural” and “collateral” to the commission’s proceedings and therefore did not give rise to due process rights. Commonwealth courts, by contrast, have recognized that these types of adverse consequences are sufficient to trigger a duty of fairness, albeit a duty less rigorous than that which is imposed on courts. See Lord Denning M.R.’s decision in *Pergamon Press*, supra note 477. See also *Du Preez*, supra note 472.
considerably lower, particularly since I consider that TCs should not be mandated to submit a list of people who should be prosecuted nor should the TC’s record be admissible in subsequent criminal trials.\footnote{Indeed, my views on limiting the TC’s mandate in this regard partially stem from the additional procedural protections that would have to be extended to individuals if the TC’s mandate involved supporting subsequent prosecutions. These additional procedural protections (e.g., the right to confront one’s accuser and to cross-examine adverse witnesses) would have an adverse impact on the TC proceedings, particularly with respect to the potential cross-examination of witnesses testifying about atrocities and human rights violations they have suffered. Limits on the TC’s mandate reduce the potential impact of the TC on individuals’ interests, which in turn reduces the scope of the TC’s duty to act fairly. A TC acting under a mandate that centres on developing a historical record of inter-ethnic violence likely would not be required to extend the right of cross-examination to individuals.} Moreover, the TC’s focus is on collective culpability; it is an indictment of society as a whole rather than an investigation into the potential criminal and civil liability of individuals involved with inter-ethnic violence. Thus, while there are individual interests at stake that are sufficient to trigger the duty to act fairly (e.g., reputational interests), these interests are relatively modest and place the content of this duty at the lower end of the procedural spectrum.

Finally, the duty to act fairly must be balanced with the need to ensure that the TC is properly equipped to fulfill its mandate in an effective and efficient manner. The TC has important responsibilities to discharge – responsibilities that a legislature has presumably intentionally assigned to the TC rather than a court. TCs, as administrative bodies, have greater procedural flexibility than courts and should be permitted to adopt procedures that are best-suited to fulfilling their mandates. Writing for the majority of the Supreme Court of Canada, Madame Justice L’Heureux-Dube put the matter as follows:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible,
adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th Ed. 1980) at p. 240), the aim is not to create ‘procedural fairness’ but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.\(^{484}\)

In light of the nature of a TC, the interests that are at stake, and the importance of ensuring that a TC can function effectively, I argue that the TC’s duty of fairness consists of providing advance notice to individuals who may be named in witness testimony\(^{485}\), investigations, or in the TC’s final report and providing a limited opportunity to such individuals to make submissions to the TC. The notice should inform an individual that he or she has been (or is likely to be) named in the course of the TC proceedings. The notice should contain a summary of the allegations made against the individual. So long as witness security is not a concern, the individual should be advised about the source of information of the allegations (e.g., the identity of witnesses or investigatory reports). The notice should also clearly explain how the affected individual may respond to the testimony or investigatory reports about the alleged actions of the individual.

\(^{484}\) Knight, supra note 475 at 685-686 per L’Heureux-Dube J. See also the judgements of Warren CJ and Frankfurter J in Hannah v. Larche, supra note 480. In that judgement, Warren CJ considered the “burden that the claimed rights would place upon [the commission’s] proceedings” to be relevant to the determination of whether the commission had violated due process rights (at 451). Similarly, Frankfurter J commented that the judicial determination of the requirements of “due process” requires consideration of “the balance of individual hurt and the justifying public good” (at 487-488).

\(^{485}\) It may not always be possible to provide advance notice to an individual that he or she will be named in the testimony of witness since it is not possible to predict precisely what a witness will say. However, TC staffers should, as a matter of general practice, develop a general sense of a witness’s story prior to the point where the witness testifies before the TC. This witness preparation is necessary for the smooth functioning of the TC in any case. Staff members should be alert to the possibility that a witness may name specific individuals in their testimony and take appropriate action to advise such individuals in writing of this possibility. If a witness testifies about a person who has not received notice, that individual should be advised that he or she has been named by a witness in a TC proceeding as soon as possible. The individual should also be given an opportunity to make rebuttal submissions.
The scope of the right to make submissions will depend on the seriousness of the allegations against a person. Individuals who are directly implicated in acts of violence, atrocity, or gross violations of human rights face potentially serious consequences in terms of possible criminal and civil liability\(^{486}\) and reputational damage. Such individuals should generally be given the opportunity to make oral submissions to the TC in the form of their own testimony. They should also be invited to provide the TC with information that could exonerate them or that could put their actions in context. Such information might include, for example, the names of people whose testimony would be useful to developing a full understanding of the events in question, official records, and other documentary evidence. Individuals who are less directly implicated in acts of atrocity and gross human rights violations and individuals who are implicated in less serious acts should be afforded a more limited ability to make submissions to the TC. Their right to be heard may be appropriately limited to the right to submit written comments to the TC in response to the allegations made about them.

In no case should an individual have the right to cross-examine witnesses who implicate him or her in violence, acts of atrocity, or gross human rights violations. As discussed above, the cross-examination of victim witnesses may re-traumatize these witnesses and the prospect of being cross-examined may deter witnesses from testifying. Moreover, it is preferable to allow victim witnesses to recount their testimony in a narrative format without the formalities of direct- and cross-examinations since the narrative format tends to yield a fuller accounting of

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\(^{486}\) Even if the TC is not directly involved with subsequent criminal prosecutions, it is likely that police and prosecutors will use information made public during the TC to begin to build cases against alleged perpetrators of violence and gross violations of human rights. Similarly, information disclosed during the TC proceedings may be used to begin to develop a civil case against various individuals by their victims. Even if the evidence received by the TC and the TC’s record are not admissible in subsequent criminal and civil proceedings, this evidence and the TC’s record do provide a place to start for gathering valuable information related to a person’s potential criminal and civil liability.
the atrocities and gross violations of human rights that have occurred.487 In a discussion of the South African TRC, Minow comments, “[b]ecause the testimony escapes the tests of cross-examination…its truth value lies in its capacity to elicit acknowledgment and to build the general picture of apartheid’s violations.”488

The aforementioned individual may be restricted from physically attending the hearings where witnesses testify about him or her if the individual’s presence would be disturbing to the witnesses. Instead, the individual may have access to the testimony through closed-circuit televisions, recordings, and/or transcripts. These restrictions are justifiable in terms of the nature of a TC, the interests that are at stake, and the need to ensure that the TC can properly fulfill its mandate. The TC can compensate for the fact that witnesses are not cross-examined through the weight given to the testimony of the witnesses in the preparation of the TC’s final report. Moreover, by gathering as much information as possible about the events in question, the TC should be able to develop a reasonably balanced sense of these events.

2.2. Accountability mechanisms
Setting the foundations for the emergence of the civic compact during transitional periods requires the adoption of processes aimed at holding individuals accountable for their actions during periods of inter-ethnic conflict. Accountability mechanisms, which include criminal prosecution and lustration, play a role both in renouncing the norms of survival politics and actualizing the norms of inter-ethnic social capital. Accountability mechanisms offer symbolic and pragmatic means of confronting the norms of survival politics and the normalization of inter-ethnic violence. Symbolically, holding individuals accountable for their roles in inter-

487 Minow, supra note 427 at 57-59.
488 Ibid. at 72.
ethnic violence, acts of atrocity, and human rights violations conveys a collective rejection of such behaviour. Accountability mechanisms tangibly manifest that using violence to promote the agenda of the ethnic group or abusing one’s public power is fundamentally unacceptable in the polity and carries serious consequences. As Orentlicher writes with respect to prosecutions, “[b]y condemning past crimes through the strongest sanction used by the institutions of government to condemn, exemplary trials could send a message to the future: ‘This will not be tolerated again.’” 489 In this regard, accountability mechanisms also act as a deterrent to those who may be tempted to revert to acts of violence or human rights violations to advance their own ends.

From the perspective of cultivating the norms of inter-ethnic social capital, accountability mechanisms actualize key dimensions of the rule of law such as the principles that no one is above the law 490 and that power may not be exercised arbitrarily in the polity. The rule of law is further actualized by the processes used to hold individuals to account. The proceedings of well-designed accountability mechanisms are consistent with the principles of natural justice. Both the fact of holding individuals accountable for their actions and the manner in which they are held accountable are thus tangible manifestations of the operation of the rule of law in the polity. Accountability proceedings also provide a means of addressing past injuries and rights violations that could otherwise continue to be a source of conflict between ethnic groups. Minow comments, for example, that

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490 For a discussion of how prosecuting human rights violations demonstrates that no person is above legal accountability and promotes the rule of law, see Stephan Landsman, “Alternative Responses to Serious Human Rights Abuses—Of Prosecutions and Truth Commissions” (1986) 59 Law. & Contemp. Probs. 81.
To respond to mass atrocity with legal prosecutions is to embrace the rule of law... Applying the rule of law in these cases expresses the hope that legal institutions can handle such issues without betraying the ideals of law for the exigencies and pressures of politics, personal biases, or yet a new phase in the cycles of revenge and power struggles. 491

Accountability mechanisms also promote the right of groups to continued physical and cultural existence. Trying and punishing individuals for their roles in inter-ethnic violence, acts of atrocity, and gross violations of human rights assist in containing the threat posed by such individuals to the welfare of ethnic groups. Moreover, establishing such proceedings is evidence of a commitment to rely on the rule of law to redress these wrongs rather than to continue to rely on self-help measures such as retaliation. The establishment or reform of accountability mechanisms thus signals a shift in the governance framework of the polity. They represent a move from a polity where power could be exercised arbitrarily and to the great detriment of certain groups of citizens to a polity where the rule of law and the continued existence of ethnic groups are taken seriously.

2.3. Accountability mechanisms: prosecutions

Criminal prosecutions have become a relatively common approach to holding individuals responsible for their actions during periods of inter-ethnic violence. Prosecutions may occur under the domestic laws of a country through country’s own institutions or under international law in a war crimes tribunal or in the International Criminal Court (ICC). In Fiji, for example, the perpetrators of the 2000 coup were tried and convicted in Fijian courts. In Iraq, the Iraqi High Tribunal, a domestic judicial body, 492 has the jurisdiction to try individuals for war crimes. In Rwanda, both the domestic courts (including the traditional gacaca courts) and an

491 Minow, supra note 427 at 25-26.
492 The Iraqi High Tribunal was originally constituted as the Iraqi Special Tribunal. This Tribunal was created in December 2003 through the delegation of authority from the Administrator of the Coalition Provisional Authority to the Iraqi Governing Council. In 2005, the Iraqi Special Tribunal was integrated into Iraqi law, at which time the Special Tribunal became known as the Iraqi High Tribunal.
international criminal tribunal have played a role in bringing those involved with the 1994 genocide to justice. Similarly, in Bosnia and Herzegovina, prosecutions have occurred in local courts and before international bodies.

The Nuremberg and Tokyo trials\textsuperscript{493} were the first time that international war crimes tribunals were established to try individuals who had allegedly committed or been responsible for atrocities in war. The international community has since built on these precedents. At present, there are three independent international juridical bodies that adjudicate international criminal law, including law related to the Convention Against Genocide: the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC. Hybrid war crimes courts also exist. These hybrid war crimes courts are staffed by both foreign and domestic personnel, and represent a blend of international and domestic institutions. One example of a hybrid war crimes court is the Serbian War Crimes Court (WCC) in the District Court of Belgrade, which was established in 2003. The WCC is a domestic court with the exclusive jurisdiction to hear cases involving war crimes, genocide, and crimes against humanity.\textsuperscript{494} Other examples of hybrid war crimes courts include: the UN-administered judicial bodies in Kosovo, Sierra Leone (the Special Court for Sierra Leone), Bosnia (the War Crimes Chamber), and Lebanon (the Special Tribunal for Lebanon).

\textbf{2.3.1. The location of criminal proceedings}

In general, from the perspective of cultivating inter-ethnic social capital, it is preferable to prosecute individuals through domestic courts or through hybrid courts so long as the courts

\textsuperscript{493} The Nuremberg trials tried Axis leaders who had participated in or been responsible for atrocities committed during World War II, including actions related to the Holocaust. The Tokyo trials tried Japanese leaders responsible for the Rape of Nanking.

are located within the country in question. It is important to bring justice close to the population so that the masses can experience the restoration of the rule of law and the protection of each group’s right to continued existence. Prosecuting individuals through domestic institutions also conveys the sense that it is the polity—the citizenry—that is holding these individuals accountable for their actions rather than a more distant, international community. This promotes a sense of ownership over prosecutions and engages the population as a whole in the restoration of the rule of law and in the rejection of survival politics. Trials that are conducted in international fora such as the ICC risk alienating the general population from the process due to the physical distance between the population and the prosecutorial proceedings and the use of a foreign rather than more familiar domestic process. This alienation undermines the opportunity to actualize the norms of inter-ethnic social capital in the experiences of the masses.

There are some potential advantages to prosecuting individuals in international bodies such as the ICC or a tribunal such as the ICTY and the ICTR. As Kritz notes, “[a]n international tribunal is better positioned to convey a clear message that the international community will not tolerate such atrocities, hopefully deterring future carnage of that sort both in the country in question and worldwide.”\textsuperscript{495} International tribunals are also more likely to have the resources necessary to carry out prosecutions, including experienced staff who have no political connections (and therefore appear unbiased) to the conflict in question.\textsuperscript{496} As I will discuss in more detail below, countries emerging from periods of violent ethnic conflict often lack the resources and infrastructure necessary to undertake prosecutions of this magnitude.

\textsuperscript{496} Ibid.
Nevertheless, it is not always the case that an international body has better access to resources than local courts. The International Criminal Tribunal for Rwanda (ICTR), for example, lacked even basic resources such as paper, pencils, computers, and typewriters. The ICTR investigators often did not have experience dealing with cases of the magnitude of the Rwandan genocide, while many prosecutors were drawn from academia or human rights organizations and lacked experience in criminal trials. Moreover, from the perspective of cultivating inter-ethnic social capital, the critical importance of integrating the process of holding individuals to account into the experience of the general population militates in favour of relying on local courts rather than an international body. International bodies are frequently located outside the country and thus removed from the population that has endured the atrocities that lie at the heart of the accountability proceedings. Thus, although prosecuting individuals before an international body allows the international community to denounce the actions of such individuals, it is not conducive to cultivating inter-ethnic social capital at the level of the masses.

2.3.2. Challenges associated with domestic prosecutions
There are at least three major challenges involved with prosecuting individuals in domestic courts: concerns about retroactivity of the law; the efficiency and fairness of the process as a whole; and the risk that prosecutions will represent a “victor’s justice”. Each of these challenges raises concerns related to the cultivation of inter-ethnic social capital, particularly with respect to the rule of law. First, prosecutions of individuals for the alleged perpetration of acts of atrocity and gross violations of human rights may raise concerns about the retroactive application of law. It is generally preferable to prosecute individuals, especially those who

498 Ibid.
previously held high ranking positions, for war crimes, genocide, and/or crimes against humanity. Atrocity and gross human rights violations that occur in the context of inter-ethnic violence differ from even the most serious of ordinary criminal offences in that the former are motivated by the desire to decimate a group of people due to their ethnic identity. War crimes, genocide, and crimes against humanity involve a systemic element; these offences are organized or, at the very least, tolerated by government. Prosecutions for war crimes, genocide, and crimes against humanity thus convey a rejection of survival politics in a way that prosecutions for murder and sexual assault cannot. However, while war crimes, genocide, and crimes against humanity have been recognized in international law, not every country has enacted domestic legislation criminalizing these offences. Thus, at the time when acts of atrocity and gross violations of human rights are perpetrated, genocide, war crimes, and crimes against humanity may not exist as criminal offences in domestic law. In some cases, domestic legislation recognizing genocide, war crimes, and crimes against humanity as distinct categories of criminal offences is only enacted after periods of intense violent ethnic conflict. In such circumstances, trying individuals for these newly recognized criminal offences raises concerns about the retroactive application of the law.

It is a well-established rule of law principle that a criminal offence must be recognized in law before a person is held accountable for committing the offence. The European Court of Human Rights has described the prohibition on the retroactive application of the law as “an

499 Prior to World War II, the concept of an international war crimes tribunal was virtually non-existent, as was the concept that one could be prosecuted for “crimes against humanity”. The Nuremberg and Tokyo trials played a key role in establishing the norms surrounding the prosecution of such crimes. The fairness of these trials was compromised by the retroactive application of the law to the accused. See Minow, supra note 427 at 30-35.
The prosecution of individuals for genocide, war crimes, and crimes against humanity in relation to acts committed before these offences were recognized in a country’s domestic criminal legislation subverts the rule of law. Under these circumstances, the trials that are meant to restore the rule of law undermine it. Concerns of this nature have arisen in Rwanda, for example. There was no domestic legislation in Rwanda codifying criminal acts related to genocide and crimes against humanity at the time of the 1994 genocide, although Rwanda was a signatory of the Genocide Convention. Before Rwanda could begin to prosecute people in domestic courts, it had to incorporate its commitments under the Genocide Convention into domestic legislation. The creation of domestic legislation making genocide a crime did not fully allay concerns related to retroactivity since this legislation was created well after the 1994 genocide had occurred. Trying the most serious cases before the ICTR did not resolve concerns about the rule of law, however. Since the ICTR was constituted as an international body, there was some question about whether it had jurisdiction to try individuals for acts that occurred entirely within Rwanda. Moreover, the ICTR operated from Arusha, Tanzania; the distance between ordinary Rwandans and the ICTR weakened the impact of the ICTR on the perception that leaders were in fact being held accountable for their actions.

Retroactivity and concerns about the rule of law may be well understood by lawyers and academics, but not by the general population. The general population cannot be assumed to appreciate the impact that retroactivity concerns have on prosecutorial decisions. Thus, a

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501 Neil J. Kritz argues that most Rwandans received very little information about what the ICTR was doing, especially during its first few years of operation. See Kritz, supra note 495 at 132.
decision not to prosecute a leader for war crimes, genocide, or crimes against humanity because such offences were not criminalized in domestic legislation at the time of the offence may appear to the masses to be a failure to hold leaders to account. In such a situation, the decision not to prosecute out of concern for a principle linked to the rule of law has the effect of undermining the general population’s actual experience with the rule of law. Radical ethnic leaders may exploit this situation to perpetuate distrust between ethnic groups and a suspicion of state institutions.

There are at least three steps that can be taken to mitigate the appearance of a lack of accountability of leaders who have been implicated in war crimes, genocide, and crimes against humanity. First, efforts should be made to explain to the public in plain language why such leaders have not been criminally prosecuted for war crimes, genocide, and crimes against humanity. Second, leaders may be subject to the other consequences that, while not as severe, ensure that the leaders are accountable for how they abused public authority. For example, leaders may be charged with criminal offences such as conspiracy to commit murder and/or conspiracy to commit sexual assault. In addition, lustration laws may be applied to bar such leaders from holding public office in the future. Finally, leaders may be prosecuted before an international war crimes tribunal, although there are jurisdictional concerns raised by this option. As discussed above, there is some question about whether an international war crimes tribunal can have jurisdiction over crimes that occurred exclusively within a state’s borders. Moreover, this option may give rise to concerns over other forms of unfairness. For example, in Rwanda, the leaders of the 1994 genocide have largely been prosecuted by the ICTR, which

502 Lustration laws operate to exclude former state officials and bureaucrats from holding public office as a result of their affiliation or collaboration with the former regime. Lustration is discussed in detail later in this chapter.
does not have the jurisdiction to sentence a person to death. By contrast, the ordinary genocidaires, those that carried out the orders of the leaders, have been prosecuted in domestic courts for murder, sexual assault, and other offences. Rwandan courts do have the jurisdiction to sentence a person to death. Thus, while the leaders of the genocide are spared the death penalty, the low-ranking participants in the genocide may be executed. This appears to be manifestly unfair and undermines the confidence that Rwandans have in the measures taken to hold those involved with the genocide to account for their actions. A possible solution is to issue sentencing guidelines that specify that lower-ranking participants in war crimes, crimes against humanity, and genocide may not receive a penalty more severe than that which could be ordered by an international war crimes tribunal, i.e., life imprisonment.

The second challenge to prosecuting individuals for their actions during periods of inter-ethnic violence relates to the efficiency and fairness of the process as a whole. Most developing countries emerging from periods of violent conflict lack the resources, infrastructure, and credible, competent legal personnel to manage timely prosecutions of individuals who have played a role in the commission of atrocities and gross violations of human rights. Court buildings and other government facilities are frequently destroyed or damaged during conflict, and even basic resources such as paper, pencils, and type-writers are in short supply. Funding for hiring judges, prosecutors, investigators, and support staff is often insufficient, leading to serious problems related to under-staffing. Moreover, investigating and preparing to prosecute war crimes, genocide, and gross violations of human rights require a high degree of expertise that regular police, security forces, and prosecutors frequently do not have. The Serbian WCC, Office of the War Crimes Prosecutor, and the War Crimes Investigation Service have all
suffered from these types of difficulties. Insufficient resources and infrastructure have impeded the ability of these institutions to prosecute cases related to war crimes and crimes against humanity. Rwanda has struggled with similar difficulties. In 1996, legislation was enacted that established special chambers to try genocide-related crimes.

Similarly, in Rwanda, domestic courts, including the gacaca courts, have been overwhelmed by the number of cases related to the 1994 genocide. In 1996, legislation was enacted that established special chambers to try genocide-related crimes. The functioning of the special chambers, however, was undermined by a critical shortage of qualified legal personnel and the disarray of the physical infrastructure of the judicial system. These problems were compounded by the fact that the judicial system was flooded with indictments. Over 100,000 people were arrested and held in detention in relation to crimes committed during the genocide. In 2002, Amnesty International raised serious concerns about the fairness of the judicial process as a whole for genocidaires:

There are currently approximately 112,000 Rwandese in the country’s overcrowded detention facilities, in conditions that constitute cruel, inhuman, and degrading treatment. Most of

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505 Gacaca is a traditional form of Rwandan dispute resolution. It will be discussed in further detail below in the section on “Traditional mechanisms for accountability”.
507 Des Forges & Longman, supra note 497 at 58. Oomen reports that only 40 of the 800 lawyers and judges that had been practising in Rwanda were still present in the country in July 1994. See Barbara Oomen, “Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda’s Multi-Layered Justice Mechanisms” in K. Ambos et al., eds., Building a Future on Peace and Justice: Studies on Transitional Justice, Peace, and Development (Berlin: Springer-Verlag, 2009) 175 at 192.
508 Des Forges & Longman, ibid.
509 Ibid.
these detainees have not been tried in a court of law. There has been little or no judicial investigation of the accusations made against many of them. There is little likelihood that most of them will have their cases heard by the country’s existing, overburdened ordinary jurisdictions…in the foreseeable future.510

The failure to bring perpetrators of atrocity and gross violations of human rights to justice in an efficient and fair manner undermines the cultivation of a rule of law culture. The rule of law requires accountability but this accountability must be enforced in a procedurally fair and neutral manner. Unfairness and excessive delay in holding such perpetrators to account taint the legitimacy of the process as a whole and undermine public confidence in the judicial system. Inefficiencies and unfairness in domestic prosecutions thus squander an opportunity to initiate a new dynamic in how public institutions function.

The final challenge associated with prosecuting individuals for their actions during periods of inter-ethnic violence relates to the concern that such prosecutions will represent a “victor’s justice”. A key dimension of the rule of law is that all persons are subject to the law regardless of their status in society or their ethnicity. Public institutions, particularly judicial and legal institutions, must be perceived as being neutral in order to maintain public confidence. Thus, the perception that only “losing” parties are held accountable for atrocities and gross violations of human rights erodes the legitimacy of accountability mechanisms and subverts efforts to restore the rule of law. Indeed, the imposition of a victor’s justice is more consistent with survival politics than the norms of inter-ethnic social capital. Moreover, the perception that prosecutions represent a victors’ justice may contribute to a sense among accused persons that they are “political prisoners” or victims. These attitudes perpetuate the dynamics of survival

politics rather than force the accused persons, as well as society as a whole, to confront the consequences of ethnic extremism. These attitudes are also inconsistent with the idea that the polity is shared by constituent ethnic groups as equal partners – a core premise of the civic compact.

Concerns about the imposition of a victor’s justice are relatively low in cases where the peace process originates from a true “hurting stalemate”. In such a case, no single ethnic group has the ability to control the mechanisms adopted to hold individuals to account for their actions during periods of conflict. However, the risk of a victor’s justice increases materially where one ethnic group has held a distinct advantage in bringing violent conflict to an end. A good example is Rwanda. Since defeating Hutu extremists in 1994, the Tutsi-dominated Rwandan Patriotic Front (RPF) has played a central role in reconstructing and governing Rwanda. The RPF formed the transition government that ruled Rwanda from 1994 until elections were held in 2003. The RPF has overwhelmingly won every election held in Rwanda since those first post-genocide elections in 2003. The RPF has thus been largely responsible for structuring the country’s domestic response to prosecuting crimes committed during the genocide. A striking characteristic of the domestic genocide-related prosecutions is that very few, if any, charges have been brought against RPF members notwithstanding the fact that at least 25,000 to 40,000 individuals were killed as a result of RPF violations of human rights. Instead of prosecuting RPF members in domestic courts or turning them over to the ICTR, the Rwandan government

511 Alison Des Forges, “Leave None to Tell the Story” Human Rights Watch (1999), online: Human Rights Watch <http://www.hrw.org/legacy/reports/1999/rwanda/>. This is a conservative estimate of victims of the RPF. Abraham McLaughlin reported in the Christian Science Monitor that some people estimate that the RPF killed as many as 200,000 people: “Discussion is forbidden about whether the Rwandan Patriotic Front – the one-time rebel group that’s now Rwanda’s main political party – was involved in revenge killings of Hutus during and after the genocide. Some estimate the RPF killed as many as 200,000 people.” See Abraham McLaughlin, “Rwanda Bucks Blind Obedience” The Christian Science Monitor (9 April, 2004).
established military chambers to hear cases. By so doing, the government has treated the actions of RPF members as issues of military discipline rather than genocide-related crimes or violations of human rights. Domestic prosecutions in Rwanda have thus acquired the air of a victors’ justice.

The imbalance in genocide-related prosecutions has contributed to a sense among some Hutu detainees that their prosecutions are political in nature. Drumbl reports that the Hutu detainees whom he interviewed saw themselves as victims of RPF aggression and that these detainees justified their actions in terms of self-defence. Oomen similarly notes that the failure to prosecute RPF crimes has severely compromised the legitimacy of domestic prosecutions in the eyes of some stakeholders. More ominously, Corey and Joireman argue that the failure to prosecute RPF members has led to a form of “politicized justice” that increases “a desire for vengeance among the Hutu population…thereby contributing to, rather than curtailing, the risk of ethnic violence in the long run.”

2.3.3. Prosecutions and traditional or endogenous practices

One way to facilitate the actualization of the norms of inter-ethnic social capital at the level of the masses is to incorporate traditional practices in the mechanisms used during the transitional phase. Traditional practices convey important values to the masses such as accountability in a manner that is familiar and accessible. These practices can therefore help to cultivate norms

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514 Drumbl, “Law and Atrocity”, supra note 512 at 63.
515 Oomen, supra note 507 at 194.
517 Ibid. at 74.
such as the rule of law in a way that resonates with the masses. Furthermore, the incorporation of traditional practices can increase the perceived legitimacy of transition processes and thus help to rehabilitate the relationship between the state and the general population. However, traditional practices should not be adopted simply because they are traditional per se. The practices should reflect the broad values associated with the norms of inter-ethnic social capital, such as respect for the rights of other groups to their continued physical and cultural existence and to take part in the governance of society, respect for diversity, fairness, accountability, and a prohibition on the arbitrary exercise of power. The Rwandan gacaca courts are perhaps the most well-known example of the integration of a local practice into the process of prosecuting individuals for genocide-related crimes. The Rwandan experience with gacaca courts offers a number of useful lessons that may guide the integration of traditional or endogenous practices into accountability mechanisms during transition periods in other countries.

Gacaca is an endogenous Rwandan dispute resolution mechanism in which members of the local community elect leaders who then work to bring the disputants together to settle their dispute in accordance with communal justice. Historically, gacaca was primarily used to settle property disputes. Although often described as a traditional practice, gacaca has not been static or uniform. It is better understood as an endogenous Rwandan process that has evolved over time in response to changing circumstances.

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519 See Clark, ibid. at 776, 777-789. Clark presents a sound analysis of the relationship between the modern gacaca courts and the original practice (or forms of practice) of gacaca.
In October 2000, the Rwandan Transitional National Assembly adopted legislation that established the use of gacaca to try all but the most serious offences related to the genocide.\textsuperscript{520} Practically speaking, the gacaca courts offered a means of reducing the stress on the mainstream judicial system, which was buckling under the pressure created by the arrest of over 100,000 individuals\textsuperscript{521} for genocide-related crimes. The decision to use gacaca courts was also influenced by the executive of the government’s concern to ensure citizen participation in the pursuit of post-genocide justice. The executive considered that such participation was critical for bringing out the truth about what happened during the genocide and for beginning the difficult process of national reconciliation.\textsuperscript{522} There was serious debate within the Rwandan government about whether a gacaca-style of proceeding was appropriate for dealing with genocide-related crimes, however, since gacaca had never been used to address such serious matters.\textsuperscript{523}

The traditional gacaca process was altered in a number of respects order to make the process consistent with a state-sponsored criminal justice proceeding. For example, elements of the process were formalized and there was an effort to ensure that basic legal requirements for a fair trial were met.\textsuperscript{524} Nevertheless, the gacaca courts have retained key elements of the local,
participative grass roots approach to dispute resolution.\textsuperscript{525} For example, the hybrid gacaca courts are local in character and emphasize communal justice and social restoration. The proceedings of the hybrid gacaca courts are simplified and overseen by members elected from the local community. Initially, instead of sentencing offenders to time in prison, the hybrid gacaca courts used reparations and commuted punishments to work for the social good.\textsuperscript{526} However, after gacaca courts were assigned responsibility for more serious genocide-related crimes in 2008, they were given the authority to sentence offenders to life imprisonment in solitary confinement.

It is somewhat difficult to assess the impact that gacaca courts have had on developing the rule of law in Rwanda and on restoring confidence in public institutions. It is difficult to find reliable and up-to-date studies of Rwandan attitudes about reconciliation and gacaca courts.\textsuperscript{527} Moreover, “as many researchers have observed, Rwandans tend to guard their true opinions and to adjust their responses according to what they think that the interviewer wants to hear.”\textsuperscript{528} The studies\textsuperscript{529} that have been done on public opinion of gacaca highlight two key sets of attitudes. First, there appears to be overwhelming public confidence in the gacaca court process among both Hutus and Tutsis.\textsuperscript{530} Second, the public has expressed quiet concern

\textsuperscript{525} Ibid.
\textsuperscript{526} Ibid. Gacaca courts later were assigned responsibility for more serious genocide-related crimes and were given the ability to sentence offenders to life imprisonment in solitary confinement. See the discussion below.
\textsuperscript{527} Max Rettig, who conducted two surveys discussed below, comments on the challenges of obtaining data on how gacaca courts are perceived by the local population. (See Rettig, \textit{supra} note 518 at 27.) Rettig also notes that, “as many researchers have observed, Rwandans tend to guard their true opinions and to adjust their responses according to what they think that the interviewer wants to hear.” (\textit{Ibid.}.)
\textsuperscript{528} Ibid.
\textsuperscript{530} A study conducted by Longman, Pham, and Weinstein found that 24.6 percent of respondents strongly agreed and 58.3 percent agreed with the statement, “I have confidence in the gacaca court process”. Importantly, the confidence in the gacaca courts is shared by both Hutu and Tutsis. Seventy-seven percent of Hutu respondents
about aspects of gacaca. One study of the gacaca courts in the Sovu community found that a significant proportion of the population believed that people tell lies in gacaca. This same study reported that some allegations made before gacaca courts were motivated by other, non-genocide related incidents, such as adultery. Moreover, witness intimidation and fear of being accused of genocide-related crimes have impacted the willingness of community members to testify at gacaca. Non-survivors (i.e., Hutus who were not targeted by the radical extremists who perpetrated the genocide) also feel that their testimony is disregarded or not believed; only the testimony of survivors is taken seriously. The perception that non-survivor testimony is disregarded is reflected in this comment made by a woman interviewed by Rettig: “[t]he survivors are the only ones who speak. Truly, there is no freedom of expression at gacaca for ordinary people who have family in prison”.

In light of the two, somewhat inconsistent sets of public attitudes about gacaca, it is difficult to say what the impact of gacaca has been on the cultivation of inter-ethnic social capital. Nevertheless, it is possible to draw some lessons about integrating traditional or endogenous practices into the transition period. First, the robust public confidence in gacaca suggests that there is some merit to integrating endogenous practices into accountability proceedings during

and 74.6 percent of Tutsi respondents either strong agreed or agreed with the aforementioned statement concerning confidence in the gacaca process. See Longman, Pham, and Weinstein, ibid. at 217. These attitudes are mirrored in research conducted by Rettig in the Sovu community in Rwanda’s South Province. Rettig reports that in a public opinion survey, 73 percent of people either strongly agreed or agreed with the statement, “Overall, gacaca has functioned well”. A second, identical public opinion survey conducted approximately five months later found that 88 percent of people either strongly agreed or agreed with that statement. Similarly, 84 percent of people in the first survey and 94 percent of people in the second survey either strongly agreed or agreed with the statement, “I have confidence in the gacaca courts”. See Rettig, ibid. at 37.

Rettig, ibid. at 39.
Ibid.
Rettig, for example, found that 63% of respondents in one survey indicated that they either agreed or strongly agreed with the statement, “some people are afraid to give testimony defending the accused.” See Rettig, ibid. at 41.
Ibid.
Ibid.
the transition period. Data is not available that would help to understand the reasons for the relative public confidence in gacaca vis-à-vis the European style courts in Rwanda.

Nevertheless, the positive public response to gacaca suggests that the use of endogenous practices may increase the legitimacy of accountability proceedings, even though there may be procedural concerns raised by these practices.

Second, traditional practices should not be adopted unquestioningly. In addition to concerns voiced by Rwandans about certain aspects of gacaca, these courts have been widely criticized by international organizations and scholars for procedural deficiencies that have compromised their fairness. Some of the concerns raised include, for example, faulty procedure, judicial corruption, and false accusations. There have also been questions about the competence of gacaca judges, who are community members elected by the local population on the basis of their honesty and wisdom, to address complex legal questions and to manage the process. There is concern that the Tutsi-led government has used gacaca courts to impose a “victor’s justice”. Moreover, a lack of procedural protections and the absence of defence counsel have raised questions about whether gacaca courts comply with international norms governing due process. These criticisms from the international community highlight concerns that appear to be shared by many Rwandans, although Rwandans may not articulate their concerns using the same terminology. The lesson here is that traditional and endogenous practices do

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539 Amnesty International, “Gacaca”, supra note 510. See also Rettig, supra note 513 at 40 & 45.

not automatically confer legitimacy on all aspects of a process. While I do not suggest that Rwanda should have adopted procedures identical to international (or, more accurately, Euro-American) norms, I do consider that gacaca required further development to meet the fairness concerns that arise in a criminal context.

Where local traditions are incompatible with the norms of inter-ethnic social capital, such traditions should not be followed. Similarly, traditions that involve extra-institutional approaches to managing disputes such as blood feuds and honour killings should not be promoted as they subvert a core principle of the civic compact, namely that disputes must be confined to institutional arenas.

Third, endogenous practices may include features that are compatible with and complementary to the norms of inter-ethnic social capital. While gacaca suffers from procedural deficiencies, some of its features are highly consistent with core values associated with the right to participate, the rule of law, and the civic compact itself. Although gacaca has evolved over time, certain features have remained constant. These features include: holding hearings outdoors in communal spaces; an emphasis on public participation; and an emphasis on social cohesion and reconciliation.\footnote{Clark, \textit{supra} note 518 at 787.} These features actualize in ways that are meaningful to Rwandans the meaning of “the right to participate”\footnote{The Rwandan government has emphasized the importance of public participation in and ownership of the gacaca courts. Many Rwandans have vocalized that Rwandans are the driving force behind the gacaca courts rather than the state. See Clark, \textit{ibid.} at 800-802.} and the rule of law principle of transparency in the exercise of power. The emphasis on holding hearings in open, communal spaces and on participation also reflects important dimensions of “fairness” insofar as studies
have shown that people are more likely to view a process as being “fair” if they perceive that they have had the opportunity to be heard. These features further convey that the public is a principal stakeholder in the accountability proceedings. Finally, the emphasis on social cohesion and reconciliation is consistent with the basic principle of the civic compact, namely that ethnic groups co-exist in the polity and share governance rights and responsibilities. Gacaca illustrates that the norms of inter-ethnic social capital can be implemented in ways that are informed and possibly enriched by endogenous practices.

Fourth, the Rwandan case highlights the importance of engaging the public in developing approaches to accountability mechanisms that blend endogenous practices with key aspects of the norms of inter-ethnic social capital. Actualizing the norms of inter-ethnic social capital in ways that are meaningful to local populations requires dialogue with these populations about what they understand values like “participation”, “fairness”, and “transparency” to mean. Efforts should then be made to integrate the population’s views into the actual structure of accountability mechanisms.

Finally, the Rwandan case illustrates that the adoption of an endogenous practice that features public ownership and participation is not a panacea for a culture of impunity. Public ownership of accountability processes must be taken seriously by government. Real efforts to restore accountability, including the accountability of public officials, must complement the adoption of endogenous practices. In Rwanda, the government’s command-style of justice\(^{543}\) with respect to accountability for genocide-related crimes leaves little room for publicly

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questioning how the government has approached accountability issues. This command-style of justice is characterized by an almost militaristic approach to post-genocide justice issues where government places a heavy emphasis on the duty of citizens to participate in accountability proceedings. The Rwandan command-style of justice is a top-down, government-imposed and government-controlled approach to accountability for genocide-related crimes that is awkwardly juxtaposed with the grassroots approach to justice embodied by gacaca. For example, as of April 2007, Rwandans are required to attend gacaca by the government and the failure to do so carries a significant fine. The right to participate in accountability mechanisms has thus been transformed into the duty to participate.

The government’s command-style of justice has impaired the development of a sense that public officials are subject to the law, a key dimension of the rule of law. Instead of a government that is subject to the law, this command-style of justice leaves the impression of a government that dictates the terms and extent of accountability and that conscripts the citizenry into the process of providing “grassroots justice”. Furthermore, notwithstanding the emphasis on public ownership of and participation in gacaca, there is little evidence that the general population has developed a sense that it has the right to question the government’s actions and the functioning of public institutions. In a survey conducted in the Sovu region of Rwanda, for example, 29 percent of Sovu residents stated that people in the community would commit violent acts if ordered to do so by public officials. Rettig reports that the Sovu community almost unanimously agreed with the statement, “it is important to obey the authorities” while only 25 percent agreed with the statement that “it is sometimes better to disobey the

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544 Rettig, supra note 513 at 37.
545 Ibid. at 44.
authorities. These attitudes are particularly troubling given the role that public authorities had in inciting the 1994 genocide. If a civic compact is to emerge and have force in Rwanda, the public must become much more willing to question the government’s actions and to demand from their political leaders moderation, public accountability, equal opportunities to participate in public processes, and, above all, protection of the right of all groups to continued existence. In sum, traditional practices must form part of a larger framework for transition that is premised upon entrenching the norms of inter-ethnic social capital as the foundation of the polity. Relying on the adoption of endogenous practices alone to legitimize key dimensions of the transition process without integrating the norms of inter-ethnic social capital into the process as a whole yields fundamental normative inconsistencies.

2.3.4. Amnesty
One of the thorniest issues during the transitional period is whether to grant amnesty to perpetrators of atrocity or gross violations of human rights in return for confessions, information about what has happened to missing persons, or other forms of cooperation. On the one hand, granting amnesties in cases of gross violations of human rights and atrocity arguably violates the norm of the rule of law and undermines the institutions of the state, especially legal institutions. Rehabilitating the legitimacy of the state and its institutions will be difficult if perpetrators of atrocities and gross violations of human rights appear to go unpunished. On the other hand, the practical realities of managing a transition period may require granting amnesties under certain conditions in order to obtain consensus of elites on key issues. Elites associated with a dominant ethnic group may staunchly oppose the peaceful introduction of reform or the initiation of a TC, for example, if they know that they will likely

546 Ibid.
be indicted as a result. The only way to change such elites’ calculus of the costs and benefits of agreeing to the reform of institutions or the initiation of a TC is to promise that they will not be prosecuted for their actions under the old regime. In these cases, the practical reality is that there will not be any opportunities to cultivate the norms of inter-ethnic social capital unless concessions on amnesties are made. While amnesties may undermine the rule of law, at least this norm can be promoted in other ways and there is scope to lay the foundation for the civic compact.

Ultimately, the decision about granting amnesties must be made with reference to the local context, the needs of a particular polity, the views of the local population, and any relevant traditions and customs. The cases of Fiji and South Africa illustrate that granting amnesties can have very different implications for long-term stability depending on the local circumstances. In Fiji, the proposal to grant amnesties to the perpetrators of the 2000 coup d’état was highly contentious and triggered a stand-off between the Fijian Prime Minister and the top general of the Fijian military. After the 2000 coup, the Soqosoqo Duavata ni Lewenivanua (SDL) government introduced the Reconciliation, Tolerance and Unity Bill. Pursuant to this Bill, a National Reconciliation and Unity Commission would be established to investigate the coup. This Commission would act somewhat like a TC: it would listen to the accounts of victims and perpetrators, and then make recommendations to the President about which perpetrators deserved a grant of amnesty and which victims ought to be compensated. The amnesty proposal generated considerable controversy. Tensions over the proposal

549 See, for example, “One rule for all” Fiji Times (5 May, 2005), online: Fiji Times <http://www.fijitimes.com/print.aspx?id=20765>; and “It won’t work, Adi Koila says” Fiji Times (8 May, 2005),
escorted when the head of the military, Cmdr Bainimarama, became involved and demanded that the amnesty provisions of Bill be removed. When Prime Minister Qarase failed to act on Cmdr Bainimarama’s demands, Cmdr Bainimarama seized control of the government through a military coup. Although Cmdr Bainimarama may have had personal motivations for opposing the amnesty provisions, the opposition to the amnesty provisions also originated from those with concerns about retributive justice, upholding the rule of law and the divisive impact that such provisions would have in Fiji. Fiji has not yet returned to democratic governance.

In South Africa, the granting of amnesties played a pivotal role in brokering the transition from apartheid to democratic governance in a relatively peaceful manner. The legal foundation for the granting of amnesty was laid in the post-amble of the Interim Constitution. The framework for administering grants of amnesty was established in the Promotion of National Unity and Reconciliation Act (“PNUR Act”), which created the South African TRC. The TRC’s mandate included granting amnesty in respect of “acts associated with political
objectives”, subject to certain conditions. The TRC included a committee that dealt with amnesty applications. Individuals seeking amnesty were required to file an application with the Amnesty Committee. Applicants were required to demonstrate that their crimes were political in motive and to make full disclosure of the acts for which they were requesting amnesty. Amnesty applications for acts that constituted gross violations of human rights required an open public hearing. Notice of the hearing had to be provided to family members of the victims, who were also entitled to be heard at the public hearing. Amnesty applications for acts that did not constitute gross violations of human rights could be processed in chambers.

It is widely accepted that a negotiated transition would not have been possible without compromise on the issue of amnesty and that the establishment of the South African TRC was contingent upon agreements on a mechanism for the granting of amnesties. The South African Constitutional Court has recognized that the granting of amnesties was a crucial component of the negotiated settlement which resulted in the adoption of the Interim Constitution. In a unanimous decision dismissing an application for an order declaring the amnesty provisions of the PNUR Act unconstitutional, the Constitutional Court recognized that concluding negotiations on the Interim Constitution had required leaders to make hard choices between competing demands and interests. While victims had legitimate interests at stake that were impacted by the granting of amnesty, the interests of South African society as a whole in

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555 Amnesty extended to both criminal and civil liability.
promoting truth-telling and reconciliation were also engaged by amnesty grants. The Court recognized a nexus between truth-telling and healing, reconciliation, and reconstruction. \(^{557}\) Nagy argues that although amnesty was a compromise, it came to be defended in terms that are much broader than political expediency such as the need for truth, reconciliation, and reconstruction. \(^{558}\) Nagy further argues that amnesty did not deliver sufficient truth for understanding and overcoming the legacy of apartheid. \(^{559}\) Notwithstanding Nagy’s arguments, the practical reality is that it would not have been possible to negotiate the end of the apartheid era without the amnesty provisions in the Interim Constitution. The granting of amnesty was not ideal in terms of promoting accountability and other rule of law values. However, the damage done to the rule of law by granting amnesty appears to be contained. Gibson, for example, presents evidence from a survey of the opinions and attitudes of South Africans that suggests that the granting of amnesty did not subvert support for the rule of law in South Africa. \(^{560}\) Furthermore, the rule of law was served generally by the transition to a democratic

\(^{557}\) Ibid. at para. 17 per Mahomed J. (writing for the Court).


\(^{559}\) Ibid. at 3.

\(^{560}\) Gibson, “Truth”, \textit{supra} note 447. Gibson’s approach to testing the attitudes of South Africans about the rule of law had two primary dimensions. First, Gibson used a scale to measure general commitment to universalism in the rule of law. Since the granting of amnesty is inconsistent with equal treatment before the law, Gibson hypothesized that the amnesty proceedings of the South African TRC would correlate to lower support for universalism in the application of the law. Second, Gibson considered the supposition that the TRC process had eroded confidence in legal institutions. Gibson reasoned that if the TRC undermined support for the rule of law in South Africa, then the survey data should show that supporters of granting amnesty to perpetrators of gross violations of human rights are less committed to legal universalism and have less confidence in South Africa’s legal institutions. (Gibson acknowledges that the best analysis of the impact of the TRC on attitudes about the rule of law requires a comparison of survey data from before and after the TRC. However, such data does not exist.) Gibson’s survey results demonstrated that there is only a trivial correlation between support for the granting of amnesty and attitudes concerning legal universalism in all four major racial groups in Africa (blacks, whites, Coloured people, and those of Asian descent). Gibson also found that there was a significant positive correlation between support for amnesty and confidence in the South African legal institutions in all four racial groups. (See Gibson, “Truth”, \textit{supra} note 447 at 350-351.) Gibson’s conclusion is that there is “no evidence that the amnesty process has undermined support for the rule of law in South Africa, and this conclusion applies to Africans, whites, Coloured people, and those of Asian origin with equal force.” (Gibson, “Truth”, \textit{supra} 447 at 351.)
governance framework. The processes used to implement regime change, including elections, a constitutional assembly, and extensive public consultations, actualized key aspects of democracy and the rule of law in the experiences of South Africans. The process through which amnesty was granted was transparent and embodied procedural fairness, which also promoted rule of law values. Moreover, the rule of law was not the only important value at stake in the transitional period: the failure to broker a peaceful means of transitioning from apartheid to democracy would have plunged South Africa into civil war. The compromise on amnesty played a role in safeguarding the right of ethnic groups to continued existence by preventing a descent into widespread violence.

Although amnesty became justified in South Africa in terms of normative values such as truth and reconciliation, I argue that it is most helpful to understand amnesty in terms of its instrumental value. In each case, the potential benefits associated with amnesty must be weighed against its potential costs. Benefits may include, as they did in South Africa, the ability to negotiate a peaceful regime change and providing perpetrators of atrocity and human rights violations with incentives to cooperate with a TC’s investigations. The costs may include impeding the cultivation of the rule of law, failing to counter a culture of impunity, and doing further offence to victims and the families of victims. Another consideration that is relevant to this calculus is whether evidence necessary to prosecute offenders, particularly to the standards required by natural justice in criminal proceedings, is available. It appears that the evidence necessary to produce convictions in South Africa was either destroyed or is missing, for example.\(^\text{561}\) By contrast, most of the perpetrators of the 2000 coup in Fiji had

already been convicted when the issue of amnesty arose. While this type of calculus may seem to be a crude approach to decision-making given the important issues at stake, the reality is that there are usually multiple interests at stake. Some of these interests are not compatible, as the South African case illustrates. Determining which of these interests should prevail on a normative basis\(^{562}\) may not be possible since the interests at stake are all associated with legitimate and important ends. Instead, the decision may need to be made on the basis of political expediency with a view to facilitating a peaceful and orderly transition, taking into account the potential costs and benefits of granting amnesty.

As a final note, issues surrounding amnesty provide opportunities to promote the norms of inter-ethnic social capital. For example, wherever possible, the public should be consulted about the issue of granting amnesty. Ensuring that people have the right to be heard on this very sensitive topic increases the likelihood that the final decision about amnesty will be perceived as legitimate, even if some people disagree with the substance of the decision. Moreover, the consultation process is an opportunity to actualize the right to participation and aspects of the rule of law such as transparency in the peace process. If a decision is made to grant amnesties, it is generally advisable to require individuals to comply with certain conditions in order to be eligible for amnesty in order to minimize the negative effects on the promotion of accountability. For example, an individual might be required to testify about the nature and extent of his or her participation in the commission of gross violations of human rights and to take responsibility for his or her actions. An individual might also be required to provide information about the fate of missing persons in order to provide families of victims

\(^{562}\) By “normative basis”, I mean determining which interests should prevail on the basis of which interests serve a higher moral and public good and therefore should be favoured.
with a measure of closure. Care should be taken to design an application process that is consistent with rule of law values and that gives the victims of atrocity and gross violations of human rights a fair opportunity to be heard on whether a person ought to receive amnesty or not. Finally, although amnesty may prevent the prosecution of perpetrators of atrocity and human rights violations, it need not bar other forms of accountability. For instance, perpetrators of atrocity and gross violations of human rights should be prevented from holding public office, serving in the bureaucracy, and serving in the police or military. Such restrictions impose consequences on perpetrators for their past actions and thus ensure that there is some accountability for these actions.

2.4. **Accountability mechanisms: lustration**
Lustration refers to the process of barring former state officials from holding public office as a result of their affiliation or collaboration with the former regime. Lustration has played a key role in the democratic transition of countries formerly controlled by Soviet communist regimes such as Poland, the Czech Republic, and other Central and Eastern European countries. Many of these countries have adopted lustration laws which are, in effect, public employment legislation aimed at vetting candidates for public office in order to eliminate candidates who were members of the *nomenklatura* or who worked with the secret police. Candidates with ties to the former regime face a range of limitations, from a complete and permanent bar on holding public office to restrictions on the level of public office they may hold to a time-limited bar on holding public office. For example, the former Czechoslovakia adopted a lustration law in 1991 that prohibited former high-level party members, members of the police forces, and their collaborators from holding high level public offices in the state sector for five years. The
public offices included posts in the military, judiciary, universities, and the state mass media.\(^5\)

Lustration may serve to promote the norms of inter-ethnic social capital at the level of the masses in at least three ways. First, removing officials who are implicated in the repressive acts of the former regime is a key step in rehabilitating the legitimacy of the state. The ongoing participation in public governance of officials who have demonstrated indifference or disregard for the protection of human rights, including collective rights to group identity, and the rule of law taints the legitimacy of public institutions. Their presence suggests that although institutional structures may have been reformed, the exclusionary values of the previous system continue to inform the governance of the state. This issue is both one of the practical functioning of the government (can reform take hold if the “old guard” retains access to power?) and perception (will the masses believe that reform has occurred if the public face of state institutions does not change?).

Second, lustration censures officials for their previous actions and attaches consequences to the more serious manifestations of survival politics such as human rights violations and abuses of the rule of law. Lustration conveys a collective judgement against the practices associated with survival politics. It therefore plays a role in making a break from the norms of survival politics and transitioning to the norms of inter-ethnic social capital. Lustration may have particular relevance in countries where prosecutions for crimes committed in periods of inter-ethnic conflict are impeded by various obstacles such as a lack of resources. In these cases, lustration

ensures that certain misdeeds such as violations of human rights do not go unpunished, even though securing criminal convictions for such actions is unlikely. Lustration may also be useful in addressing situations where some elites refuse to cease hostilities and to work towards a power-sharing approach to governance because they suspect that they will be indicted as soon as they give up their claims on power. In such situations, compromises may be necessary to bring an end to violent conflict or insurgency. Lustration may serve as a cornerstone for such compromises: the elites in question agree to step down from high-ranking roles and not to pursue public office in return for amnesty from prosecution in criminal courts.

Third, lustration can serve as a means of actualizing the right to continued existence by removing officials who represent threats to the continued physical and cultural existence of constituent ethnic groups. When an official’s past actions have compromised the continued existence of an ethnic group, then barring this official from holding public office represents a tangible step towards securing the existence of the ethnic group. In this regard, lustration can play a role in directly promoting the norms of inter-ethnic social capital at the level of the masses.

Lustration’s ability to cultivate the norms of inter-ethnic social capital at the level of the masses depends on how it is structured. There is a wide range of approaches to lustration, some of which risk subverting human rights and the rule of law. Moreover, some approaches are more sensitive to the context of an ethnically polarized polity than others. It is helpful to review a classification of lustration systems developed by Roman David in order to establish a framework for critically assessing lustration as a tool for promoting inter-ethnic social capital.
David examines the “various methods of dealing with inherited personnel situations within the public administration, security, and other positions in the state structure in times of regime changes”. David does not address the method of lustration, i.e., the method of determining collaboration with the former regime. Nevertheless, his categorization provides a useful starting point for analysis.

David identifies two broad categories of lustration systems: exclusive systems and inclusive systems. In exclusive lustration systems, officials associated with the past regime are not permitted to hold certain posts in the new political order. While a former state official may hold a lower position that is not subject to lustration laws, he or she is automatically barred from lustrated posts once his or her collaboration is established. There is no discretion in the decision to exclude a person from a lustrated post once collaboration is established. This approach ensures that certain key posts in the new state institutions are “disconnected from past practices through personnel changes”. Exclusive systems were adopted in Czechoslovakia in 1991, Bulgaria in 1992, and Albania in 1993.

The lustration system adopted in Czech Republic is a good example of how exclusive systems function. The system uses a person-by-person specific vetting process. The Czech

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565 Ibid. at 353-354.
566 Ibid. at 354.
567 Ibid. at 355.
568 The Czech lustration law was originally adopted in 1991 when the Czech Republic formed part of Czechoslovakia. After the split of the Czechoslovak federation, the law was not applied in the Slovak Republic and expired at the end of 1996. However, the lustration law was extended indefinitely in the Czech Republic in 2000. See Roman David, “Lustration Law in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)” (2003) 28 Law & Soc. Inquiry 387 at 409. The lustration law continues to be in effect in the Czech Republic [David, “Law”].
lustration laws identify a set of groups and activities that existed under Communist rule. Membership in any of those groups or participation in the named activities is a complete bar to holding any of the positions listed in the lustration laws. An individual who holds or applies for any of the positions identified in the lustration law must submit two documents. First, he or she must provide a certificate from the Ministry of the Interior about his or her work for, or collaboration with, the secret police; the written consent of the individual is necessary before this certificate can be published. Second, he or she must provide a personal affidavit stating that he or she did not work with or belong to any of the other groups listed in the law. If the individual belonged to any of the groups listed in the law, he or she is not eligible to hold any of the positions listed in the law. However, the individual may hold other posts that are not included in the law. The list of lustrated posts is broad, and encompasses appointed and assigned senior positions in the government, bureaucracy, intelligence services, military, and police. Other lustrated posts include: judges, prosecutors, investigators, state notaries, some security-sensitive trades where state concessions are required to operate (e.g., the manufacture of munitions and firearms), academic officials in senior management positions, public media, the management of the national bank, and management of enterprises in which the majority shareholder is the state.

Initially, the Czechoslovak lustration laws included provision for the creation of a review body called the Independent (Review) Commission. This Commission reviewed positive lustration

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570 The information in this paragraph is derived primarily from David, “Law”, *supra* note 568 at 409-410. For additional discussion of the Czech lustration system and its operation, see Priban, *ibid*.

571 For a discussion of disqualifying positions and activities under the Czech lustration law, see Priban, *ibid* at 311-313.
certificates issued when a private citizen was found to have collaborated with the secret police under the Communist regime. Unlike the other categories of activities and memberships for which a person could be issued a positive lustration certificate, this category applied to individuals who worked secretly for the Communists and who therefore did not have clear membership in the repressive regime. This category was controversial since it was not always clear whether a person consciously collaborated with the secret police, was a target of police monitoring, or was the unintentional source of information gathered by police in interviews. While the public was concerned to ensure that secret agents did not hold public office, it was often difficult to discern whether a citizen was working for the police or was its victim. Thus, when a person was issued a positive lustration certificate on the basis of having collaborated with the secret police, the Commission reviewed the certificate on the basis of the reliability of available evidence, including the records of the secret police. The Commission’s work became unnecessary after the Constitutional Court reviewed the lustration laws and annulled the category related to private citizens’ collaboration with the secret police, and the Commission was subsequently dissolved. Other applications for lustration certificates are processed by administrative staff of the Security Office of the Ministry of the Interior. The issuance of a lustration certificate is an administrative act and a citizen can therefore file an administrative complaint with respect to its issuance.

One advantage of the exclusive system is its efficiency. By minimizing discretion to determine whether a person should or should not be excluded from holding public office and by adopting

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572 Priban, *ibid.* at 312.
a relatively straight-forward system for processing lustration certificates, it is possible to move quickly to exclude members of the old regime from governance. In assessing the exclusive lustration system in the Czech Republic, for example, David comments that the system “enabled the new elite to secure control over the state administration, launch crucial reforms and catch up with Poland and Hungary”.\footnote{David, “Lustration Systems”, supra note 564 at 356.} David further comments that the lustration process adopted in the Czech Republic is also “more suitable for societies that are poor in human resources and do not have a large number of reliable civil servants to carry out the examination of transgressors.”\footnote{Ibid.} At the same time, however, the exclusion of individuals on the basis of broad categories of membership and activities in the former repressive regime without individualized hearings raises legal concerns about the protection of these individuals’ rights. Given that individuals have economic interests at stake in terms of current and future employment prospects, as well as reputational interests, it seems appropriate that they should be entitled to an individualized hearing to determine the extent of their individual culpability with respect to the former regime’s misdeeds. In this regard, an individual should be entitled to know the evidence against him or her, including records that will be used to assess his or her past actions and the reliability of such records. In addition, the individual should be entitled to make submissions in writing or orally. If an individual will be completely banned from holding all forms of public office, the procedural rights may even extend to allowing the individual the right of cross-examination in terms of the evidence brought against him or her. Facilitating individualized hearings that provide an appropriate level of procedural protections may be beyond the scope of countries that lack a corps of reliable and experienced civil servants who have access to adequate resources. In the Czech case, concerns about a lack of adequate human resources and other infrastructure to provide appropriate procedural
protections to individuals subject to lustration ultimately resulted in a narrowing of the
categories of memberships and activities which were subject to lustration.\footnote{Ibid.} Only individuals
who had clear roles in the repressive Communist regime were subject to lustration. There is
therefore a trade-off to be made: vetting can occur efficiently, even in states that lack human
resources, but the categories of individuals who are lustrated must be drawn relatively
narrowly and, in general, will be limited to those who played clear roles in the repressive state
apparatus. This implies that the categories of individuals who are lustrated must only include
officials who, by the very nature of their position, played a clear role in the repressive state
apparatus. If there is any doubt about the extent to which an official may have participated in
the repressive acts of the state, that category of official must be excluded.

David’s second category of lustration systems is inclusive systems. In inclusive systems,
officials who collaborated with the former repressive regime may retain their public office
provided that they comply with conditions requiring them to reveal their past involvement with
the regime.\footnote{Ibid. at 353 and 357.} The assumption is that the public can exercise control over the official once
these revelations are made.\footnote{Ibid. at 357.} Officials are not forced to disclose the truth about their past,
however. They may resign if they prefer not to provide information about their past
collaboration with the former regime. A key assumption in an inclusive system is that “the
new democracy breaks continuity with the past through ending the secrecy typical of the
previous regime, making the new personnel policies transparent.”\footnote{Ibid.} In the case of officials
who refuse to disclose information about their past, the polity breaks continuity with the past

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\begin{itemize}
  \item \footnote{Ibid.}
  \item \footnote{Ibid. at 353 and 357.}
  \item \footnote{Ibid. at 357.}
  \item \footnote{Ibid.}
regime through personnel changes.\textsuperscript{583} Inclusive systems were adopted in Hungary in 1994, Poland in 1997, Romania in 1999, and Serbia, in the case of the highest state officials in 2003.\textsuperscript{584}

In some cases (e.g., Hungary), the initial investigation of the past is undertaken by a lustration panel. In Hungary, for example, a panel of three judges reviews evidence to make a determination if a person collaborated with the former regime. If a public official is found to have collaborated with the former regime, the official is confronted with the information. The official can then choose to resign or to retain his or her post, but have his or her name published in the news media.\textsuperscript{585} In other cases, which David describes as “reconciliatory inclusive systems”, the onus is on the official to reveal his or her past collaboration. Poland adopted a reconciliatory inclusive system, for example. In Poland, each official holding a position to which lustration laws apply is required to submit an affidavit concerning his or her past. This affidavit is then subject to special lustration verification procedures. Officials may resign their post or transfer to a non-lustrated position if they choose not to undergo this process. Details of past collaboration and any evidence of dishonesty in the affidavit are announced publicly.\textsuperscript{586}

David identifies a third, hybrid category of lustration systems described as “mixed systems”.\textsuperscript{587} In mixed lustration systems, lustration occurs on a case-by-case basis. There are no automatic

\textsuperscript{583} Ibid.
\textsuperscript{584} Ibid. at 357-358.
\textsuperscript{585} Ibid. at 358. For a detailed examination of the lustration system in Hungary, see Elizabeth Barrett, Péter Hack & Ágnes Munkácsi, “Lustration as Political Competition: Vetting in Hungary” in Mayer-Rieckh & De Greiff, supra note 569, 260.
\textsuperscript{586} David, “Lustration Systems”, \textit{ibid.} at 359-360.
\textsuperscript{587} Ibid. at 361-362.
consequences that flow from an official’s past collaboration, but the official generally must demonstrate his or her ability to hold a particular post in order to retain his or her position. Decisions are ultimately made with reference to the individual’s past record, the requirements of a particular post, and, from a pragmatic perspective, the nature of the labour market.\footnote{588} This approach was adopted in Germany as a term of the Unification Treaty.\footnote{589}

In mixed systems, the lustration decisions are often made by “vetting commissions”. Some vetting commissions are staffed by members of the institutions in which the person being investigated works or seeks employment. Wilke refers to these types of commissions in the German case as “administrative commissions”.\footnote{590} Administrative commissions integrated vetting procedures into the everyday work of an institution, but lacked legitimacy since the members of the commission were not elected nor did they come from outside of the institution itself.\footnote{591} Alternatively, vetting commissions may be staffed by a mix of members of the institution and outsiders; the outsiders typically consist of individuals with professional expertise (e.g., lawyers) and individuals with high moral standing (e.g., representatives of civil society).\footnote{592} These outsiders may be elected to the commission or appointed by the legislature. Wilke refers to these types of commissions in Germany as “pluralistic commissions”. Wilke argues that while pluralistic commissions required more resources and were more labour-

\footnote{588}Ibid. at 362. See also Serge Rumin, “Gathering and Managing Information in Vetting Processes” in Mayer-Rieckh & De Greiff, \textit{supra} note 569, 402 at 405-406.\footnote{589} David, “Lustration Systems”, \textit{ibid.} \footnote{590}Christiane Wilke, “The Shield, the Sword, and the Party: Vetting the East German Public Sector” in Mayer-Rieckh & De Greiff, \textit{supra} note 569, 349 at 354.\footnote{591}Ibid.\footnote{592}Ibid.
intensive to establish, they ultimately were seen as more independent of government and therefore enjoyed greater legitimacy.\textsuperscript{593}

An important drawback to mixed lustration systems is the need for a large number of reliable personnel to carry out the screening process. Large human resources are required to investigate the past history of those being vetted, which generally requires sifting through vast amounts of information and confirming details about an individual’s past. The exercise of discretion in a mixed system also requires a more sophisticated decision-making process that incorporates procedural protections for individuals being lustrated. The scope of procedural protections required by natural justice principles would appear to be fairly robust given that individuals are impacted in a direct and personal way by the lustration process. Although an individual’s liberty may not be at stake, economic rights (the ability to hold certain positions) and privacy issues are engaged by the lustration process. The decision-making process in a mixed system must therefore ensure that individuals have the ability to know and to respond to the evidence about them used in the lustration process.

Building on David’s analysis of the types of lustration systems, I argue that a mixed system holds the most potential for promoting inter-ethnic social capital at the level of the masses in most cases. By “mixed system”, I mean a system that deals differently with public officials, depending on the nature of the officials’ collaboration with the former regime. Thus, a mixed system is neither fully exclusive nor fully inclusive. For most public officials who have participated in some way in the repression of the past regime, the system should be inclusive.

\textsuperscript{593} \textit{Ibid.}
However, officials who have played pivotal roles in directing the commission of gross violations of human rights or the perpetration of atrocities should be completely barred from holding public office or serving in a public capacity. Lustration legislation should specify different categories of past involvement with repressive acts and attach proportionate levels of lustration to these categories, depending on the nature of the involvement. Arguably, lustration legislation should also sanction violent subversive movements and insurgents, as well. However, applying lustration legislation to those who have opposed a repressive regime poses some difficulties since one person’s “freedom fighter” is another person’s terrorist. Moreover, in the context of a civil war, the use of violence by either the government or rebels may be difficult to sanction. Nevertheless, there are objective criteria that could guide the application of lustration laws to rebel groups. For example, a distinction could be made between violence that targets combatants and violence that targets civilian populations. While the former may not trigger the application of lustration laws, the commission of the latter form of violence should invite sanction regardless of whether the perpetrator is associated with the government or rebel forces.

A mixed lustration system is more sensitive to the distinct dynamics of an ethnically polarized country emerging from violent conflict than either an inclusive system or an exclusive system. An important attribute of an ethnically polarized, developing society is the robust levels of intra-ethnic social capital that exist. As I discussed in Chapter Two, the ethnic group plays a central role in the lives of its members. In this context, “collaboration with the former regime” will often equate to cooperation with a person’s ethnic group. In a developing country where the ethnic group provides many, if not most, of the political, social, and economic goods typically provided by the state in a developed society, the failure to cooperate with one’s ethnic
group would cut a person off from vital resources necessary for survival. Furthermore, ethnic identity is an important part of a person’s sense of self. While it is important to avoid unthinking loyalty to one’s ethnic group, it is also important to recognize that refusing to cooperate with one’s group involves a complex form of self-betrayal at one level of the psyche. The nature of ethnic identity, particularly in polarized developing countries, should therefore be a mitigating factor in assessing a person’s culpability for the purposes of lustration. This suggests that an exclusive lustration system, with its broad approach to preventing any official who is identified as a collaborator with the former regime, is inappropriate in the context of an ethnically polarized country emerging from violent conflict.

The adoption of an exclusive approach to lustration also raises concerns about the protection of human rights and the rule of law. Critics of exclusive lustration systems argue that the lack of discretion in the system amounts to collective punishment of all those who have some degree of cooperation with the past regime. Critics further contend that exclusive lustration systems violate international standards of human rights, including the freedom of expression and the right to be free from discrimination. The automatic barring of public officials who have collaborated with the former regime also appears too arbitrary and a violation of the right to be treated fairly. This is especially true in developing countries, where the government is often one of the largest employers and a job in the bureaucracy is highly desirable. In this regard, the arbitrary nature of exclusive systems is inconsistent with important dimensions of the rule of law.

595 Ibid. However, Roman David suggests elsewhere that critics have underestimated or overlooked the legitimate aims of lustration and that the legitimate aims of lustration may justify a proportional encroachment of certain rights pursuant to the provisions of various international conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5. See David, “Laws”, supra note 568 at 389.
It is not surprising that David reports that the political opposition in every country that adopted exclusive lustration laws requested a constitutional review of the lustration legislation.\textsuperscript{596} The Czech lustration law was narrowed, though upheld in its substance, following constitutional review; the Bulgarian court endorsed one lustration law, while the Albanian court struck down that country’s lustration legislation.\textsuperscript{597} As the Czech case illustrates, exclusive lustration laws may only pass constitutional scrutiny if their application is restricted to a narrow category of individuals and if robust legal protections exist for those caught up in the process.\textsuperscript{598} In the Czech Republic, the lustration law was narrowed to apply only to a small group of the secret police and \textit{nomenklatura} who had collaborated with the former communist regime. Furthermore, a person against whom the lustrations law had been applied has the right to initiate a judicial challenge to issuance of a lustration certificate against him or her and to the termination of his or her employment.\textsuperscript{599} As the Czech example suggests, to the extent that an exclusive approach is used to deal with some types of officials in a mixed system, the category should be narrowly drawn and the lustration legislation should include procedural protections for individuals who fall within this category.

From a practical perspective, exclusive lustration systems may pose logistical problems in countries where the government, bureaucracy, police, and the military have been dominated by one ethnic group. In such countries, the exclusion of all officials who have collaborated in some respect with the former regime could create critical labour shortages in the public sector.

\textsuperscript{596} David, “Lustration Systems”, \textit{supra} note 564 at 356.  
\textsuperscript{597} \textit{Ibid.}, citations omitted.  
\textsuperscript{598} \textit{Ibid.} at 356-357.  
\textsuperscript{599} \textit{Ibid.}
Moreover, given that other ethnic groups have often been denied the educational opportunities necessary to fulfill public service roles in a competent manner, there may not be enough people with adequate skill sets to step into the vacancies created by lustration. Exclusive lustration systems may therefore propel a country into a bureaucratic and administrative crisis at a time when the smooth functioning of the state is vital to transition.

In light of the above considerations, inclusive lustration systems are generally more appropriate for ethnically polarized countries. Public officials who are implicated in various forms of ethnic violence and insurgency would be required to comply with lustration laws related to disclosing their actions in order to be eligible to hold certain public positions. It is preferable that the officials have the onus of providing the information about the nature of their past actions since the responsibility to disclose this information will foster greater ownership of their acts and the consequences of these acts. In the case of most officials, then, the preferred approach to lustration is an inclusive reconciliatory system, to use David’s terminology. Details of each official’s past should be made public, as public knowledge serves to shame the officials for their past conduct. Shaming, as I have discussed above, plays a legitimate role in breaking with the past. Shaming also serves as a form of public censure and thus ensures that there is accountability for a person’s past acts. At the same time, allowing officials to retain their positions if they comply with disclosure requirements reflects sensitivity to the social structure of ethnically polarized countries, avoids problems associated with collective guilt, balances concerns about human rights, and avoids creating critical labour shortages in the public sphere.
While inclusive lustration systems are appropriate for dealing with most officials, some officials ought to be subject to an exclusive system. As I indicated above, officials who have played pivotal roles in directing the commission of gross violations of human rights or the perpetration of atrocities should be completely barred from holding public office. Subjecting this category of officials to an exclusive lustration system is a fair and proportionate response to the gross abuse of power and to the flagrant disregard of such officials for human rights and for the rule of law. Barring these officials from holding any public office also ensures that they are not able to subvert the transition to a new system of governance based on the norms of inter-ethnic social capital. In its review of the Czechoslovak lustration law, the Constitutional Court of the Czech and Slovak Federal Republic likened lustration to a security clearance in working democracies. Although the security clearance is based on past conduct, it is an acceptable pre-requisite for certain sensitive functions in the State administration. The Constitutional Court noted that to permit “persons who participated in the violation or suppression of human rights and freedoms the … means which could serve serious destabilization of democratic development and the threat of the security of citizens would be an irresponsible risk”.

The removal of these officials from public office helps to restore the legitimacy of public institutions and to re-build the public’s trust. The public’s perception of state institutions is important since they must be convinced that institutional structures offer a better means of advancing their group’s interests than violence or insurgency. Exclusive lustration systems disassociate the state from officials who have committed gross violations of human rights or

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perpetrated atrocities. The replacement of these officials signals in a tangible way a change in the values of public institutions and in the norms about how public power may be exercised.

Adoption of a mixed lustration system that applies an inclusive system for most public officials but an exclusive system for a category of officials who are directly implicated in gross violations of human rights or atrocities is the most appropriate approach to lustration in an ethnically polarized country. It meets the need for accountability and for re-establishing the legitimacy of the state in a way that is sensitive to the unique dynamics of identity and survival in an ethnically polarized, developing country. In order to maximize the potential benefits associated with lustration, it is important that the lustration process be characterized by good procedures and respect for natural justice. As I have already noted, it is preferable that public officials bear the primary responsibility for disclosing details about their past. These details must be verified, and an open, transparent process should be developed for this purpose. For example, verification could occur by publishing the sworn statements of public officials about their past, along with an invitation to the public to submit information to a verification panel if the statement provided by the official is incorrect or incomplete. The demands of natural justice require that a public official have the opportunity to respond to any allegations that his or her statement did not disclose the full truth about his or her past. In general, the substance of the allegations and the identity of the person making the allegations should be made known to the official. The procedures used to provide the public official with the ability to respond to the allegations should vary, depending on the seriousness of the allegations and the potential consequences attached to the allegations. For example, allegations made about the commission of gross violations of human rights or the perpetration of atrocities carry very serious consequences – a complete exclusion from holding public office. Accordingly, the public
official implicated by the allegations should likely be given the right to make oral submissions about the allegation, to provide counter-evidence, and possibly even the right to cross-examine the persons making the allegations. On the other hand, allegations that may result in exclusion from some, but not all, positions may trigger only the right to make written submissions. Alternatively, the substance of the allegations may be published once their credibility has been determined, along with a response from the public official. In such a case, the public official may be permitted to retain his or her position so long as he or she consents to the publication of this information.

The lustration system as I have envisioned it would require an administrative and decision-making body to oversee the lustration process and to make key determinations about how certain officials will be treated. It will be necessary, for example, to determine if a public official is directly implicated in the commission of gross violations of human rights or atrocities. A conviction by a criminal court in relation to such crimes could automatically trigger the application of the exclusive lustration system. However, there will likely be more cases where criminal convictions have not occurred. In these cases, a lustration panel could be constituted to receive evidence about an official’s past acts and to make determinations, based on a balance of probabilities\(^\text{601}\), about whether the official has committed or has ordered the commission of gross violations of human rights or atrocities. Since the public official’s interest is significant (the right to hold a position in the public sphere), the official would likely be entitled to a fairly robust set of procedural rights. These rights should include the right to know the nature of the case against him or her, right to make call evidence, the right to make

\(^{601}\) A lower evidentiary standard is appropriate since the official’s liberty is not at stake. The main interest at stake is economic: the right to a certain position.
oral submissions, and possibly the right to cross-examine witnesses making allegations against him or her.

The panel hearing these types of cases should be comprised of members of all of the constituent ethnic groups in order to avoid any appearances of bias. Each ethnic group should have equal representation on the lustration panels. Proportional representation on lustration panels is not appropriate since in many cases it will allow one ethnic group to control the decision-making process. Members should generally be appointed to the lustration panel as opposed to being elected since elections could heavily politicize the lustration process and risks opening the process to ethnic outbidding. Moreover, an appointment process allows members to be selected based on criteria that are conducive to the efficient, fair, and independent functioning of the lustration panel rather than popular appeal. Appointments to the lustration panel may be made by the government (assuming that a power-sharing government is in place such that the interests of all ethnic groups are adequately represented in the appointment process) or through negotiations among elites in the early stages of the peace process. The members of the lustration panel should be a blend of individuals with legal expertise and individuals who are recognized as community leaders (e.g., clergy or leaders of civil society organizations). Those with legal expertise serve to provide important guidance about the legal requirements of the lustration decision-making process. The community

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602 Proportionality is appropriate in the context of political governance structures since institutional mechanisms such as vetoes can be adopted to protect the minority against the dominance of the majority. Moreover, proportionality gives minorities a stake in political governance structures where they might otherwise be excluded from these structures, e.g., the cabinet in a Parliamentary system.

603 Outbidding occurs when ethnic elites adopt increasingly radical positions in order to portray themselves as the best protectors of the interests of their own ethnic groups while also portraying their rivals as having “sold out” the interests of the group. Other elites are then forced to match these radical positions or risk being viewed as incapable of protecting the interests of the group. In the context of elections for lustration panel membership, it is possible that interested elites may take increasingly hard-line positions about vetting the members of other group in their campaigns. This outbidding ultimately increases levels of inter-group tension.
leaders ensure that there is representation from civil society on the lustration panels. Their participation fosters a closer connection between the lustration panels and the community as a whole and ensures that the interests of the community are properly represented in the lustration process. Community leaders also lend their integrity to the lustration process, which helps to establish the lustration system as a credible means of promoting accountability for acts of repression, atrocities, and the commission of gross violations of human rights.

Ultimately, the most important element in the design of the lustration process is the integration of rule of law values into the process. Thus, the process should be fair, transparent, and consistent with the principles of natural justice. The public should have ample access to the information about the past acts of public officials and should be afforded opportunities to participate in the lustration process, for example, through the provision of further information about an official’s past. Allowing the public to observe and to participate in the lustration process will help to actualize norms related to accountability, fairness, transparency, and natural justice in the experiences of the masses. This, in turn, helps to cultivate the norms of inter-ethnic social capital and to set the foundations for the emergence of the civic compact.

3. Conclusion
This chapter has explored how the legitimacy of the state and its institutions may be re-established during transition periods so as to cultivate the norms of inter-ethnic social capital at the level of the masses. The task of re-establishing the state’s legitimacy is one dimension of the broader challenge of rehabilitating the relationship between the state and the general population. This dimension focuses on dealing with the past and addressing the legacy of the state’s commission of atrocities and gross violations of human rights. There is a second dimension to the rehabilitation of the relationship between the state and the general population.
The second dimension focuses on the future, that is, on how the relationship between the state and the masses will be recast. I argue that this second dimension of the rehabilitation of the relationship between the state and the masses centres on developing a sense of public ownership of the state and its institutions. Cultivating this sense of public ownership is the topic of the next chapter in this dissertation.

The focus on rehabilitating the relationship between the general population and the state and its institutions underlines the central importance of restoring (or building) public trust in institutions during the peace process. One of the core challenges faced by states emerging from periods of violent conflict is how ethnic groups that recently were locked in deadly battles can overcome their mutual animosity so that they can coexist within the polity. Some scholars approach this issue by proposing methods for building trust and promoting reconciliation between ethnic groups. I argue, however, that so long as ethnic groups have confidence in the institutions that mediate their coexistence within the polity, it is not necessary that they directly trust each other. Maintaining a peaceful coexistence requires a means of addressing the contentious issues that arise while sharing the polity. While these issues would be resolved more efficiently and effectively if there were robust levels of inter-group trust, low levels of inter-group trust do not imply that such issues cannot be resolved without violence. Ethnic groups may still be able to broker solutions to contentious issues if they jointly agree to and participate in institutional processes to address these contentious issues and to enforce the decisions taken on these issues. So long as the ethnic groups perceive that their interests will

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be adequately protected and that the process is fair, their distrust of each other need not taint their perception of the legitimacy of the outcome of the process. Stability may therefore be maintained through institutions whose processes and procedures are perceived to protect the interests of ethnic groups and are seen to function fairly.

It is true that robust inter-group trust offers one of the best guarantors of long-term peace and stability. However, it is arguably easier to reform institutions and to change the public’s perception of these institutions than to develop genuine trust between ethnic groups, particularly when there has been a long history of violence and animosity between these groups. Moreover, as the next chapter will demonstrate, attempting to build inter-personal connections between members of different ethnic groups before the norms of inter-ethnic social capital have been fully internalized in the polity is likely to trigger a radicalization of politics. The transition period is not well-suited for promoting inter-group reconciliation and trust at the individual level. That is not to say that cultivating trust between ethnic groups should not be a long term goal; however, in the short- to medium-term, efforts should be centred on developing public confidence in the institutions of the state that will mediate the coexistence of ethnic groups within the polity.

Chapter Five builds on the exploration undertaken in this chapter of re-establishing the legitimacy of the state, although Chapter Five shifts the focus from the past to the future. Reference was made in this chapter to the importance of consulting with the public about key aspects of the processes used to re-establish the legitimacy of the state and its institutions. Chapter Five will develop this theme more fully by considering how to promote a sense of
public ownership of the state and its institutions. This sense of public ownership plays a pivotal role in building public trust in institutions so that institutions can play a mediating role in polarized societies. Chapter Five will explore the issue of developing public trust in institutions from two perspectives, both of which are directly related to the cultivation of inter-ethnic social capital at the level of the masses. First, as indicated, Chapter Five will consider how to develop a sense of public ownership of institutions in a manner that promotes the norms of inter-ethnic social capital. Second, Chapter Five will explore the apparent paradox in the recommended policy of not promoting contact between individuals from different ethnic groups in order to support the emergence of the civic compact.
Chapter 5
Cultivating Inter-ethnic Social Capital at the Level of the Masses: Developing a Sense of Public Ownership of State Institutions

1. Introduction
This chapter continues the exploration of how inter-ethnic social capital may be cultivated at the level of the masses by examining how to foster a sense of public ownership of state institutions. In Chapter Four, I argued that the foundation for the emergence of the civic compact could be set during transitional periods by rehabilitating the relationship between the state and the general population. The rehabilitation of this relationship has two primary dimensions: re-establishing the legitimacy of the state and its institutions and developing a sense of public ownership of the state and its institutions. Whereas Chapter Four focused on rehabilitating the legitimacy of the state in light of the state’s past history of human rights violations and the commission of atrocities, this chapter focuses on setting a new course for the relationship between the state and the masses going forward. Chapter Four focused on dealing with the past; this chapter addresses managing the relationship between the state and the masses going forward into the future. The key theme in this chapter is the need to develop a greater sense of connection between the state and the masses. As I will demonstrate in this chapter, developing this sense of ownership of public institutions is closely tied to addressing the challenge of promoting cooperative coexistence after periods of violence.

Perhaps the greatest challenge following inter-ethnic violence is rebuilding relations between ethnic groups so that the groups can coexist together in the polity in a productive and peaceful manner. Members of ethnic groups who were once taught to think of the members of other ethnic groups as “the enemy” must now learn to live alongside of and cooperate with these outsiders. In light of the atrocities and abuses that have been committed and the low levels of
inter-group trust, setting the foundation for a stable coexistence seems like an impossible task. In this chapter, I argue that the best hope for developing a stable coexistence between ethnic groups after periods of violent conflict is to cultivate the norms of inter-ethnic social capital and to foster a sense of public ownership of state institutions so that institutions can serve as intermediaries between ethnic groups. The overarching goal is to create a set of public institutions that are trusted by the public and viewed as legitimate so that collective decisions taken through these institutions are accepted as fair outcomes in the polity. Low levels of trust between constituent ethnic groups are tolerable if members of each constituent ethnic group trust the institutions that manage the coexistence of ethnic groups in the polity. In other words, institutions can serve as “honest brokers” between ethnic groups in the polity and effectively act as a substitute for direct inter-group trust.

Rehabilitating the relationship between the state and the masses is a necessary step in creating institutions that can mediate the coexistence of ethnic groups in the polity. Both re-establishing the legitimacy of the state and fostering a sense of ownership of public institutions among the masses play a role in developing institutions that can serve as “honest brokers” in the polity. However, I focus on the mediating role that institutions can play as substitutes for direct inter-group trust after periods of violence and atrocity primarily in light of the need to cultivate the sense of ownership of public institutions. As this chapter will illustrate, developing the basis for a stable coexistence between ethnic groups after violent conflict raises important issues related to how the general public is engaged in the peace process. This chapter will juxtapose my approach to engaging the public in the peace process, which emphasizes the cultivation of the norms of inter-ethnic social capital, with the relational approaches favoured by many other scholars, who tend to focus on reconciliation.
The scholarship on peace-building and transitioning out of violence envisions a range of different ways that the masses can and should be engaged in the peace process. Many scholars have approached the challenge of repairing fractured societies in transition periods by emphasizing the role of reconciliation. Scholars from diverse fields (including, for example, law, politics, psychology, and sociology) have explored the idea of reconciliation and have articulated different roles that reconciliation may play in establishing a foundation for peace after violent conflict and mass atrocity. One of the primary emphases in the literature on reconciliation is a restoration of the relationship between parties that have been in conflict with each other. Overall, the general goal is to engage individuals from different ethnic groups in activities and processes that allow them to see their former enemies in a new light, to break down barriers and stereotypes, and foster positive connections between members of different groups.

605 To date, there is very little scholarship on building social capital after periods of violence. A notable exception is Ashutosh Varshney, who has studied the emergence of social capital between Hindus and Muslims in India. I address Varshney’s arguments later in this chapter.


611 In general, the focus is on individuals drawn from the general population of the ethnic group as opposed to the elites of the group, although there is also scholarship that explores trust-building between elites.
For their part, social capital theorists have largely focused on the social network aspect of social capital or on the idea of civic associations. For example, Varshney, who is one of the very few scholars to study social capital in the context of ethnic conflict, emphasizes the role of civic engagement between Hindus and Muslims to explain why communal rioting and violence occurred in some Indian towns and cities, but not in others.612 According to Varshney, pre-existing local networks of civic engagement between Hindu and Muslim communities played a pivotal role in regulating and managing communal tensions. In this regard, Varshney’s work reflects the original thesis of Putnam in the latter’s study of democracy in Italy, namely that robust associational life in a society leads to a stronger quality of democracy.613

I argue that the rehabilitating the relationship between public institutions and the masses should take priority over rehabilitating the relationship between different ethnic groups at the level of the masses.614 In the early stages of transition, the best hope for setting a foundation for a peaceful, stable coexistence at the level of the general population lies in building a sense of ownership and trust in the public institutions that will mediate relations between ethnic groups. Promoting contact between individuals from different ethnic groups at an early stage in the transitional process creates incentives for leaders to radicalize their claims and thus risks re-igniting violent conflict.

614 At the level of the elites, however, I advocate using a different strategy. As I discussed in Chapter Two, at the level of the elites, promoting the development of inter-ethnic social capital requires encouraging cooperation between elites on the basis of the norms of inter-ethnic social capital. Direct contact between individuals from different ethnic groups must occur at the level of the elites. As I will explain below, inter-personal contact between elites from different ethnic groups is not problematic. It is inter-personal contact between individuals at the level of the masses that creates difficulties due to the resulting pressures placed on elites.
While many scholars focus on the role of reconciliation during the transitional phase, I argue that reconciliation itself is a problematic concept in the context of many ethnic conflicts. While I do not advocate actively suppressing contact between individuals from different ethnic groups, I do suggest that the scarce resources that are available for post-conflict rebuilding and transition should not be directed to programs designed to promote cross-ethnic contact. Instead, the emphasis during the early phases of transition should be on building public confidence in state institutions and increasing the relevance of these institutions to the lives of the masses. In this regard, my approach to managing the transition out of violent conflict differs significantly from social capital theorists and many scholars active in the study of peace-building.

This chapter is divided broadly into two sections. I begin by addressing how a sense of ownership of public institutions among the masses may be cultivated. I discuss the importance of engaging the masses in the peace process as a means of nurturing a sense of ownership of public institutions; I also offer examples of processes and procedures that offer promise for fruitfully integrating the participation of the masses in the peace process. I then outline two factors that contribute to the overall success of developing a sense of ownership of state institutions among the general population. These factors are: increasing the representativeness of the peace process and state institutions and the need to increase the relevance of institutions in the lives of the general population.

In the second section of this chapter, I present a case for prioritizing normative development over the relational dimensions of inter-ethnic social capital during the early stages of transition. I argue that cross-ethnic inter-personal contact at the level of the masses has a destabilizing
effect on inter-ethnic relations if it occurs before the normative framework of the civic compact has begun to emerge. I also present a critique of the concept of reconciliation in the context of ethnically-polarized societies and I critically evaluate practical attempts to overcome inter-group animosity. The discussion in the second section of this chapter will further illustrate the importance of creating institutions that can serve as “honest brokers” between constituent ethnic groups as the best hope for managing coexistence after periods of violence and atrocity.

2. Part I: Inter-ethnic social capital and the ownership of public institutions
Developing a sense of ownership of public institutions among the general population plays a central role in rehabilitating the relationship between the state and constituent ethnic groups in the polity and, thus, in cultivating inter-ethnic social capital at the level of the masses. As I indicated in Chapter Four, the norms of inter-ethnic social capital are disseminated and internalized among the masses in part through the masses’ ongoing interaction with state institutions. However, the dysfunctional relationship between the state and the ethnic groups in the polity alienates the masses from state institutions. Moreover, as I described in Chapter Two, the state in many developing countries does not or cannot provide basic socio-economic services to the citizenry. As a result, ethnic groups tend to provide to its members most of the basic socio-economic services that the state typically provides in a developed country, leaving the state to play a marginal role in the lives of many members of the general public. The alienation and marginalization of state institutions in the lives of the masses impedes the ability of these institutions to serve as vehicles for the dissemination and internalization of the norms of inter-ethnic social capital. Moreover, this alienation and marginalization of the state erodes any attachments that the general population may feel to the state or its institutions. This lack of attachment to state institutions materially undermines the development of an expectation that
the ethnic group should pursue its agenda exclusively through the existing institutions of the state.

Developing a sense of public ownership of state institutions offers a means of increasing the relevancy and legitimacy of state institutions in the lives of the general population. As the relevancy and legitimacy of state institutions increase, institutions become more effective vehicles for facilitating the dissemination and internalization of the norms of inter-ethnic social capital. Moreover, as the public’s stake in state institutions increases, the costs of adopting radical, extra-institutional strategies such as violence or insurgency also increase. Cultivating a sense of public ownership of state institutions thus helps to develop a political market for moderation among elites. Overall, then, increasing the sense of ownership of state institutions among the general population helps to set the foundation for the emergence of the civic compact.

The process of developing the sense of ownership of public institutions among the masses can itself promote the norms of inter-ethnic social capital at the level of the general population. Institutional reform offers an opportunity to engage the masses in a process that is carefully designed to reinforce the norms of inter-ethnic social capital so that the masses can experience these norms in practice and begin to internalize them. Moreover, integrating the norms of inter-ethnic social capital into the process of institutional reform helps to establish these norms as foundational constitutional values in the polity. The process of institutional design and reform conveys value judgements about the basis of legitimacy in the polity for it speaks to who has the right to be heard on such important matters and the nature of the interests at stake. The fusion of the process of institutional reform and design with the norms of inter-ethnic
social capital thus creates an important link between the legitimacy of institutions and the right to participation, the right to continued existence, and the rule of law.

The importance of developing a sense of public ownership of institutions has at least three implications for the structure of the peace process. First, the peace process must include opportunities for the general population to participate meaningfully in the decision-making process. Second, the peace process itself and the institutions that emerge from it should incorporate elements that are representative of constituent ethnic groups, including, for example, language. Finally, programs that provide key services to the public such as health care and education should be implemented as quickly as possible. I will discuss each of these three elements below.

2.1. Participation and representation

2.1.1. The necessity of meaningful participation
Developing a sense of public ownership of state institutions requires that institutional reform processes and peace-building be characterized by broad participation throughout all segments of society. Hart comments that people must be a part of peace-building after conflict rather than being treated as part of a “division of the spoils” between factions. Hart argues, “[w]here conflict is essentially over governance by, and respect for, a diversity of people and peoples, those people and peoples must be heard in the process of constitution-making.”615 Broad-based, meaningful participation engages the population in the creation of the governance structure of the state and thus gives them a stake in public institutions. Such participation helps to ensure that institutions and transitional justice mechanisms are adopted that are responsive to the needs and views of the general population. The participation of the masses also increases

the likelihood that the masses will have a general understanding of the nature of institutional reforms being introduced and thus will be better positioned to participate in the polity going forward.

Broad-based participation of the general population in the process of institutional reform actualizes key dimensions of the norms of inter-ethnic social capital. Indeed, cultivating the norm of the right to participation requires that efforts be made to facilitate the participation of the masses in institutional reform processes in order to make this norm meaningful in the experiences of the general population. However, the right to continued existence and the rule of law are also promoted by ensuring wide participation in institutional reform processes. A participatory and representative process demonstrates the fact that no one group is entitled to impose institutional arrangements, laws, and policies on other groups in an arbitrary fashion. Instead, the reform process reflects the norm that power in society is shared and that each group is entitled to exercise influence over how the polity is governed. The right to exercise such influence gives each group a tangible means of protecting itself and its interests and thus reflects the fact that each group has the right to its continued physical and cultural existence. From the perspective of promoting the rule of law, broad-based participation in the institutional reform process is consistent with the right to be heard, a core principle associated with natural justice. Moreover, to the extent that such participation does in fact ensure that the general population is able to be heard in the institutional reform process, this participation increases the likelihood that the institutional arrangements that result from the process will be viewed as legitimate in the eyes of the population. This perceived legitimacy is essential to the emergence of the civic compact since it fosters the expectation that the ethnic elites should
seek to advance the interests of the ethnic group through existing institutions rather than through radical extra-institutional strategies.

The importance of engaging the public in the process of institutional reform cannot be overstated. Exclusion from the reform process may create a disconnection between the masses and the formal institutions that result from the process. The resulting sense of alienation from the institutions in the polity makes people more willing to consider supporting extra-institutional strategies. Exclusion from the reform process also leads to ignorance about the nature of public institutions and the manner in which the interests of each group are protected and how power is shared between groups. In this context, it is easier for outbidders to allege that the elites of a group have “sold out” the interests of the group in the institutional reform process. Radical elites may use this situation to advance their own extreme agenda.

The 2000 Fijian coup illustrate the potential costs of excluding the public from the process of institutional reform. Following two coups in 1988, the Fijian government, controlled by native Fijian elites, had promulgated a constitution in 1990 that subverted the interests of Indo-Fijians and established the political dominance of native Fijians. Less than five years later, the Fijian government initiated a constitutional review process that was unprecedented in Fiji in terms of the efforts made to broker compromises between native Fijian elites and Indo-Fijian elites on everything from the terms of reference for the review committee to the actual draft constitution provisions. The constitution that emerged from the process of constitutional review represented a major departure from the 1990 constitution. Although the 1997 constitution protected the major interests of native Fijians, it also made major concessions to Indo-Fijians, particularly in terms of how the government and civil service would be constituted.
Elites from both the native Fijian and the Indo-Fijian communities participated meaningfully in all stages of the constitutional review process that occurred in Fiji during the mid- to late 1990s. Moreover, the Commission of Review (the Reeves Commission) held consultations throughout Fiji with various stakeholders and received research and reports from a variety of sources. The Joint Parliamentary Select Committee on the Constitution (the JPSC) subsequently produced an agreement (the JPSC agreement) on all major issues related to constitutional reform. All major political parties had representation on the JPSC, and its membership was approximately 45% Indo-Fijian and 55% native Fijian. The JPSC Agreement, which constituted the basis of the bill that would formally amended the constitution once passed by the legislature, was the result of considerable compromise among the native Fijian and Indo-Fijian elites. At the level of the elites, the norms of inter-ethnic social capital had begun to take root.

The advances made by the Fijian constitutional review process towards the cultivation of inter-ethnic social capital at the level of the elites were not mirrored at the level of the masses. Although the Reeves Commission held public hearings during the process of constitutional review, the public was not invited to review or to comment on the Commission’s report. Furthermore, the report of the Reeves Commission was published only in English, making the

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617 Ibid.
620 Ibid. at 32.
report inaccessible to those who could read only Fijian or Hindi. The Parliamentary stage of the constitutional review process was even less accessible to the public than the work of the Reeves Commission. Much of the work of the JPSC was conducted in secret, although this was likely necessary to broker the compromises necessary to reach consensus on the draft Constitution. Nevertheless, once a draft of the Constitution was completed, it was not presented to the public for review. No efforts were made to solicit the input of the public on the proposed provisions of the Constitution. Once the Constitution had been passed into law, there were few efforts made to educate the public about the Constitution. The process of constitutional review thus did not incorporate public participation as a key component of the review.

It appears that the Fijian public was not significantly invested in the 1998 Constitution. Without an opportunity to participate in the crafting of the Constitution and in the absence of civic education, the majority of the population did not develop a sense of ownership in this critical institution. Some people were unaware of the significance of the promulgation of a new constitution. Many did not fully understand the differences between the 1990 Constitution and the 1998 Constitution.

Extremist native Fijian leader George Speight used the ignorance and ambivalence of the public about the new constitution to his advantage to execute a coup d’état in 2000. He misrepresented the nature of the 1998 constitution by claiming that the new constitutional provisions threatened the political paramouncty of native Fijians in order to stir up

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621 Ibid. at 32-33.
dissatisfaction. Adopting an outbidder strategy, Speight portrayed himself as the defender of the interests of native Fijians and the chief spokesman for the cause of the people. The public’s ignorance of the nature of the constitution and a lack of attachment to the constitution made it easier for Speight to convince native Fijians that he was, in fact, acting in their best interests by overthrowing the government. This reduced the costs associated with perpetrating the coup.

The coup initiated by Speight in 2000 thrust Fiji back into a crisis of political legitimacy from which it has yet to recover. Prior to the coup in 2000, there was cause for optimism in Fiji. Fiji appeared to be moving towards a politico-legal rule of law culture. Moreover, the governance framework of the country was based on a negotiated compromise that respected the right of both native Fijians and Indo-Fijians to continued existence and the right to participate in the decision-making structures of the state. Yet the failure to engage the public more extensively in the constitutional review process exposed the polity to a critical weakness. The norms that had begun to take root at the level of the elites had not been cultivated at the level of the masses. The 2000 Fijian coup illustrates that even well-designed institutions that formalize the norms of inter-ethnic social capital may not facilitate coexistence if the process of institutional reform has not included the broad participation of the population at all levels of society.

2.1.2. Structuring public participation – General considerations
Public participation must be carefully structured in order to be meaningful. The norms of inter-ethnic social capital should inform how the participation of the general population in the

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peace process is structured. First, participation must be informed and accessible. Just as consent must be informed consent to be binding in law, so the right to participation is premised upon an understanding of the process, the nature of the decision to be taken, and its potential consequences. Participating in a decision-making process without an understanding of the framework surrounding the decision to be taken cannot be considered fully free and voluntary. Efforts must be therefore be made to educate the population about the peace process and to explain the issues being considered and institutional reform options.

The information and explanations provided to the public about institutional reform must be presented in a format that is readily accessible to the vast majority of the population. This implies that it must be relatively easy for the population to acquire the relevant information and that the information must be presented in a format that is understandable to the population. At minimum, all information should be made available in the languages of all constituent ethnic groups in the polity. The failure to facilitate the participation of an ethnic group through its own language practically excludes group members who do not speak other languages. This exclusion, in turn, alienates the group members from the institutions that emerge from the process notwithstanding the fact that there may have been formal efforts to allow such group members to participate in the process.

Engaging the public in the process requires flexibility and creativity in terms of how public education occurs and how the public may make submissions about proposed institutional changes. Illiteracy, for example, may impede the meaningful participation of large parts of a country’s population. In such cases, arrangements should be made to present information in a
manner that resonates with the local population, such as through narrative processes like stories or song. In Eritrea, for instance, constitutional education and consultation took the form of songs, stories, poems, and plays, presented in the local vernacular to communities across the country using theatre and radio.623

Both South Africa and Rwanda included campaigns to educate the public about constitutional reform processes as part of the measures these countries adopted to facilitate public participation. In South Africa, efforts to educate the public included media and public advertising campaigns in which information was disseminated on television, the radio, in newspapers, on billboards, on posters on the sides of buses, through cartoons, in public meetings, and on a website.624 Estimates suggest that this massive education campaign reached approximately 73 percent of the population.625 The South African public responded well to this education campaign: approximately two million submissions on the interim constitution were made by individuals, advocacy groups, professional associations, and others.626 It is not clear, however, what portion of these submissions were made by the disaffected and marginalized members of South African society.

In Rwanda, post-genocide efforts to create a new constitution included a massive public education campaign, followed by widespread public consultations. The Legal and Constitution Commission (the Commission), which was responsible for creating a new constitution, prepared 40 national population trainers and 9,800 provincial trainers to educate Rwandans

623 Hart, supra note 615 at 7.
625 Ibid.
626 Ibid.
about the constitution and the process of reform. The Commission also developed plans to ensure that Rwandans living abroad and in refugee camps in Tanzania, Uganda, the Congo, and Zambia would also receive information about the constitutional reform process wherever possible. The “sensitization of the population” sessions (i.e., the educational portion of the Commission’s mandate) occurred in August and September 2001. Subject matters canvassed during the population education sessions included: information about the Commission; the Constitution; instruments of power in government; nature of political systems; human rights and the role of citizens; past constitutions of Rwanda; and genocide and its effects. The population trainers dispersed throughout Rwanda and presented sensitization sessions according to a pre-set format. According to the Rwandan government, the average turnout at these sessions was 90,000 people in each province, including students and prisoners. The Commission also made use of the media to provide information to the public about constitutions.

Second, public participation in the peace process should be designed with a view to engaging the general population in a dialogue about institutional reform and the transition out of violence. Public engagement should extend beyond holding a referendum to ratify a peace agreement or draft constitution; members of the public should have the opportunity to express more than a “yes” or “no” vote about institutional reform. Members of the public should be able to provide substantive feedback about institutional reform. Thus, in addition to public education campaigns, the views of the public on a wide range of matters should be actively

628 Ibid. at 5.
629 Ibid. at 7-8.
630 Ibid. at 8. Although this number seems extraordinary, this figure is published in the Commission’s report.
solicited. Moreover, when public consultations have occurred, efforts should be made to demonstrate to the public how leaders have responded to the feedback received during these consultations. For example, it is helpful to provide a summary of the feedback received during the consultation process, as well as responses to this feedback, particularly when leaders have opted not to act on recommendations made by the public. This approach conveys to the public that its views have been heard and provides a reasoned explanation of why leaders have or have not acted upon these views. There is evidence that the perception that one has been “heard” in a process increases the likelihood that a person will accept the result of the process even if the result is not favourable.\(^{631}\) Thus, summarizing and responding to the feedback received from the public reduces the risk that members of the public whose views are not reflected in the final design of institutions will feel alienated from those institutions. This approach also promotes transparency in the institutional reform decision-making process and thus advances the rule of law. Moreover, by requiring leaders to provide reasoned responses to the feedback they have received during the consultation phase, this approach reduces the risk that decisions will be made arbitrarily or that the decision-making process will appear arbitrary.

### 2.1.3. Forms of public participation

There are a number of different forms of public participation that may be incorporated into the peace process. There is no manifestly “right” approach to integrating public participation in the peace process. In each case, decisions about how to include meaningful public participation must be made in light of local circumstances, public expectations, and what is

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realistically possible for the country as it emerges from periods of conflict. The discussion that follows outlines some of the most common approaches to implementing meaningful public participation in the peace process.

Public consultations are a common mechanism for engaging the public in the peace process. Examples of forms of public consultations include widespread meetings with stakeholders, the dissemination of proposed legislation coupled with an invitation to submit comments on the proposal, and the distribution of a set of questions for comment to stakeholders. Public consultations may focus on a variety of different issues. For example, the public may be invited to provide input on proposed constitutional arrangements. Modern constitution-making has engaged the public at virtually every stage of the process. At the outset of a constitutional reform process, widespread consultations with the public are sometimes held in order to build awareness of the process and to obtain feedback from the public. In 1988, for example, both Brazil and Uganda asked for public input into the constitutional drafting process before beginning the process. In both countries, public input was also sought after the initial draft of the constitution was complete.

In other cases, the public is invited to comment on an initial draft constitution. In 1986, for instance, the Nicaraguan National Assembly invited the public to comment on the draft of a new constitution. Similarly, the South African public was encouraged to provide feedback on the country’s interim constitution. In Rwanda, the Legal and Constitution Commission conducted broad consultations about the content of the proposed constitution after the 1994 genocide. Commission representatives consulted with a wide range of stakeholders, including,
but not limited to: government ministries, universities, NGOs, women, minorities, youth, the aged, religious denominations, teachers, secondary students, the disabled, security officers, artisans, small businessmen and women, and magistrates.\textsuperscript{632} The Commission used a variety of approaches to solicit the views of these stakeholders, including round table discussions held throughout the country and questionnaires.\textsuperscript{633} The feedback received from the public consultation was then considered during the process of writing the constitution and validating its key themes.

The masses may also be consulted about how the country should respond to the acts of atrocity and gross violations of human rights that have occurred. Such consultations offer an opportunity to explore what the population views as necessary to restoring justice and accountability within the polity. Another approach is to create opportunities for the public to comment on the findings and policy recommendations of a public body that has been established to investigate a particular event or issue related to inter-ethnic conflict. This body could be a truth commission (TC) or another commission with a narrower mandate. For example, in 2009, a public consultation was initiated in Northern Ireland with respect to the recommendations of the Eames-Bradley Consultative Group on Dealing with the Past\textsuperscript{634} (the Eames-Bradley Commission). The Eames-Bradley Commission was appointed to investigate


\footnotesize{\textsuperscript{633} \textit{Ibid.}}

\footnotesize{\textsuperscript{634} The Consultative Group on Dealing with the Past (CGP or the “Eames-Bradley Commission”) was established in June 2007 to consult communities throughout Northern Ireland about how Northern Ireland can best approach the legacy of violence between Protestants and Catholics. The CGP was also charged with making recommendations on any steps that could be taken to rebuilding a “shared future” in Northern Ireland that is not “overshadowed by the past”. The CGP issued its report in January 2009. See Northern Ireland Office, News Release, “Government launches consultation on Eames/Bradley recommendations” (24 June, 2009), online: <http://www.nio.gov.uk>. See also \textit{Report of the Consultative Group on the Past} (Belfast: Legacy Policy Unit of the Northern Ireland Office, 2009), online: Consultative Group on the Past <www.cgpmni.org> [Eames-Bradley Report].}
how Northern Ireland could best approach the legacy of the past 40 years of sectarian violence.\textsuperscript{635} The Commission’s work involved extensive engagement with the public. After these consultations concluded, the Commission prepared a report setting out its conclusions, including its recommendations, for the Secretary of State for Northern Ireland.\textsuperscript{636} The release of the Eames-Bradley Report ignited intense public debate, particularly with respect to its recommendation that the families of all victims of the Troubles (including paramilitaries) be compensated in recognition of their loss.\textsuperscript{637} The issue of “recognition payments” and the question about how “victim” should be defined threatened to dominate public discussion and parliamentary debate on the Report. Consequently, the Secretary of State for Northern Ireland, Shaun Woodward, initiated a further public consultation on the recommendations made by the Eames-Bradley Commission.\textsuperscript{638}

The consultation paper issued by the Secretary of State invited broad public participation in the consultation process\textsuperscript{639}, though it also specifically urged political leaders to engage in the process.\textsuperscript{640} Secretary of State Woodward recognized that reaching consensus on all of the consultation paper’s recommendations would not be easy and that the leadership of the political parties would be central to consensus-building. Thus, each of the political parties was urged “to look with great care at each of the Group’s recommendations and to share with me

\textsuperscript{635} Eames-Bradley Report, \textit{ibid.} at 22.
\textsuperscript{636} \textit{Ibid.}
\textsuperscript{638} See CGP Consultation Paper, \textit{ibid.}
\textsuperscript{639} “Everyone with an interest in dealing with the past” was invited to consider each of the recommendations set out in the consultation paper and to provide feedback. \textit{Ibid.} at 3.
\textsuperscript{640} In the consultation paper, the Secretary of State makes a direct request for the participation of Northern Ireland’s political leaders: “I am especially asking the political leaders in Northern Ireland to engage fully in an evaluation of the proposals.” \textit{Ibid.}
their opinions.” The emphasis on the participation of the political leaders risks undermining the impetus for the general population to engage in this consultation process. This weakens the sense of public ownership of the process, which in turn may weaken the public ownership of the results of the process. In this regard, the emphasis on the engagement of political leaders misses an important opportunity to promote the norms of inter-ethnic social capital at the level of the general population. This emphasis does, however, offer an opportunity to cultivate inter-ethnic social capital at the level of the elites.

Notwithstanding the fact that the consultation paper may emphasize the participation of elites at the expense of the engagement of the masses, the consultation paper serves as a good example of how to establish a framework for a constructive consultation process. The consultation paper sets out each of the Commission’s recommendations and provides a short summary of the background of each recommendation. The consultation paper then sets out specific questions about each recommendation which are designed to stimulate discussion about the recommendations, their justifications, and possible alternatives. The consultation paper also notes that submissions may be made on any other issue related to a recommendation or the Eames-Bradley Report generally that are not addressed through these questions. The consultation paper provides direction for the dialogue about the recommendations while avoiding undue restraint with respect to what issues may be addressed in this dialogue.

Participating in the public consultation process is limited to making written submissions, although steps have been taken to make it relatively easy to provide comments. Comments

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641 Ibid.
642 See Chapter Three for a discussion of cultivating inter-ethnic social capital at the level of the elites.
643 CGP Consultation Paper, supra note 637 at 3 and 35.
may be filed using a Response Form available on the website of the Northern Ireland Home Office or in other written formats submitted by mail, e-mail, and fax. Participation may have been further developed if the consultation process had included public events such as town hall meetings. Limiting the process to a written consultation format may prevent some people who are not generally inclined to write their opinions down from participating.

Various aspects of the Eames-Bradley Report consultation process promote elements of the rule of law, particularly transparency. The consultation paper gives a clear explanation of the process and includes directions about how to participate. The consultation paper also explains what the Northern Ireland Office plans to do with the submissions received in the process. The consultation paper states that a summary of all submissions will be made public. Submissions will also be analyzed by the Northern Ireland Office and the Office will prepare a response to the Eames-Bradley report, in conjunction with the Irish government and the local, devolved government of Northern Ireland. Providing the summary of submissions and a response to the Eames-Bradley report allows the public to monitor whether the government has really “heard” their voices in the consultation process. The public is also better placed to assess how the government addresses the matters raised by the Eames-Bradley commission. Making the summary of submissions and the final response to the Eames-Bradley report available to the public thus enhances the transparency of the decisions that the government ultimately makes about the measures that will be adopted to address the legacy of the Troubles in Northern Ireland. Moreover, the public is provided with information that it can use to assess the quality of the government’s decisions which, in turn, promotes better accountability. In this regard, the public consultation process may promote the rule of law in Northern Ireland.
The process adopted in Northern Ireland cannot be readily transplanted into every country emerging from periods of inter-ethnic violence. This process is not well-suited to countries with high rates of illiteracy, for example, since most of the population would not be able to read or to respond to the consultation reports. Moreover, countries that lack infrastructure to disseminate consultation reports (e.g., a low penetration rate of Internet access, few newspapers, low access to other forms of public media, and/or poor postal services) are also ill-suited to adopt a process like the one in Northern Ireland. Such countries do not have the means to distribute information or to receive public feedback about the matters being canvassed in the consultation using written reports and surveys. Obstacles such as high illiteracy rates and weak infrastructure are not necessarily complete bars to holding a public consultation process, however. A possible alternative is to disseminate information through oral presentations given at local meetings throughout the country. Such meetings could also serve as a forum for members of the public to voice their views on the matters being considered. Ideally, the initial meetings would be followed up with additional meetings to present information about how the government has responded to the feedback provided by the public. Although conducting such meetings throughout a country would be logistically challenging and labour-intensive, these meetings serve an important purpose in terms of public engagement and are therefore merit the difficulties and expense associated with holding them.

In addition to public consultations, the general population can be engaged in the peace process through mechanisms aimed at ratifying new legislation, new constitutions, constitutional amendments, or peace agreements. For instance, after finalizing the draft of a constitution, some countries have then held a referendum to ratify the constitution. In Rwanda, after an extensive process of public education and consultations, revisions, and further public
discussion, a referendum was held in which 93 percent of those who voted supported the final
draft version of the constitution. The constitution was subsequently promulgated in a public
ceremony. In Burundi, voters approved a new power-sharing constitution in a referendum held
in 2005. Although the vast majority (approximately 90%) of voting Burundians approved the
constitution, it appears that many voters in the rural areas did not know much about the
actual constitutional provisions. According to a BBC correspondent, many rural voters “know
little about the content of the constitution, but they hope it will put an end to ethnic violence in
Burundi.”

Referenda have also been used to ratify peace agreements and proposed constitutional
amendments. In Northern Ireland, a special referendum was held to ratify the Good Friday
Peace Agreement in May 1998. This Agreement established, among other things, a formula
for power-sharing in Northern Ireland. The Good Friday Peace Agreement found favour with
voters: approximately 71 percent voted in favour of the accord. In Canada, a referendum on
a proposed slate of constitutional amendments was held in 1992. The set of constitutional
amendments, called the Charlottetown Accord, included, among other things, a “Canada
Clause” that sought to articulate the values that define the Canadian character. These values
included the recognition of Quebec as a “distinct society” and the recognition in principle of

\[\text{footnotes continue}\]
Aboriginal self-government. The Canadian voting public ultimately rejected the Charlottetown Accord, however.

The public may also participate in the process of constitutional or other institutional reform by electing delegates to an assembly or convention that has the responsibility of preparing and voting on constitutional or institutional arrangements. In South Africa, for example, the process of constitutional reform included the creation of an interim constitution and a set of binding principles and procedures to govern the final constitution-making process. These procedures featured an election held in April 1994 to elect representatives to parliament, which acted as the Constitutional Assembly. After a public education campaign was conducted and after receiving public submissions, the Constitutional Assembly began the work of drafting the new constitution. The public’s direct participation was limited to the consultation that occurred after the Constitutional Assembly was initially elected. After the period of public education and consultation ended, the public’s participation was indirect and occurred through the actions of the elected representatives.

The South African Constitutional Assembly is an example of a national conference approach to public participation. A national conference brings together representatives from the

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648 The actual form that Aboriginal self-government would take was subject to further negotiation and therefore this value was not to be enforced in the courts for three years.

649 A great deal of the framework for the process of constitutional reform (including the principles guiding the process and the creation of an interim government) were derived from the Harare Declaration, which was issued by the Organization of African Unity (OAU) and communicated to the South African government by the ANC in 1989. See the Harare Declaration, Declaration of the OAU Ad-hoc Committee on Southern Africa on the Question of South Africa, Harare, Zimbabwe, August 21, 1989, online: <http://www.anc.org.za/ancdocs/history/transition/harare.html>. See also Mac Maharaj, The ANC and South Africa’s Negotiated Transition to Democracy and Peace, Berghof Transitions Series No. 2 (Berlin: Berghof Research Center for Constructive Conflict Management, 2008), online: Berghof Research Center for Constructive Conflict Management <http://www.berghof-center.org/uploads/download/transitions_anc.pdf> at 18-22.
government, civic groups, and political groups and parties to discuss and to develop a plan for the country’s political future.\footnote{Michael Lund & Carlos Santiso, “Democratic Levers for Conflict Management: National Conferences” in Peter Harris & Ben Reilly, eds., Democracy and Deep-Rooted Conflict: Options for Negotiators (Stockholm: International Institute for Democracy and Electoral Assistance, 1998, reprinted 2003) 252 at 253.} African countries have pioneered the use of national conferences. Between 1990 and 1993, national conferences were used in 12 African countries, the vast majority of which were Francophone.\footnote{Ibid. at 254.} A national conference engages the public largely through its representatives in civic and political groups. In this regard, a national conference is a hybrid between a reform process centred on elite participation and a process that engages the public more broadly. Because the public only participates in national conferences indirectly through the election of representatives, these conferences have less potential for cultivating a sense of public ownership of institutions. This weakness can be mitigated by coupling extensive public education processes and public consultations with the national conference.

2.1.4. Participation and multi-track democracy
My approach to integrating the participation of the masses in the peace process should be distinguished from the approach taken by advocates of multi-track diplomacy. Multi-track diplomacy refers to the engagement of multiple “tracks” or levels of society or arenas for interaction between different ethnic groups in the peace process. Joseph Montville and William Davidson first articulated the idea that both governmental action and nongovernmental action can play an important, even pivotal, role in conflict resolution in 1982. They referred to official, government-sponsored processes as Track One diplomacy, and informal and non-structured processes as Track Two diplomacy.\footnote{See William D. Davidson & Joseph V. Montville, “Foreign Policy According to Freud” (1981-82) 45 Foreign Policy 145.} Since then, other scholars who have built
upon the insights of Montville and Davidson have identified up to nine different tracks for diplomacy, and coined the term “multi-track diplomacy.”

Proponents of multi-track diplomacy consider that secondary diplomacy tracks (i.e., tracks outside of formal, official governmental action) can have a transformative impact on conflict by attending to psychological barriers to peace. Montville and Davidson, for example, proposed that Track Two diplomacy provides an informal means of allowing members of groups in conflict to interact, to come to know each other, and, in so doing, to overcome the psychological barriers to making peace with each other. Sisk also recognizes the need for “many different opportunities, or “tracks” (arenas of interaction) to find confidence and build co-operation. Multiple tracks at which top- and mid-level leaders negotiate are essential to success.”

My principal objection to the multi-track diplomacy approach is its emphasis on bringing individuals from different ethnic groups together at early stages of the peace process. I do not dispute that psychological barriers to peace and to coexistence exist, including profound mistrust and even hatred of members of other groups, stereotypes, and insecurities. I also recognize that interactions between such individuals can reduce these psychological barriers and facilitate a better understanding and cooperation between individuals from different ethnic groups. However, as I will argue in greater detail in the second portion of this chapter, the gains that may be made in changes to individual attitudes are subverted by the effect that cross-

654 See Davidson & Montville, supra note 652.
ethnic inter-personal contact has on inter-ethnic relations at the group level. For reasons that I will detail below, cross-ethnic inter-personal contact tends to result in a radicalization of the rhetoric used by and claims made by ethnic elite, which risks triggering a re-escalation of hostilities. I therefore recommend avoiding the active promotion of contact between individuals of different ethnicities at the level of the masses until the civic compact has begun to emerge. Multi-track diplomacy is only appropriate where restricted to the interactions between elites and sub-elites (e.g., local elites and leaders).

2.2. The representativeness of the peace process
The peace process must be representative of all constituent ethnic groups in the polity. The same is true for the institutions that are adopted during the peace process. A representative peace process conveys that the ethnic groups have status in the polity as constituent stakeholders. This is an important message to reinforce as efforts are made to lay the foundation for the civic compact, which is premised on the fact that the polity is shared by all constituent ethnic groups. The development of a sense of public ownership of state institutions is also advanced when the peace process and public institutions include attributes that resonate in some way with and are recognizable by the members of constituent ethnic groups. These attributes may include, for example, the language of proceedings, symbols adopted to represent the state, and the integration of traditional practices. Moreover, the integration of such attributes into the peace process actualizes the norm of the right of each group to its continued existence. The norm of the right to continued existence encompasses both physical and ethnocultural existence. It is therefore important to convey to the general population that both their physical safety and their ethnic identity will be protected and preserved. A representative

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656 This section will focus primarily on the representativeness of the peace process rather the state institutions in keeping with the overall focus of this dissertation on the early stages of transition.
peace process gives evidence that key attributes of each group’s ethnic identity will be respected and preserved and thus promotes the norm of the right to continued existence.

Ensuring that the peace process and the institutions that are adopted in the peace process are representative is an important step in protecting the vital interests of constituent ethnic groups. The protection of the vital interests of groups is crucial to creating an institutional framework in which groups feel secure enough to cooperate. As groups resist assimilation, institutional structures that fail to protect the key elements of the group’s ethnic identity will have little legitimacy in the eyes of the group. This undermines the ability of institutions to act as intermediaries between ethnic groups. Moreover, the subversion of the language, religion, cultural practices, and history of a group often becomes a major grievance in a polarized society. This subversion can thus act as a catalyst for political agitation and the rejection of existing social structures. For example, the “Sinhala Only” law in Sri Lanka, which gave preference to the language of the Sinhalese, became a major grievance in the Tamil community and ultimately led to the radicalization of Tamil demands and forms of political action.

There are a number of ways that the peace process can be made representative of the constituent ethnic groups in the polity. First, the peace process must reflect the distinctive elements of each group’s ethnic identity such as language. Language is a vital dimension of a group’s identity since it often is one of the primary distinguishing traits of a particular ethnic group. “Next to skin color, language is the most evident ascriptive indicator of membership in
a given social group. The adoption of a group’s language as an official language of the peace process and subsequently of the state sends a powerful message about the status of the group in the polity. It indicates that the group belongs in the polity and that the polity in some way belongs to the group. Designating a group’s language as an “official” language also helps to ensure that this vital part of a group’s collective identity will be protected. By contrast, failing to include a group’s language as an official language of the peace process and the state itself excludes the group symbolically from the state and, in practice, often alienates the group from the peace process and state institutions. This alienation makes it easier to justify adopting radical extra-institutional strategies to advance the interests of the group.

The failure to recognize an ethnic group’s language as an official state language has become a serious grievance in a number of conflicts. The “Sinhala Only” law in Sri Lanka and the selection of Urdu as the official language of the newly created Pakistani state had a very divisive effect on the Sri Lankan and the Pakistani communities, respectively. In Spain, Franco’s ban on the use of the Basque language (Euskera), as well as a ban on the expression of all other elements of the Basque identity, contributed to a widespread sense among the Basques of being a colonized people, dominated by an illegitimate foreign power (Spain). In this context, a conviction arose that all available means should be used to free the Basques from their foreign oppressor, including the use of violence. Language has been a divisive issue

in both Canada and Belgium. In both of these countries, the issue of language has become
politicized and has had a catalyzing effect on ethno-national mobilization.659

In addition to language, religion can be a significant element of ethnic identity. Religion has
had a polarizing effect in Northern Ireland and in Burma, for example. In Burma, Buddhism
was made the official religion of the state. The special recognition of Buddhism was symbolic
of the hegemony of the Burmese, a point that was not lost on minority groups such as the
Kachins and Chins.660 In order to preserve the representativeness of the peace process and of
state institutions, care should be taken to avoid conferring special recognition on the religion of
one group without equal recognition of the religion of all other constituent ethnic groups.
From a practical perspective, the schedule of the peace process should accommodate religious
holy days and other special festivals and events. In general, meetings and other events that
form part of the peace process should not be opened with prayers that are part of only one of
the group’s religious traditions. Either no prayers should be said at all or prayers that represent
the religious traditions of all constituent ethnic groups should be said. Similar care should be
exercised when adopting symbols (e.g., the national flag, the national bird, and the national
anthem) for the state and when including symbols in the peace process.

The second means of making the peace process representative of all constituent ethnic groups
is to include matters that relate to protecting the identity of constituent ethnic groups on the

Affairs 12 [Gagnon, “Canada”].
660 Donald L. Horowitz, Ethnic Groups in Conflict 2nd ed. (Berkeley and Los Angeles, California: University of
peace process agenda. In addition to issues that are commonly addressed in peace processes such as constitutional arrangements, human rights protection, and electoral formulae, matters such as education, the selection of national symbols, and other issues connected to protecting each group’s identity require consideration. The population should be consulted about such matters and efforts should be made to develop broad consensus on how these matters are addressed. Including such matters on the agenda for the peace process demonstrates sensitivity to the types of issues that impact the ability of an ethnic group to preserve its distinct identity. It also offers assurances that the interests of constituent ethnic groups will be considered as the state is re-constructed and as institutions are reformed.

As indicated, the issues that generally should be placed on the agenda for the peace process include education and the selection of national symbols. Education raises concerns that are vital to the interests of ethnic groups for at least two important reasons. First, education is closely linked to socio-economic mobility, and is a valuable asset to the members of a community. Second, schooling shapes students’ value systems and senses of self. Education conducted in the language of the ethnic group that includes a cultural component and the teaching of the history of the ethnic group reinforces the ethnic identity of the group in its youngest members. Education conducted on the terms of other groups, however, exposes the children of the group to a high risk of assimilation to the language, norms, culture, and religion of the out-group. Control over education is therefore critical to shoring up the ethnic identity of the members of the group and engages the right of each group to continued cultural existence. Accordingly, education should be addressed at the same time as issues related to the composition of the government, constitutional vetoes, electoral formulae and the like.
The selection of national symbols should also be part of the peace process. The selection of the flag, the national anthem, the national colours, and other symbols of the state must be conducted in a manner sensitive to the ethnic identities of the groups in the state. The symbols of the state should not be imposed by one group on the state as a whole. Moreover, the symbols should, wherever possible, reflect the identities of both ethnic groups or, at minimum, not be associated exclusively with the identity of one of the groups. Adopting symbols of the state that are associated with both ethnic groups represents the partnership of the groups in the state. Like the selection of the languages of the state, the selection of the symbols of the state must convey that each group is an important stakeholder in the state in order to build up the role of state institutions as the intermediaries between groups.

In Rwanda, the selection of the national symbols of the country was one of the matters addressed by the Legal and Constitutional Commission during the extended peace process after the 1994 genocide. This Commission was established in 1999, and began an extensive, multi-stage process of consultation about the constitution throughout Rwanda in 2002. The general goal of the consultation process was to foster a sense of ownership of the constitution among the people based on their participation in the writing of the constitution. One of the matters canvassed during the constitutional consultations was the national symbols of the country. Rwandans were invited to share their views about the symbols of Rwanda, as well as many

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661 Constitutional and Legal Commission of Rwanda, “Current News of the Commission: The Commission started gathering views on the draft constitution (15 January 2002)”, online: <http://www.cjcr.gov.rw/eng/index.htm>. As I will argue in Part II of this chapter, the Rwandan government’s broader strategy has been to develop a supra-ethnic Rwandan identity to the exclusion of Tutsi and Hutu identities. This strategy, I will argue, has been unsuccessful. While the consultations with the public about national Rwandan symbols are a good example of how to begin to cultivate a sense of public ownership of state institutions, the broader emphasis on a single Rwandan identity (including the subversion of Tutsi and Hutu identities) has tended to alienate people from the state. Thus, the gains that Rwanda may have made by developing broad public consensus about its national symbols have been undermined by attempting to force people to abandon their ethnic affiliations in favour of a single national identity.
other constitutional issues. A draft constitution and then a final constitution were prepared using the feedback from the consultation process. The final version of the constitution contains provisions outlining the symbols of Rwanda, including its flag, motto, seal, and national anthem. The final version of the constitution was approved by the citizenry in a referendum in May 2003.

Finally, the peace process provides an opportunity to implement measures designed to make institutions such as the bureaucracy, military, and police more representative of the population as a whole. It is not unusual for the staff of government agencies and bureaucracies to be dominated by one particular ethnic group. This is true in Malaysia, India, and Fiji, for example. This domination contributes to the alienation from public institutions experienced by excluded groups. Ensuring that public institutions are staffed by people who are representative of the population as a whole helps to bridge the distance between public institutions and excluded groups and thus to foster a greater sense of public ownership of state institutions.

Increasing the number of employees who are members of under-represented ethnic groups may involve a number of different policies and practices. First, a program of socio-economic support in certain ethnic communities may be warranted. Some ethnic groups may be underrepresented in the work force because they have not had adequate access to important social goods such as proper nutrition, education, and health care. In order to increase the ability of members of such ethnic groups to gain employment in government agencies, measures must be implemented to secure access to these important social goods. Communities

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that require assistance must be identified, their needs assessed, and then priority should be
given to delivering programs aimed at meeting these needs. These programs could include, for
example, building a health care clinic or a school in an under-served area. Some assistance
might be indirect, such as improving roads and the transportation network in a region in order
to make it easier for the inhabitants to travel to schools, market places, and hospitals.

In addition, there ought to be a critical review of government policies, regulations, and
legislation that may directly or indirectly obstruct access of one or more groups to key social
goods and services such as education. Language policy is a good example. Care should be
taken to ensure that the legislative framework governing education provides for instruction in
all of the languages of constituent ethnic groups or in a language common to all ethnic groups.
Granting preference to the language of one ethnic group in the education system limits the
educational opportunities of students from other ethnic groups and, consequently, limits their
vocational options, including employment in the public sector.663

The experience of Malaysia demonstrates how the choice of the language of instruction can
alienate other ethnic groups and obstruct their access to education. Under the Malaysian New
Economic Policy (NEP), the Malay language was imposed as the language of instruction in
schools and colleges. As Chinese and Indian students were accustomed to being educated in
English, these policies had a devastating effect on their ability to gain entrance to Malaysian

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663 Note, however, that there is a paucity of empirical studies that test whether teaching standard curriculum in a
student’s native language improves the student’s educational outcome. In the case of Maori students in New
Zealand, see e.g. Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (New Haven: Yale
University Press, 2004) at 184. Nevertheless, there is evidence from Malaysia and Sri Lanka, for example, that
giving preference to the language of one ethnic group over other groups in the education system in a state can
worsen inter-ethnic relations and generate grievances.
universities. Consequently, by 1980, tens of thousands of Chinese and Indian students left Malaysia to study at universities abroad.664 This trend was also evident at the secondary school level: more than 10,000 secondary students left Malaysia to study in Singapore, where instruction was still conducted in English.665

Second, affirmative action programs are sometimes used to increase the representation of a particular ethnic group on the staff of government agencies and the state bureaucracy. Broadly speaking, affirmative action programs are programs “in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment.”666 There are different types of affirmative action programs. Some programs use a quota system. In a quota system, a set number of positions are set aside or held for members of a particular ethnic group. This ensures that there will be at least a certain number or percentage of employees from the targeted ethnic group. Other affirmative action programs focus more on assisting members from a particular ethnic group to obtain employment by reserving a number of university admissions for such members.

Affirmative action, particularly quota systems, offer what would appear to be an expedient means of making the bureaucracy, police, and military more representative of the population. After all, reserving a proportionate number of positions in government, police, and the military would address the past exclusion of certain groups from these positions and would bring about

664 Ibid. at 65.
665 Ibid.
a more representative composition of the bureaucracy, police, and military. Nevertheless, there are a number of factors that suggest that affirmative action programs may not be the best policy alternative for making government institutions more representative of the population. To begin, affirmative action programs may not materially advance the larger goal of promoting a sense of public ownership of institutions. Preferential policies tend to benefit a small number of the members of an ethnic group who are typically among the elite or sub-elite. The rank and file members of the ethnic group do not gain greater access to positions in the bureaucracy, military, and police and often do not have close connections with the elites and sub-elites who are hired into these positions. Consequently, although government institutions may appear to be more representative, preferential policies do not necessarily bridge the distance that exists between the general population and the bureaucracy, police, and military.

The experiences of various countries such as India, Nigeria, Sri Lanka, and Malaysia with affirmative action programs suggests that these programs create as many problems as they are intended to resolve. Preferential policies in each of these countries have been associated with rising inter-group tension, increasingly polarization, and even violence. In India, for example, preferential policies were designed to improve the socio-economic levels of the untouchables, India’s lowest caste. Since these preferential policies were adopted, there has

667 Sowell, *ibid.* at 185-187. See also Schuck, *ibid.* at 64-66.
668 Mosher distinguishes between active and passive representation. Passive representation is based on demographic attributes; for example, if a bureaucrat is of the same ethnic origin as a particular group of individuals, then the bureaucrat is a passive representative of those individuals. Passive representation focuses on ensuring that the composition of the bureaucracy mirrors the demographics of society. Active representation, by contrast, exists when a bureaucrat advocates on behalf of the individuals he or she is presumed to represent, for example, by pressing for the interests and desires of such individuals. See Frederick C. Mosher, *Democracy and the Public Service* (New York: Oxford University Press, 1968).
669 A greater sense of public ownership of institutions may flow from a more active style of representation. For a discussion of societal and occupational factors that increase the likelihood that a bureaucrat will actively represent his or her ethnic group, see Frank J. Thompson, “Minority Groups in Public Bureaucracies: Are Passive and Active Representation Linked?” (1976) 8 Administration & Society 201.
670 Sowell, *supra* note 663 at 177, 180-184.
been a steady increase of violence against untouchables that is associated with a backlash against these policies.\textsuperscript{671} In regions where untouchables are able to respond to this violence, their response has been extreme and violent.\textsuperscript{672}

Affirmative action programs also impose costs related to losses of efficiency. The losses of efficiency result from both the hiring of less qualified persons over more qualified persons and the emigration of many highly qualified persons from non-preferred groups who leave due to the loss of opportunities available to them.\textsuperscript{673} In South Africa, for example, the affirmative action programs for blacks adopted in the post-apartheid era has caused many white government workers to take early retirement and prompted thousands of whites to emigrate annually.\textsuperscript{674} In Malaysia, the preferential policies contained in the New Economic Policy sparked a significant exodus of Chinese capital and professionals from Malaysia. Between 1976 and 1985, an estimated USD $12 billion worth of capital left Malaysia.\textsuperscript{675} More than half of this capital was owned by the Chinese.\textsuperscript{676}

The experience with affirmative action programs around the world suggests that while these programs may offer a seemingly expedient means of making the bureaucracy, police, and military more representative of the ethnic composition of society, any gains come at a potentially high cost. Ethnic quota systems appear to be particularly problematic with respect

\textsuperscript{671} Ibid. at 25-26.
\textsuperscript{672} Ibid. at 27-28.
\textsuperscript{673} Ibid. at 187. See also Michael J. Trebilcock, \textit{The Limits of Freedom of Contract} (Harvard University Press, 1993) at 206.
\textsuperscript{675} Sowell, \textit{supra} note 663 at 68. Most of the preferential policies contained in the New Economic Plan aimed at providing Malays with preferences in the commercial and educational contexts.
\textsuperscript{676} Ibid.
to generating resentment among non-preferred ethnic groups. At the same time, there is little empirical data available that tests whether quota systems that are adopted to make institutions more representative of the population as a whole actually result in a greater sense of public ownership of such institutions. Accordingly, the adoption of ethnic quota systems for hiring within the bureaucracy, police, and military should be approached with caution. Instead, priority should be given to addressing the barriers to obtaining employment in the public sector, such as poor educational opportunities (discussed above) and biased government hiring practices (discussed below).

Finally, an alternative to affirmative action programs is a focus on recruiting in under-represented ethnic communities. This approach relies on outreach to encourage more members of under-represented ethnic groups to apply for employment with government agencies and departments. Providing public notice of employment opportunities is an important component of a recruitment strategy. It is not uncommon for vacant positions in government agencies and departments to be filled by a person with connections to an employee already working in the government. Notice of the vacancy may never be made public, and thus even if there is a competitive hiring process, outsiders may be unaware of the opportunity to apply for the position. In some cases, simply ensuring that notice of the state’s intention to hire employees is provided to all ethnic communities may suffice to increase the number of applicants from under-represented ethnic groups.

It may be necessary to review the hiring practices of government agencies and departments in order to ensure that they are not biased against any particular ethnic group. Care must be taken
to avoid comparative procedural unfairness in the hiring process. Comparative procedural
unfairness “exists if procedures give some applicants a better chance than others [at obtaining
employment] independent of their substantive qualifications.” 677 Scheduling interviews on a
particular day of the week could result in comparative procedural unfairness if the day in
question is a religious holiday or day of rest for certain ethnic groups (e.g., Fridays for
Muslims, Saturdays for Jews, and Sundays for Christians), as it would make it difficult or
impossible for members of affected ethnic groups to attend the interview session.

The criteria used to evaluate potential employees must also be reviewed to ensure that they do
not exclude members of certain ethnic groups. Employment requirements that are not related
to the ability to do one’s job competently and safely should be removed since they may be
indirect attempts to exclude certain groups. For example, a requirement that a police officer
must wear a standard, police-issue cap would likely exclude from employment minority groups
such as Sikhs who wear turbans for cultural or religious reasons. Efforts to accommodate
cultural or religious practices should be made where possible so that members of under-
represented ethnic groups are not dissuaded from seeking employment with government
agencies or departments by the constraints that such employment would place on them.

2.3. Prioritizing the delivery of social services

One of the debates in both the law and development literature and in the peace building
literature involves the sequencing of reforms in developing countries. I have argued elsewhere
in this dissertation that it will be difficult for elites to introduce major political and socio-
economic reforms before inter-ethnic social capital begins to emerge. 678 Thus, including such

677 Michael D. Bayles, Procedural Justice: Allocating to Individuals (Dordrecht: Kluwer Academic Publishers,
1990) at 218.
678 See Chapter Two.
reforms on the agenda during the peace process negotiations is not likely to be productive. However, more modest proposals for the provision of aid and basic services to areas and populations that have been hit particularly hard by inter-ethnic conflict should be part of the transition plan. The provision of food, shelter, primary and secondary education, and medical services should be a priority from the outset of the peace process and onward. From the perspective of cultivating inter-ethnic social capital at the level of the masses, there are two principal reasons for an early emphasis on providing these types of public services.

First, the basic needs of the population must be met before it is reasonable to expect the population to engage in a meaningful way in the peace process. Providing food, shelter, and medical aid alleviates immediate concerns about the ability to survive and creates conditions that are more conducive to engaging people in the peace process. In this regard, the provision of food, shelter and medical aid promotes the right to participation. The provision of such basic necessities also affirms in a direct way the right of each group to its continued existence.

Second, the state must begin to supplant the ethnic group as the provider of vital socio-economic services in order to increase the relevancy of the state in the lives of the general population. As I discussed in Chapter Two, the ethnic group often provides its members with many of the basic socio-economic goods and services that are generally provided by the state in developed countries. As a result, the state has a marginal role in the lives of ethnic group members and ethnic group members have only weak attachments to the civic institutions of the state. By taking a more direct and central role in providing vital socio-economic services, the state can begin to nurture stronger attachments between the general population and the state and its institutions. While ethnic group members are likely to continue to be loyal to their
respectively ethnic groups, the state’s role in providing these services gives the members a greater stake in the institutions of the state and makes them more invested in the polity.

3. Part II: Inter-ethnic social capital and the priority of normative development
In the early phases of transition out of violent conflict, the strategy for cultivating inter-ethnic social capital focuses primarily on fostering widespread adherence to the norms of inter-ethnic social capital. Developing networks of inter-personal relationships between individuals from different ethnic groups must remain a secondary priority throughout the initial post-violence period. As I will explain below, promoting contact between ethnic groups is a complex undertaking. Initiatives aimed at facilitating contact risk destabilizing the fragile peace of the post-violence period. The priority in the early stages of transition must be to set the foundation for the emergence of the civic compact in order to create a context where contact can occur and inter-personal relationships can develop with little risk of de-stabilization and violence.

The norms of the right to participation, the right to continued existence, and the rule of law are the foundation of the civic compact and provide the basis for coexistence. The entrenchment of these norms helps to set a moderating tone for dialogue between ethnic communities. Widespread adherence to these norms among the citizenry also decreases the population’s tolerance for radical, ethno-nationalist rhetoric from their politicians. Thus, as the civic compact begins to emerge, a political market for moderation grows. The civic compact, including the political market for moderation, mitigates the risk of destabilization and violence. Although inter-ethnic rivalry will likely continue to exist, this rivalry is confined to the institutional arenas in the state. Adopting radical, extra-institutional strategies to advance
ethnocentric agendas becomes increasingly unacceptable to the vast majority of the population and politicians.

Once the civic compact has begun to emerge, the strategy for cultivating inter-ethnic social capital should broaden to include formal initiatives aimed at promoting contact between individuals from different ethnic groups. At this stage, a key policy objective should be the development of networks of cross-ethnic inter-personal relationships. To be clear, prior to this point, the strategy for cultivating inter-ethnic social contact should be indifferent to contact, but not necessarily adverse to it. There should not be active attempts to keep ethnic groups separate, nor should the official policy of the state be to discourage or prohibit contact. Instead, the policy should be not to intervene: to allow cross-ethnic contact and inter-personal relationships to develop where they can, but not to allocate resources to programs designed to bring groups together or to keep them apart.

My approach to cultivating inter-ethnic social capital at the level of the masses differs from the approaches taken by other scholars to social capital. Other scholars focus on the social network aspect of social capital or on the idea of civic associations. For example, Varshney argues that variations in levels of pre-existing local networks of civic engagement between Hindu and Muslim communities can explain why communal rioting and violence occurred in some Indian towns and cities, but not in others. Varshney identifies two main forms of networks: associational forms of civic engagement and everyday forms of engagement. Associational forms of engagement arise in organizational settings, while everyday (or

679 See Varshney, supra note 612.
680 Ibid. at 9.
quotidian) forms of engagement are informal patterns of interactions that occur in day-to-day life. Both forms of engagement involve contact between members of different ethnic groups.

Based on his analysis of the role of associational and day-to-day forms of civic engagement in managing communal tensions in India, Varshney argues that civic linkages can contain ethnic violence. He suggests that there is no evidence from his research that supports the idea that the state alone can bring lasting peace to areas ridden by violent conflict. Instead, Varshney argues that the “state should begin to see civil society as a precious potential ally and think of the kinds of civic linkages that can promote the cause of peace.” From Varshney’s perspective, then, fostering civic linkages through associational and quotidian forms of engagement offers a powerful strategy for managing violent ethnic conflict. Varshney’s work in this regard is consistent with Putnam’s arguments that robust associational life in northern Italy has led to a stronger quality of democracy in that region compared to southern Italy.

Both Varshney and Putnam favour promoting contact between citizens through associational activities in order to increase a society’s stores of social capital (or civic engagement, to use Varshney’s term). While I recognize that fostering networks of cross-ethnic inter-personal relationships has a role to play in the development of social capital, I consider that formal efforts to create such networks should not take place until the civic compact has begun to emerge. This difference between my approach and that of Putnam and Varshney is more than

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681 Ibid.
682 Ibid. at 295.
683 Ibid. at 297.
684 See Putnam, supra note 613.
just one of timing. Varshney and Putnam would likely argue that civic linkages and the forms of contact that accompany such linkages are necessary preconditions to the emergence of a democratic culture capable of managing intercommunal tension. However, Varshney and Putnam fail to address the complexities associated with promoting contact and their recommendations risk triggering an escalation in radical ethno-centrism and violence. I argue that formal attempts to promote inter-personal contact between individual members of different ethnic groups can subvert the transition to a functioning democracy. Extensive efforts to promote cross-ethnic inter-personal contact should not be undertaken until the civic compact has begun to emerge.

3.1. Managing challenges related to contact between ethnic groups

My argument that the cultivation of the norms of inter-ethnic social capital should take precedence over the development of networks of inter-ethnic relationships is rooted in the impact that cross-ethnic inter-personal contact has on elite incentive structures. During periods of peace-building and inter-group reconciliation, elites may fear that their sphere of influence will shrink as the members of their ethnic group form relationships with members from other ethnic groups. Prior to this phase of peace-building, the influence and power of the elites have rested upon the salience of ethnicity in the polity. The status of elites rests in large

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686 Interpersonal contact at the level of the elites must occur to promote the cultivation of inter-ethnic social capital at the level of the elites. However, as will be discussed below, interpersonal contact at the level of the masses creates elite incentives that can trigger a radicalization of ethnic claims and the intensification of inter-ethnic tension.

687 My analysis of the impact of contact on elite incentive structures, particularly the arguments concerning the risk of destabilization due to contact, is based on Forbes’ analysis of the effects of contact at the individual and the group levels. See H.D. Forbes, Ethnic Conflict, supra note 685.
part on their ability to represent the members of their respective ethnic groups. Thus, the ties that bind the members of the public to the elite are essentially ethnic in nature.

Cross-ethnic relationships threaten the base of elite influence by diminishing the saliency of ethnicity in the polity. As individual members of different ethnic groups interact and form relationships, it is inevitable that some assimilation will occur.688 This assimilation erodes the significance of the key markers of group identity. Moreover, cross-ethnic relationships diminish the centrality of the ethnic group in the lives of each individual. Thus, contact, particularly in the form of reconciliation between ethnic groups, threatens the influence and status of elites.

As I indicated in Chapter Two, elites understand that their continued influence is contingent upon ensuring that a solid majority of group members remains committed to the group and the group’s own language, norms, and institutions. The pressure to prevent individual members of the ethnic group from defecting to outside groups creates incentives to rally members to the cause of the ethnic group and to instil loyalty to the group within the masses. Accordingly, elites often respond to the pressures created by increasing contact between individual members of different ethnic groups by adopting ethno-centric platforms. These platforms undermine efforts at reconciliation. They increase the levels of suspicion and tension that already exist between groups and thus risk destabilizing the tenuous peace that exists. Thus, while contact

688 See Forbes, Ethnic Conflict, ibid. at 143-149.
may have a positive effect on the individuals who interact with each other, this same contact triggers increased tension at the level of the group.\footnote{689}

The rising ethnocentrism that follows contact has an effect on the levels of contact. The attitudes and behaviours associated with ethnocentrism (segregation, discrimination, prejudice) tend to reduce levels of contact between ethnic groups.\footnote{690} As Forbes observes, “[s]omehow, other things being equal, more ethnocentrism must mean less contact.”\footnote{691} Forbes goes on to present a model that illustrates the relationship between contact and ethnocentrism. This model demonstrates that as contact between members of groups increases, so do levels of ethnocentrism, and then as ethnocentrism rises, the levels of contact begin to drop.\footnote{692} In the context of post-violence efforts to build peace and to foster reconciliation, this model suggests that encouraging contact between individual members of groups may ultimately trigger growing radicalism and ethnocentrism at the level of the group, which in turn leads to a reduction in contact between groups.

Anecdotal evidence from Northern Ireland offers support for the relationship between contact and ethnocentrism. In Northern Ireland, the British government introduced a community relations policy agenda in the late 1980s in response to growing segregation between the


\footnote{690} Forbes, \textit{Ethnic Conflict}, supra note 685 at 161.

\footnote{691} \textit{Ibid.}

\footnote{692} \textit{Ibid.} at 161-166.
Protestant and Catholic communities. The Central Community Relations Unit (CCRU)\textsuperscript{693} was established to implement this policy. The CCRU’s primary objectives included the promotion of cross-community contact and the fostering of mutual understanding between Catholics and Protestants and the promotion of respect for diversity.\textsuperscript{694} The government also established the Community Relations Council (CRC) which helped to fund a variety of community relations projects. There is evidence of significant growth of peace and reconciliation activities in Northern Ireland since the late 1980s.\textsuperscript{695} Nevertheless, it appears that Catholic and Protestant communities continue to be heavily segregated, perhaps even more so since the introduction of these programs. Moreover, the efforts to promote peace, reconciliation, and cross-community contact were criticized by both Republican and Unionist leaders.

Republican and Unionist leaders voiced different concerns about the creation of the CCRU and the promotion of cross-community contact. Republican leaders were suspicious of these initiatives, arguing that efforts to promote contact between Catholic and Protestant communities were in fact part of a larger agenda aimed at assimilating the minority Catholic/Republican community into the larger Protestant/Unionist culture.\textsuperscript{696} Republicans also argued that the problems in Northern Ireland were more complex than tense relations between communities. The policy initiatives neglected the “real” issues and appeared to exonerate the British government from its role in the development and perpetuation of the

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\footnote{\textsuperscript{693} The CCRU was renamed the Community Relations Unit (CRU) in 2000.}
\footnote{\textsuperscript{694} Joanne Hughes, “Peace, reconciliation, and A Shared Future: a policy shift or more of the same?” (2007) Community Development Journal 1 at 2 [Hughes, “Peace”].}
\footnote{\textsuperscript{696} Hughes, “Peace”, \textit{ibid} at 3.}
\end{footnotesize}
conflict.\textsuperscript{697} By contrast, Unionists criticized the contact initiatives as “political gimmickry”. Unionists argued that the initiatives were a waste of public monies; they asserted that public resources could better be used to pursue terrorists.\textsuperscript{698}

The level and quality of interaction between Catholics and Protestants have not materially improved since the creation of the CCRU and the proliferation of programs aimed at fostering contact, tolerance, and reconciliation. Indeed, some scholars suggest that residential segregation has increased since the late 1990s notwithstanding the advances made in the peace progress.\textsuperscript{699} According to some research, a majority of people now opt to live in residentially polarized areas.\textsuperscript{700} Research conducted for the Northern Ireland Housing Executive (NIHE) found a marked increase in segregation in NIHE estates\textsuperscript{701} between 1971 and 1991; this trend toward greater segregation continued between 1991 and 2001.\textsuperscript{702} The NIHE reported that the problems of segregation have been compounded by an increase in sectarian-related graffiti, flags, kerb painting, and the like.\textsuperscript{703} Segregation of Catholics and Protestants also remains

\textsuperscript{698} Hughes, “Peace”, \textit{ibid.}, citing Knox & Hughes, “Crossing the Divide”, \textit{supra} note 695.
\textsuperscript{700} Shared Future, Annexes, \textit{ibid.} at 86.
\textsuperscript{701} NIHE estates are publically-owned residential properties. People may rent out these properties or purchase long-term (125 year) leases.
\textsuperscript{702} U.K., Northern Ireland Housing Executive, \textit{Mapping Segregation on Belfast Estates} by I.G. Shuttleworth & CD Lloyd (Belfast: Northern Ireland Housing Executive, online: Northern Ireland Housing Executive \texttt{<http://www.nihe.gov.uk/index> at 10 [NIHE, Mapping Segregation].}
\textsuperscript{703} Shared Future, Annexes, \textit{supra} note 699 at 86.

Initiatives aimed at fostering contact, tolerance, and reconciliation have also failed to generate an increase in positive relationships between Catholics and Protestants. Research on cross-community friendships, for example, suggests that the pattern of inter-group friendships has remained more or less constant from 1968 until 1998.\footnote{\textit{Shared Future, Annexes, supra} note 699 at 86.} The prospects for increased contact and a reduction in prejudice in the next generation are not strong. One study of Belfast households in “interface” areas (\textit{i.e.}, areas where segregated Catholic and Protestant neighbourhoods meet) found that 68% of young people aged 18 to 25 years old had never had a meaningful conversation with a person from the other denomination.\footnote{\textit{Ibid.}} A 2005 survey of 16 year olds found that 29 percent had no friends from the other denomination and that 54 percent believed that in five year’s time, inter-community relations will be “worse” or “about the same”.\footnote{“North segregation ‘worsening’”, \textit{Irish Independent} (7 September, 2005) (Factiva).}

Notably, some studies do suggest that inter-personal contact between Catholics and Protestants results in a reduction of distrust and animosity towards the other group at the level of the
individual. In other words, individuals who live in “mixed” areas or who have otherwise been brought into contact with individuals from the other ethnic group tend to trust the other group more and to behave in more positive ways toward members of the other group. These studies appear to create a case for promoting contact between individuals from different ethnic groups in order to build inter-group trust, reduce animosity, and increase the potential for inter-group cooperation. However, these studies focus only on the amelioration of attitudes at the level of the individual. They fail to consider the impact that contact between individual members of different communities have on inter-group relations at the level of the group. It should not be assumed (as these studies appear to do) that a reduction in bias and an increase in trust at the level of the individual will automatically result in greater stability at the macro level. As Forbes demonstrates, the opposite is more likely: elites respond to individuals’ improved attitudes towards the other group by employing more radical ethnic rhetoric in an effort to shore up their key base of political support. To date, there has been no empirical analysis of the impact of contact at the individual level on the attitudes of elites and on the strategies employed by elites in Northern Ireland. However, the anecdotal evidence presented thus far illustrates that leaders have been suspicious and/or dismissive of various contact initiatives. Moreover, even if cross-ethnic inter-personal contact was desirable, the anecdotal evidence suggests that promoting such contact on a large scale basis is likely to be difficult given the depth of segregation that exists in Northern Ireland.

In sum, it appears that many Catholics and Protestants remain suspicious of one another and many prefer to live apart from the other denomination despite the efforts of government and non-governmental actors to promote contact, tolerance, and reconciliation. These attitudes persist notwithstanding the fact that a solid majority of the population in Northern Ireland (71 percent) voted in favour of the Good Friday Agreement in the 1998 referendum. Contact between ethnic groups thus appears to have complex consequences. From the perspective of cultivating inter-ethnic social capital, the implications are that policy initiatives aimed at bringing individual members of ethnic groups together in the immediate post-violence period are likely ill-advised.

Elites must be given time in the immediate post-violence period to adjust to the new political regime, which will include institutions based on the principle of power-sharing. They must be given time and space to see that their ethnic constituencies remain intact and are not diluted by the new institutional framework. At the same time, at the level of the masses, efforts must be focused on building up the norms of inter-ethnic social capital (the right to continued existence, the right to participation, and the rule of law) so that the civic compact may begin to emerge. The civic compact should have a moderating effect on the attitudes of the masses and, by consequence, on elites. Thus, the immediate goal in the post-violence period is to create the basis for a political market for moderation in order to raise the costs associated with radical, ethno-centric strategies. By raising the costs of such strategies and by allowing elites to consolidate their constituencies before policies of contact are introduced, it is possible to create a socio-political environment where policy initiatives aimed at fostering contact, tolerance, and trust can be introduced without risk of destabilization.
There will inevitably be some contact between individuals of different ethnicities in the polity. One consequence of fostering a sense of public ownership of state institutions is increased contact between individuals in interactions occurring in the context of these institutions. As the bureaucracy, police, and military become more representative of the ethnic composition of society as a whole, individuals will work alongside of other individuals from different ethnic groups. Moreover, individuals may be served by members of the bureaucracy, police, or military who are of a different ethnicity. Proponents of the contact theory, a socio-psychological theory concerning inter-personal relationships, argue that contact between individuals can reduce prejudice and hostility if the contact experience occurs under certain conditions. A number of scholars have made recommendations about how to facilitate the transition out of violent conflict and reduce ethnic or racial tension using the contact theory.

710 The criteria for contact are largely based on the work of Gordon Allport, and include: equality of status of the participants; cooperative independence; the pursuit of common goals; and a framework of normative support for the cooperative contact between the individuals. See Gordon Allport, The Nature of Prejudice, Anchor Books edition (Garden City, N.Y.: Doubleday Anchor Books, 1958). [The Nature of Prejudice was originally published by Addison-Wesley Publishing Company, Inc. in 1954.] Subsequent research on the so-called Allport conditions has added a fifth criterion for contact, namely that the contact have acquaintance potential, i.e., that the contact occurs in a setting that has sufficient intimacy that the participants have an opportunity to develop real relationships with each other rather than passing familiarity.


It is therefore possible, though I argue unlikely, that the contact that follows from efforts to foster a sense of public ownership of state institutions may result in the types of cross-ethnic interpersonal relationships that reduce the salience of the ethnic group in the lives of individuals. Thus, promoting a sense of public ownership of state institutions and the resultant interpersonal contact potentially risks creating incentives for elites to adopt more radical claims. The cross-ethnic contact that will occur within state institutions is not likely to materially impact elite incentive structures, however. The quality of the cross-ethnic contact that will occur within institutions is generally not sufficient to give rise to the informal friendships and inter-personal relationships that diminish the importance of the ethnic group in the lives of the individuals involved.

Research on prejudice and inter-group relations has established that contact between individuals from different groups is a necessary but insufficient condition for improving relations between individual members of different groups. In order to create a basis for forming the sorts of relationships that can reduce the salience of the ethnic group in the lives of its members, contact must provide individuals from different ethnic groups with the opportunity to come to know each other well enough to challenge the stereotypes and
prejudices that each individual holds vis-à-vis the other. Broadly speaking, there must be sustained inter-personal contact in which the individuals from different ethnic groups interact with each others as equals. The contact situation must require these individuals to cooperate together in an interdependent effort in pursuit of common, super-ordinate goals, and the individuals should not be in competition with each other. Contact should occur in situations where the surrounding social, political, and legal norms favour inter-group contact and acceptance. Finally, there must be sufficient intimacy of contact to allow individuals to develop real relationships with each other rather than merely passing knowledge of each other. Contact should therefore be personal, informal, and intimate so that the individuals have the opportunity to come to know members of other ethnic groups as individual persons rather than as stereotypical representatives of the other groups.

Given the conditions under which contact must occur to reduce inter-group hostility and prejudice between individuals, it is not likely that the contact that occurs in the context of state institutions will give rise to incentives for elites to radicalize their claims. The contact between the citizenry and the staff of state institutions who may be of a different ethnic origin will generally be of a transitory, formalized, and impersonal nature. This contact lacks the sustained intimacy that is required to reduce inter-group prejudice. Thus, this contact is unlikely to give rise to the intimate, inter-personal relationships that can diminish the

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712 See Allport, supra note 710. See also Pettigrew, Racially Separate, ibid. at 275; Pettigrew, “Advancing Racial Justice”, ibid. at 169; Amir, “The Role of Intergroup Contact”, ibid. at 286; Amir, “Contact hypothesis in ethnic relations”, ibid.; and generally Cook, “Experimenting on social issues”, ibid.

713 This summary of the conditions under which contact can reduce inter-group prejudice and hostility is based on Allport, ibid., Pettigrew Racially Separate, ibid., and Stuart W. Cook, “The systematic analysis of socially significant events: a strategy for social research” (1962) 18 Journal of Sociological Issues 66. See also Pettigrew, “Intergroup Contact Theory, supra note 710; Fisher, supra note 710; Cook, “Experimenting on social issues”, ibid.; Amir, “The Role of Intergroup Contact”, ibid.; and Amir, “Contact hypothesis in ethnic relations”, ibid.
importance of the ethnic group in the lives of the individuals involved. Similarly, the contact between employees of different ethnic origin who work together in the bureaucracy, police, and military will generally be insufficient to the intimate inter-personal relationships that pose a threat to elites’ spheres of influence. Although employees may engage in sustained interactions that may even involve cooperative interdependence, these interactions will generally be formalized, professional, and limited to the workplace. While employees may acquire passing knowledge of each other, they are unlikely to engage in interactions\(^{714}\) that allow them to know each other more intimately and thus to become friends. Thus, most of the contact that occurs between employees of different ethnicities is unlikely to give rise to inter-personal relationships that diminish the salience of ethnic identity in the lives of the employees. Assuming that some employees do form cross-ethnic friendships, it is likely that these friendships will be relatively rare. These friendships are therefore unlikely to cause elites to perceive a threat to their sphere of influence. On the whole, then, it is unlikely that the cross-ethnic contact that will occur within state institutions will destabilise inter-ethnic relations by creating incentives for elites to radicalize their claims.

### 3.2. Repairing fractured societies: A role for reconciliation?

#### 3.2.1. The idea of reconciliation

Thus far, I have advanced a case for focusing on developing the norms of inter-ethnic social capital at the level of the masses rather than cultivating inter-personal connections between members of different ethnic groups at the outset of the peace process. My approach deviates from a major stream of peace and conflict scholarship that emphasizes the role of reconciliation in responding to the challenge of repairing fractured societies in transition.

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\(^{714}\) Interactions that could give employees the opportunity to form more than a passing acquaintance of each other generally would have to involve socializing outside of the workplace. However, given the polarization in society, socializing outside of work is unlikely unless promoted and facilitated by the employer. In this case, the employer is the state, which can elect not to facilitate opportunities to socialize outside of work.
periods. Given the emphasis placed on reconciliation in the current scholarship, it is prudent to consider whether reconciliation offers a means of addressing the challenges implicit in cultivating the norms of inter-ethnic social capital after violent conflict.

One of the immediate concerns with reconciliation is that it generally involves the promotion of contact between individuals from different sides of the conflict. A great deal of the scholarship on reconciliation flows from or has connections with socio-psychological studies of inter-personal relationships, including, for example, the contact theory. The scholarship on reconciliation focuses on restoring relationships between individuals and reducing hatred, animosity, and prejudice at the individual level based on the tenets of the contact theory. Much of this scholarship fails to take into account the dynamics of inter-ethnic animosity at the group level. Thus, while the scholarship on reconciliation may include useful prescriptions for restoring individual level relationships, it generally fails to consider the possible negative repercussions of contact at the group level. The failure of much of the scholarship on reconciliation to address the dynamics of inter-ethnic relations at both the individual and the group level is a critical weakness.

The scholarship on reconciliation suffers from other limitations, as well. A serious problem in the scholarship on reconciliation is the ambiguity of the term itself. There is no consensus on the meaning of “reconciliation”. “Reconciliation” may understood as an interpersonal or

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715 The contact theory was discussed above.
716 For a good discussion of how contact between individuals of different ethnicities may have positive effects on the individual-level relationship, but a negative impact on inter-group relations, see Forbes, Ethnic Conflict, supra note 685.
community process involving the restoration of a broken relationship; something that brings healing to individuals; the state of peace, trust and acceptance; attempts to restore justice to a society; truth-telling and accountability; and even nation-building. Some scholars emphasize the ideas of apology, remorse, and forgiveness in their exploration of reconciliation; other scholars argue that forgiveness is conceptually separate from reconciliation. Reconciliation is a process and an end in itself. Scholars differ on whether it occurs at the individual, community, or national level.

718 See e.g. Hamber & Kelly, supra note 610 at 38; Andrew Rigby, Justice and Reconciliation: After the Violence (Boulder, CO: Lynne Rienner, 2001) at 12; and Jodi Halpern & Harvey Weinstein, “Rehumanizing the Other: Empathy and Reconciliation” (2004) 26 Human Rights Quarterly 561.


722 See e.g., Lederach, “Building Peace”, ibid.; Assefa, ibid.; and Hamber & Kelly, supra note 610 at 38.

723 See e.g. Hamber & Kelly, ibid.


726 See e.g. Rigby, ibid. and Lederach, “Civil Society”, supra note 719.

727 Bloomfield, Clarifying Reconciliation, supra note 610 at 6-7 and Bar-Tal & Bennink, supra note 720. Bloomfield and Bar-Tal and Bennick argue that reconciliation can be understood as both a process and an outcome.

728 For a discussion of the debate among scholars about the level at which reconciliation does and should occur in society, see Hamber & Kelly, supra note 610 at 20-23 and Bloomfield, Clarifying Reconciliation, ibid. at 25-28.

729 See e.g. Halpern & Weinstein, supra note 718.

730 See e.g. Halpern & Weinstein, ibid.

731 See, e.g. Hamber & Kelly, supra note 610.
The combination of these varied perspectives on reconciliation does not give rise to a rich, multi-dimensional conception of “reconciliation”. Instead, we are left with a clutter of ideas that leaves one with the impression that “reconciliation” may be anything from the healing of a relationship between a victim and her tormentor to nation-wide processes of truth-finding and institutional reform. Reconciliation can mean everything and anything in peace-building. The resulting ambiguity deprives reconciliation of much constructive utility when considering the role it might play in promoting inter-ethnic social capital.

The usefulness of the idea of reconciliation is also limited by implicit assumptions within the concept itself. Reconciliation (or re-conciliation) implies that individuals, communities, or nations are brought back to a state of conciliatory relations that had previously existed. In many ethnic conflicts, however, conciliatory relations have not existed for many generations. In some cases, for example, the Balkans, there is a perception that there have never been conciliatory relations. In other cases such as Rwanda and Burundi, ethnic groups lived together harmoniously in pre-colonial societies, but it is difficult to conceive of how the conditions of this peaceful coexistence could be replicated in a modern society. Moreover, even where there might once have been conciliatory relations between ethnic groups, any residual goodwill has been supplanted by fear, distrust, anger, and often hatred due to the intensity of the conflict between the groups. Thus, in many ethnically polarised societies, discussion of “reconciliation” is conceptually misleading.

**3.2.2. Practical approaches to overcoming inter-group animosity**

Although reconciliation as a concept is problematic, the question about whether attitudes towards other ethnic groups can change during periods of transition remains. From a pragmatic perspective, what matters most is the ability to move the citizenry past the prejudice,
suspicion, distrust, and hatred that characterizes relations between ethnic groups during periods of violent conflict. A number of countries have adopted legislation, programs, proceedings, and other mechanisms designed to address past atrocities and the divisions between ethnic groups within the state. I review select examples of the approaches that have been taken to addressing fractured relations within a state below. Ultimately, there appears to be little evidence of success in healing the relationships between ethnic groups, at least in the short-term. These examples force us to consider what is realistically possible to accomplish in terms of inter-group relations in the short- to medium-term. One key implication is that the strategy for cultivating inter-ethnic social capital in the early stages of the peace process should focus on promoting the norms of inter-ethnic social capital rather than on developing networks of inter-ethnic relationships.

3.2.3. The South African Truth and Reconciliation Commission

The South African Truth and Reconciliation Commission (TRC) is perhaps the best known example of a formal, state-sponsored proceeding to address on a nation-wide basis past atrocities and injustices perpetrated within a country. The South African Government of National Unity established the TRC to address what happened within the country during the apartheid period. The *Promotion of National Unity and Reconciliation Act, 1995*732 (the TRC Act) created the TRC and set out its key objectives, functions, and powers. According to the TRC Act, the objectives of the TRC were “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”733 through a number of key processes. These processes included:

- “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were

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733 S. 3(1), *National Unity and Reconciliation Act, ibid.*
committed” during the apartheid era “by conducting investigations and holding hearings”, 734

- facilitating the granting of amnesty to persons who met the specified requirements for amnesty, which included making full disclosure of various facts; 735

- “establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims and by recommending reparation measures in respect of them”; 736 and

- compiling a report providing as comprehensive an account as possible of the activities and findings of the TRC with respect to the first three processes and which sets out recommendations of measures that should be taken in order to prevent the future violations of human rights. 737

In order to accomplish its objectives, three committees were established as part of the TRC: the Human Rights Violation Committee, the Committee on Amnesty, and the Committee on Reparations and Rehabilitation. The Human Rights Violations Committee (HRVC) was responsible for matters relating to the investigation of gross violations of human rights. The HRVC received testimony from victims in hearings that were held throughout South Africa. The Committee on Amnesty was responsible for matters related to the granting of amnesty. The Reparations and Rehabilitation Committee (RRC) was charged with dealing with matters related to reparations. The RRC received a total of 19,890 claims for compensation from victims. 738 Compensation was only provided to individuals found to be “victims” by the HRVC. 739

734 S. 3(1)(a), National Unity and Reconciliation Act, ibid.
735 S. 3(1)(b), National Unity and Reconciliation Act, ibid.
736 S. 3(1)(c), National Unity and Reconciliation Act, ibid.
737 S. 3(1)(d), National Unity and Reconciliation Act, ibid.
739 Ibid. at 165-166.
It is difficult to assess the impact of the TRC on South African society. Although there has been significant scholarship on the TRC\textsuperscript{740}, there is little consensus about whether the TRC should be considered a success, a failure, or something in between. Although many claims have been made about the TRC, the empirical evidence on which these claims are based remains thin. Moreover, there are few rigorous analyses of the empirical evidence on the impact of the TRC. I have based my assessment of the TRC on a combination of anecdotal evidence and, where available, analyses of responses to the TRC collected in scientific studies and surveys. Further scholarship on the impact of the TRC is clearly necessary. Nevertheless, from the perspective of cultivating inter-ethnic social capital, it does appear that the TRC has not resulted in a quick mending of the broken relationship between whites, blacks, and other groups in South Africa.

South Africa remains a deeply divided country. There is little evidence that participating in the hearings facilitated reconciliation between individual victims and perpetrators or a more general willingness to forgive groups for the violence and human rights violations committed by such groups.\textsuperscript{741} Although the TRC reported hearing “some remarkable evidence of a willingness to forgive”\textsuperscript{742}, it also acknowledged that not everyone who came before the Commission experienced healing and reconciliation.\textsuperscript{743} Subsequent studies of the experiences of victims who testified before the HRVC confirm that many victims were not willing or


\textsuperscript{741} In terms of groups, I refer to a willingness of victims to forgive entire groups for what the groups represented and what the groups did during the apartheid period.

\textsuperscript{742} See the examples reported by the TRC in South Africa, \textit{Truth and Reconciliation Commission of South Africa Report}, Volume 5, 29 October, 1998 at 350, 371-381 and 392-400 (\textit{TRC Report, Vol. 5}).

\textsuperscript{743} \textit{TRC Report, Vol. 5}, \textit{ibid.} at 350.
prepared to forgive and that many victims’ testimonies were not focused on forgiveness at all.744

The TRC was frank in its appraisal of its limited ability to promote reconciliation and national healing. In its final report, the TRC stated that its work highlighted that reconciliation (the meaning of which was hotly contested within the TRC) had to occur at multiple levels in society. Reconciliation included: coming to terms with the past; reconciliation between individual victims and perpetrators; reconciliation at a community level; and national unity and reconciliation.745 The TRC indicated that it found this latter dimension of reconciliation—the meaning of unity and reconciliation at a national level—to be particularly difficult to comprehend.746 The TRC also recognized that “[w]ith its short lifespan and limited mandate and resources, it was obviously impossible for the Commission to reconcile the nation.”747 After reviewing evidence received about the coexistence of victims and perpetrators, the TRC made the following important observation:

The … emphasis on peaceful or non-violent co-existence suggests that a weak or limited form of reconciliation may often be the most realistic goal towards which to strive, at least at the beginning of the peace process. This applied to relationships between former enemies within communities, but also to the network of relationships between communities, ethnic and racial groups at regional and national levels.748

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746 Ibid. at 108.


748 Ibid. at 400.
The TRC’s observation highlights the importance of seeing reconciliation as a lengthy process. It is virtually incontestable that the TRC did not bring about a swift reconciliation between individual victims and perpetrators or between ethnic and racial groups in South Africa. For the purposes of the discussion of how to cultivate inter-ethnic social capital at the level of the masses in the early stages of transition, the South African experience thus suggests that building up networks of inter-ethnic relationships will be very difficult. However, both reconciliation and the cultivation of inter-ethnic social capital are lengthy processes; the final effect of the TRC on these processes likely cannot be known for many years. It would therefore be prudent to avoid making final judgements about the impact of the TRC on inter-group relations in South Africa until much more time has passed.

3.2.4. Attempts to create an overarching national identity: Rwanda, Fiji, and Tanzania
As I indicated in Chapter Two, some scholars recommend responding to ethnic divisions by promoting civic nationalism or by pursuing “quiet policies of assimilation”. Both Rwanda and Fiji have taken steps to create or to reclaim national identities, with the goal of making ethnic identities less important or even irrelevant to post-conflict societies. In Rwanda, the government has made a concerted effort to de-emphasize Hutu and Tutsi ethnic identities since the genocide. A cornerstone of the government’s approach is the interpretation of Rwandan history that is promoted by the government.\(^{749}\) According to this historical interpretation, Rwandan society was unified in all major respects prior to the arrival of the colonial powers and the Catholic Church.\(^{750}\) Tutsi, Hutu, and Twa identities were associated with occupational


\(^{750}\) Ibid. This view is reflected, for example, in the Preamble of the Rwandan constitution, which states in part: “Considering that we enjoy the privilege of having one country, a common language, a common culture, and a long shared history which ought to lead to a common vision of our destiny”. See also Rwanda, The Unity of Rwanda (Kigali: Office of the President, 1999). This report was commissioned by the President in 1998 to study
divisions and did not carry significant social or political importance. Divisions in pre-colonial Rwanda tended to fall along clan or geographic divisions, but not ethnicity. Colonial powers used ethnicity to divide the population and attached significance to ethnic identity. Thus, the roots of modern conflict, including the 1994 genocide, between Tutsis and Hutus were firmly rooted in colonialism. Rwanda’s true indigenous roots lie in a unified population in which ethnicity is of trivial importance.

Since 1994, the Rwandan government, dominated by the Tutsi-led Rwandan Patriotic Front (RPF), has taken various measures to promote this historic narrative. For example, prior to the 1994 genocide, each person’s official identification card listed his or her ethnicity. After the genocide, the government eliminated ethnic identification from official records and documents. The government’s official stance has been that all citizens are Rwandan and that ethnicity poses dangerous divisions. The government routinely used (and continues to use) genocide memorials at massacre sites and annual commemorations to show the dangerous consequences that flow from divisive ethnic allegiances. Indeed, the government has drawn a tight link between ethnicity and genocidal violence such that those who speak of ethnicity risk being accused of inciting or supporting hostilities.

One of the more direct attempts to indoctrinate the population with the RPF government’s historic narrative and to promote national unity and the eradication of ethnic divisions is

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the unity of Rwanda. The Unity of Rwanda sets out the bases of the unity of Rwandans prior to colonialism, including for example, language, culture, religion, shared social, economic, and political institutions, and a shared loyalty to the King.

751 Longman & Rutagengwa, ibid.
752 Ibid.
753 Ibid. at 165.
754 Ibid. at 166.
Ingando or solidarity camps. Shortly after the end of the genocide, the government began to use these solidarity camps to help re-integrate Tutsi returnees who had been forced for various reasons to leave Rwanda. The Ingando project has since expanded and has become a key part of the government’s strategy for promoting reconciliation and national unity in Rwanda.

Both Hutus and Tutsis now participate in the Ingando project. The government requires or encourages politicians, students entering university, church leaders, former soldiers, released prisoners, genocidaires and gacaca judges, among others, to attend solidarity camps. Attendees live, eat, and sleep at the camps for anywhere from a few days to up to three months. Attendees at the solidarity camps study government programs, including the official government version of Rwandan history and the government’s program for unity and reconciliation. The Ingando project is administered by the National Unity and Reconciliation Committee (NURC) in Rwanda. According to the NURC National Plan, every Rwandan of majority age will attend an Ingando solidarity camp at some point in their lives.

Consistent with the government’s official historical narrative, the Rwandan Constitution of 2003 emphasizes the national identity of all Rwandans as Rwandans, not as Tutsi, Hutu, or Twa. The Constitution recognizes the promotion of a national identity as a “Fundamental Principle”. Article 9(2) of the Constitution provides, “The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof: … (2) eradication of ethnic, regional, and other divisions and promotion of national

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757 Mgbako, supra note 755 at 202, 208-209; Longman & Rutagengwa, supra note 749 at 166.
758 Mgbako, ibid. at 208-209; Longman & Rutagengwa, ibid.
759 Mgbako, ibid. at 209.
The Preamble of the Constitution also references the eradication of ethnic and other forms of division in Rwanda. The Rwandan Constitution does not make a single reference to Tutsis, Hutus, or Twa.

Although public criticism of the Rwandan government’s attempts to cultivate an overarching national identity has been muted, there is evidence that suggests that the government’s strategy is less than ideal. The government, which has been dominated by the RPF since 1994, has been criticized for suppressing political opposition and restricting the freedom of the press. Consequently, it appears that many people do not feel free to speak publicly about ethnic identity. Instead, many people publicly endorse the government’s official stance that there is no ethnicity, but only one united Rwandan identity, while criticizing this stance privately or indirectly. Tiemessen suggests that the creation of a single “Rwandan” identity has only been successful in the public sphere; in private, social conditions in post-genocide Rwanda remain constructed in terms of ethnic identity. As an elderly woman in Kibuye said to Longman and Rutagengwa, “It is true that in the official documents, like the identity card, the

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762 See the reports on interviews with Rwandans in Longman & Rutagengwa, *supra* note 749 at 176-177. See also Sarah Warshauer Freedman *et al.*, “Confronting the past in Rwandan schools” in Stover & Weinstein, eds., *supra* note 749, 248.
The government’s tactics also raise concerns about the suppression of freedom of expression. Even if the efforts to displace ethnic divisions were successful, the means used to achieve this end undermine the fundamental freedom and rights of Rwandans. While Rwanda might gain a semblance of unity, it would likely come at the expense of political and social development. Moreover, a unity that emerges from the suppression of divisions is always tenuous at best; such unity is likely to unravel when placed under pressure since it is built upon coercion rather than genuine sentiment. The Rwandan government may have had more success if it had recognized the existence of ethnic identities at the same time as it sought to cultivate an overarching national identity.\textsuperscript{765} Regardless of Rwanda’s pre-colonial history, ethnic identities are now firmly entrenched in present-day Rwandan society. Attempting to move beyond the violence and atrocities of the recent past is not likely to be successful if the principal strategy for cultivating a unified national identity replicates patterns of dominance by suppressing ethnic affiliations and propagating a particular historical and political narrative.

In post-2006 coup Fiji, the Interim Administration\textsuperscript{766} has adopted a plan for reform that includes the promotion of a national Fijian identity. In the fall of 2007, the Interim Administration created the National Council for the Building of a Better Fiji (NCBBF). The

\textsuperscript{764} Longman & Rutagengwa, supra note 749 at 176.

\textsuperscript{765} For example, the government may have acknowledged the existence of the Tutsi and Hutu communities, but emphasized that both communities are part of the greater Rwandan nation. The government may also have adopted a less coercive approach to building up a supra-Rwandan identity by allowing greater freedom of expression with respect to ethnic affiliation. Rather than attempt to suppress expressions of Tutsi or Hutu affiliation, the government may have focused on promoting positive expressions of the supra-Rwandan identity.

\textsuperscript{766} The Interim Administration was appointed as the government by Commodore Voreqe Bainimarama, the commander of the Fijian army and the leader of the coup that occurred in December 2005.
NCBBF’s mandate centres on the creation of a People’s Charter for Change and Progress (the “People’s Charter”), as well as the preparation of a very detailed analysis of the problems (social, economic, and political) facing Fiji. After conducting a nation-wide consultation, the NCBBF released a draft of the People’s Charter and its report on the problems facing Fiji. The draft People’s Charter sets out 11 pillars for rebuilding Fiji. The second pillar focuses on “developing a common national identity and building social cohesion”. The discussion of this pillar sketches out key measures and actions related to building a unified national “Fijian” identity, including, for example, the development of a national moral vision for the common good; the promotion of shared national values through the national education curriculum; the phasing-out of institutional names that denote racial affiliations; the promotion of national narratives, rituals, and symbols; and the elimination of racial categorization in all government records and registers.

While the People’s Charter envisions the development of a common national Fijian identity and a sense of “belongingness” to Fiji, it also appears to recognize the need for respect of diversity among the Fijian citizenry. The People’s Charter includes the “Foundation for the Common Good based on Our Shared Values, Vision, and Principles” (the “Foundation for the Common Good”). This statement of principles states that, “[w]e respect, appreciate, and celebrate the diversity and aspirations of our people. We recognize the freedom of our various

768 Ibid. at 10.
769 Ibid. at 18.
770 The People’s Charter states that “[o]ur common and equal citizenship underlines our desire for more inclusiveness, mutual respect, a common national identity, unity, loyalty, social cohesion, integration, confidence, and belongingness to Fiji.” Ibid. at 6.
771 Ibid. at 4.
communities to follow their beliefs as enshrined in the Constitution.” 772 The statement of the values and principles that underlie the common good includes “respect for the diverse cultural, religious, and philosophical beliefs”, as well as “unity among people driven by a common purpose and citizenship” 773 Even the discussion of the second pillar, the development of a national identity and the building of social cohesion, reflects a concern for respecting diversity and multiculturalism. While the People’s Charter envisions promoting shared values through the national education curriculum, it also envisions the teaching of vernacular languages (including the languages of native Fijians and Indo-Fijians) and the promotion of multicultural education. 774

The concern for cultivating respect for diversity that is implicit in the People’s Charter distinguishes Fiji from Rwanda. The Rwandan government has actively sought to stifle all discussion and recognition of the Tutsi and Hutu ethnic identities. By comparison, the NCBBF does not seek to eclipse the identity of various communities within Fiji. Instead, the NCBBF promotes a civic type of nationalism that focuses on shared values, principles, and national symbols. The sense of being “Fijian” espoused by the People’s Charter does not require native Fijians and Indo-Fijians to abandon their ethnic or religious identities. Whereas the Rwandan approach leaves no room for sub-Rwandan identities, the Fijian People’s Charter appears to promote the respect for and even the celebration of diversity.

It is difficult to assess the impact that the People’s Charter will have in promoting a shared Fijian identity and engendering a cohesive and integrated Fijian society. The Charter seeks to

772 Ibid.
773 Ibid. at 5.
774 Ibid. at 18.
strike a delicate balance between unity and cohesion on the one hand and respect for diversity
and multiculturalism on the other. In practice, it may prove difficult to build a unified Fijian
identity while also celebrating diversity and multiculturalism. Furthermore, some provisions of
the People’s Charter are contentious. For example, the Charter gives special recognition to the
indigenous people of Fiji called the *i-Taukei* (*sic*). The Charter also recognizes that special
care must be taken to ensure that individual indigenous landowners are able to participate
meaningfully in the modern economy. Although the People’s Charter does not purport to
undermine the constitutionally-recognized collective ownership of Fijian land by indigenous
Fijians, its sixth pillar advocates making more of this land available for social and productive
purposes. Among other things, the Charter specifically proposes creating a market for leased
land, increasing security of tenure and equitable returns to both landowners and tenants,
formalizing *vakavanua* (or informal settlement) on all types of land, and making more land
available for housing and infrastructure development. Land rights in Fiji are particularly
controversial. Former Prime Minister Qarase, leader of the Soqosoqo Duavata ni Lewenivanua
(SDL), argued that the land reform provisions in the People’s Charter are an important reason
to reject the Charter. Qarase suggested that the People’s Charter would undermine
indigenous ownership and control over collectively held land, an allegation contested by the
NCBBF.

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776 The discussion of the Foundation of the Common Good in the People’s Charter provides, “[w]e must ensure
that the indigenous individual landowners are empowered and assisted to participate meaningfully and
778 “Qarase – Making a Choice” *Fiji Daily Post* (8 October, 2008), online: Fiji Daily Post
People’s Charter” (media release, 26 September, 2008), online: Fiji People’s Charter/NCBBF
A particularly contentious proposal contained in the People’s Charter pertains to electoral reforms. The People’s Charter proposes that the existing electoral system enshrined in the 1997 Constitution be abolished; this electoral system is based in part on a communal role (i.e., that each ethnic group is assigned a set number of seats and members of each ethnic group vote for representatives from their own ethnic group). The People’s Charter advocates abolishing this form of communal representation and adopting a common roll, open list Proportional Representation (PR) electoral system. The Charter also proposes removing the mandatory power-sharing arrangements that are set out in the 1997 Constitution. The electoral reform provisions have generated controversy. The interim Prime Minister, Commodore Bainimarama has contributed to the growing tension surrounding these provisions by retreating from a promise to hold free and democratic elections by the spring of 2009. Commodore Bainimarama has stated that the electoral reform outlined in the People’s Charter must precede elections. The promised elections must be delayed in order to introduce a “non-racial and truly democratic” electoral system. Commodore Bainimarama has also stated that elections would not be held if the People’s Charter is not accepted.

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780 See *ibid.* at 13. In a “common roll”, open list system, seats in government are not set aside for each ethnic group. Instead, all voters vote off of a common roll or electoral slate of candidates. In a Proportional Representation (PR) electoral system, seats are ultimately allocated to each party based on the percentage of votes each party receives from the voting public.


At this stage, it is not clear whether the people of Fiji, both native Fijians and Indo-Fijians, understand and support the People’s Charter. While the interim government and the NCBBF claim that there is widespread support for the People’s Charter\(^786\), there are some indicators that suggest that public opinion is more divided on the matter. In April 2008, a three day text poll conducted by the Fiji Times found that opposition to the People’s Charter (at 46.2 percent of respondents) slightly outweighed support for the Charter (at 45.8 percent of respondents).\(^787\)

Two of Fiji’s major political parties, the SDL and the National Federation Party (NFP) oppose the Charter.\(^788\) The SDL, which is associated with native Fijians, argued that the Charter will further divide the native Fijian and Indo-Fijian communities.\(^789\) The SDL also raised concerns that the Charter will undermine the land rights of native Fijians and their rights to a separate administration in Fiji.\(^790\) The SDL urged the interim government to hold elections before adopting the Charter so that the Charter could be considered by a democratically elected government.\(^791\) For its part, the NFP, which is traditionally associated with the Indo-Fijian community, raised concerns that the Charter will relegate Indo-Fijians to “third-class citizens”.

\(^786\)“Widespread support for People’s Charter in Fiji: NCBBF” Islands Business (12 December 2008), online: Islands Business <http://www.islandsbusiness.com/news/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=130/focusContentID=13917/tableName=mediaRelease/overrideSkinName=newsArticle-full.tpl>. See also “Charter Support overwhelming” Fiji Broadcasting Corporation Limited (9 December, 2008), online: Radio Fiji (Fiji Broadcasting Corporation Limited) <http://www.radiofiji.com.fj/fullstory.php?id=16415>.

\(^787\)“Majority say no to Charter, but ‘ayes’ close behind” Fiji Times (15 April, 2008), online: Fiji Times Online <http://www.fijitimes.com/story.aspx?id=86434>.


\(^789\) See “People’s Charter ‘Will Divide Fiji’” Fiji Daily Post (8 August, 2008), ibid.

\(^790\) Ibid.

\(^791\) Ibid.
The NFP’s party secretary went as far as to suggest that people boycott the charter consultation process.\textsuperscript{793}

The Methodist Church in Fiji, to which the majority of native Fijians belong, also unequivocally opposes the adoption of the People’s Charter in light of the violations of the rule of law that have surrounded the process of creating the Charter.\textsuperscript{794} There is also evidence that the traditional chiefs are divided on the matter of the Charter; a number of chiefs boycotted a traditional leaders meeting with the interim Fijian government to discuss the Charter.\textsuperscript{795} The division in the public’s view of the People’s Charter is the Charter’s greatest weakness. Broad-based support for the Charter is necessary for the Charter to provide the basis for a united and cohesive society. At this stage, it does not appear that this support exists.

An example of a country that appears to have successfully developed an over-arching national identity to unify its population is Tanzania. Collier argues that Julius Nyerere, the Tanzanian President from 1964 until 1985, successfully constructed an overarching national identity that unifies Tanzanians and avoids ethnic fractionalization.\textsuperscript{796} Nyerere used language policy, education, and the political system to construct the over-arching national Tanzanian identity.

\textsuperscript{792} “Fiji’s NFP says Charter will downgrade Indo-Fijians” Radio New Zealand International (28 August, 2008), \textit{supra} note 788.

\textsuperscript{793} \textit{Ibid.}


\textsuperscript{796} Paul Collier, \textit{War, Guns and Votes: Democracy in Dangerous Places} (New York: Harper Collins, 2009) at 66-68. The description of Nyerere’s policies that follows in this paragraph is based on Collier’s description and analysis.
Nyerere made the Kiswahili language universal across Tanzania. He also ensured that primary school curriculum included pan-Tanzanian history and that the curriculum encouraged children to think of themselves as being Tanzanian. In terms of the political process, Nyerere avoided multiparty electoral competition, fearing that it would be too divisive. Instead, Nyerere focused on creating village committees that played a central role in local governance. When Tanzania introduced multiparty elections, parties were not permitted to campaign on ethnic platforms. Nyerere also used the rhetoric of national unity extensively, while simultaneously downplaying ethnic identities.

Nyerere’s strategy appears to have been successful. Tanzania is one of Africa’s most stable and successful countries. Moreover, responses to the Afrobarometer survey indicate that the vast majority of Tanzanians do not conceptualize themselves in ethnic, linguistic, or tribal terms. This survey asked, “Which specific group do you belong to first and foremost?”, and respondents were left with a blank to fill in their own answer. In Tanzania, only three percent of the population gave a response couched in ethnic or linguistic terms, compared with nearly half the responses in other ethnically diverse countries. This suggests that Nyerere’s attempts to downplay ethnic identity and to cultivate an overarching “Tanzanian” identity have been successful.

Tanzania’s success may not be readily duplicated in other, ethnically-polarized countries, however. Tanzania is not an ethnically-polarized country. Its population is almost entirely African, of which 95 percent is Bantu. The Bantu people consist of over 130 different

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797 This survey asks the same attitudinal questions in many African countries.  
798 Ibid. at 68.
Tanzania is thus an ethnically-fractionalized country, a factor that gives rise to very different elite incentive structures where the mobilization of the masses is concerned. In an ethnically fractionalized country such as Tanzania, elites cannot rely on the support of their own ethnic group alone to secure political power since ethnic groups are too small. Instead, elites must build support across ethnic lines to gain sufficient mass appeal to contend for political power. Elites therefore must build their support on something other than ethnic identity, in contrast to elites in polarized countries where the most efficient basis for mass mobilization is shared ethnic identity.

One need only look at the impact that language policies have had in ethnically-polarized countries to see the limitations of a model premised on the Tanzanian case for ethnically-polarized countries. In Tanzania, the adoption of Kiswahili as the lingua franca in the polity facilitated the consolidation of the Tanzanian national identity. In ethnically polarized countries such as Sri Lanka and Pakistan, by contrast, efforts to impose a single language on the polity were perceived as an attempt to dominate non-speakers of the language. Far from promoting the development of a national identity, the adoption of a single “national” language in ethnically polarized countries typically becomes a serious grievance which triggers an intensification of inter-ethnic conflict. The “Sinhala Only” language in Sri Lanka eventually plummeted the country into civil war. The imposition of Urdu as the national language of Pakistan increased the resentment of East Pakistanis, leading to the successful secession of East Pakistan and the creation of Bangladesh. In short, the policies that are generally required to cultivate an overarching national identity are likely to generate considerable resentment and

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grievances in ethnically polarized countries. Accordingly, the Tanzanian case should not be viewed as a template for action in ethnically polarized countries given that Tanzania lacks the inter-ethnic relational dynamics that exist in polarized countries.

4. Conclusion: Violent Conflict and its Consequences: Dealing with the Legacy of Atrocity
This chapter has focused on how the masses should be engaged in the peace process in light of the inter-group tensions, fear, and suspicion that linger after periods of violent conflict and atrocity. I have presented an approach to cultivating inter-ethnic social capital at the level of the masses that prioritizes normative development rather than cross-ethnic inter-personal contact or reconciliation in the immediate post-conflict period. My approach to cultivating inter-ethnic social capital differs significantly from traditional approaches to social capital and to reconciliation and post-conflict peace building. Both the social capital literature and the peace building literature attribute value to relationship-building at all levels of society; the timing of initiatives designed to promote relationship building is rarely considered. For social capital theorists in particular, relationship building is a central part of developing the networks that lie at the heart of social capital itself. This emphasis on relationship building in the social capital literature is a good example of why inter-ethnic social capital merits special attention. Inter-ethnic social capital should not be assumed to share the same dynamics and characteristics of social capital existing between other, non-ethnic types of groups. Whereas contact may promote the formation of bridging and linking social capital generally, in the context of inter-ethnic relationships there are times when contact between individual members of ethnic groups will ultimately have a negative impact on the social capital existing between the groups. The nature of ethnic affiliation and ethnic rivalries within the polity must be given special attention when considering how to cultivate social capital between ethnic groups in a polarized society.
My approach to cultivating inter-ethnic social capital in the immediate post-conflict period, with its emphasis on delaying formal attempts to promote inter-ethnic contact and reconciliation, stems from a realistic assessment of what is possible after violence and atrocity. Violent conflict between ethnic groups fractures the relationship between the groups at all levels of society: at the level of the polity as a whole, the local level, and the individual level. While institutions can (and must) be recreated fairly quickly, it is not possible to generate healing and trust between members of different ethnic groups as easily. As this chapter has illustrated, formal attempts at reconciliation have generally been unsuccessful, at least in the short term. Even success in the peace process, such as the signing of the Good Friday Agreement in Northern Ireland, appears to have had somewhat of a chilling effect on relationships between ethnic groups. Although the groups may not be locked in violent conflict, the legacy of this violence between the groups has a lasting impact on people’s ability to form or to reform relationships with others from a different ethnic group.

Anecdotal evidence from Rwanda poignantly illustrates the difficulty people have in reconstructing relationships after periods of violence. Philip Gourevitch recounts a conversation he had with Edmond Mrugamba, a man he had come to know in Kilgali, Rwanda. Mrugamba told Gourevitch that he was a well-traveled man and that after having taken many trips to East Africa and Europe, “he had always felt that Rwandans were the nicest, most decent people in the world.” But Mrugamba went on to tell Gourevitch that he could not recover that feeling since the 1994 genocide. Mrugamba had lost family members and friends to communal violence over the years, including a sister and a brother in 1994. After taking

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800 Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Picador, 1998) at 238.
Gourevitch to the site where his sister, brother-in-law, and their children were brutally killed in the genocide, Mrugamba commented: “[p]eople come to Rwanda and talk of reconciliation…It’s offensive. Imagine talking to Jews of reconciliation in 1946. Maybe in a long time, but it’s a private matter.”

Mrugamba’s comment illustrates two important observations about post-violence contact and relationship-building. First, for many of the people touched by inter-communal violence and atrocity, reconciliation and the reconstruction of relationships are difficult and, in some cases, unthinkable. It is not unreasonable to believe that violent conflict and atrocity between ethnic groups destroys the possibility for genuine trust and relationship building for approximately two to three generations. Members of different ethnic groups may resume living side-by-side and may even develop some basic forms of cooperation. However, the foundation for the development of networks of cross-ethnic inter-personal relationships and trust lies in a generation that has not yet been born and therefore has not experienced inter-ethnic violence and atrocity. Because this unborn generation’s views may be impacted by the wounded attitudes of its parents and grandparents, it is possible that even the first generation born after the end of conflict may not be capable of the type of openness necessary to build or rebuild networks of cross-ethnic relationships.

Second, grieving the losses of violent conflict and moving towards reconciliation and healing are very personal and private processes. Individuals grieve in different ways and have different capacities for coming to peace with their losses and their former enemies. Plans for peace-building should reflect this reality and should not presume to prescribe methods for healing and

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801 Ibid. at 147.
reconciliation. Instead, these plans should leave ample room for each person to deal with his or her personal trauma in his or her own way, including providing scope for each person to choose to engage in reconciliation or not. To be clear, I do not mean to suggest that no resources should be made available to help individuals deal with trauma. On the contrary, diverse forms of assistance should be provided to the populations affected by violence, including (but not limited to) medical assistance, grief and trauma counseling, help for those suffering from post-traumatic stress disorder, spiritual counseling, food and shelter, and even job re-training. However, what forms of assistance each person chooses and the extent to which she elects to avail herself of the available resources should be respected as a personal decision. Moreover, public resources should not be allocated to fund programs designed to promote contact between individual members of ethnic groups in the immediate post-violence period.

At present, a considerable amount of the scholarship and even public opinion on peace-building, reconciliation, and social capital appears to fail to take the full consequences of conflict seriously. Strategies for rebuilding post-conflict societies rarely grapple with the fact that it may take up to two or three generations before it becomes possible to cultivate meaningful relationships and trust between members of different ethnic groups. There is rarely serious consideration of the impact that contact between individuals of different ethnicity has on the relationships between groups. Some might argue that the failure to grapple with the impact of contact in the post-conflict period stems from an optimism that people can overcome hatred and move willingly towards reconciliation. This optimism, however, is naïve and

802 One example is some analysts’ conclusions that the war in Iraq has failed to promote democracy in that country. While it is true that Iraq remains a profoundly dangerous place and is not a functioning democracy, there has not been nearly enough time for democratic norms to take root in Iraq. Assessing the progress of democratic reform in Iraq at this stage—less than ten years after the invasion of Iraq—is premature.
misguided. The issue is not whether people can overcome hatred or whether they are capable of reconciliation. The issue is that violent conflict and acts of atrocity are thoroughly destructive. It is not prudent or fair to place an expectation of reconciliation on people who have survived violent conflict and atrocity. When formulating strategies for rebuilding post-conflict societies, it is essential to be realistic about the capability of a society to recover. The suffering caused by violent conflict continues to reverberate throughout society long after the violence has ended. This cold reality must inform the approaches taken to peace-building and the cultivation of inter-ethnic social capital. The failure to acknowledge the potential risks of cross-ethnic inter-personal contact and the emotional, psychological, and spiritual barriers to relationship-building jeopardizes the ability to develop a workable strategy for containing violence in the long-term.

My argument that cultivating inter-ethnic social capital in the immediate post-violence period requires that no formal efforts are made to broker contact between individuals from different ethnic groups or to promote reconciliation may at first appear to be cynical. I consider, however, that this approach offers the best hope for generating robust levels of inter-ethnic social capital. Moreover, this approach seeks to respond to the challenges inherent in building peace and stability in a polarized society after periods of violence and atrocity by seeking to establish state institutions as “honest brokers” in the relationship between ethnic groups. Both the cultivation of inter-ethnic social capital at the level of the masses and the development of state institutions that can serve to mediate the relationship between ethnic groups have their roots in the rehabilitation of the relationship between the state and the masses. Cultivating a sense of ownership among the general population of state institutions is central to both the promotion of inter-ethnic social capital and the development of institutional trust. This sense
of ownership paves the way for state institutions to mediate the relationship between ethnic
groups in the polity. It also plays a central role in promoting the internalization of the norms of
inter-ethnic social capital so that the civic compact can begin to emerge. Once the civic
compact has begun to emerge, it is likely that the accompanying political moderation will
restrain politicians from using extreme ethno-nationalist rhetoric and from promoting radical
strategies involving violence or insurgency. In this context, contact between individual
members of ethnic groups can occur without triggering a return to the dynamics of survival
politics. Thus, once the civic compact has begun to emerge, formal policies designed to
promote contact (and hence improve the prospects for creating networks of inter-ethnic
relationships) can be adopted.

When the state does begin to promote contact, it should seek to create opportunities that meet
the criteria identified by proponents of the contact theory as being conducive to reducing inter-
group hostility and prejudice.803 Thus, contact situations should provide individuals from
different ethnic groups with the opportunity to come to know each other well enough to
challenge the stereotypes and prejudices that each holds about the other. Contact situations
should therefore feature personal, informal, and intimate interactions in which individuals meet
as equals. This contact should be sustained over time so that individuals have repeated
interactions with each other and thus have the opportunity to come to know each other well.
Moreover, the contact situation should require the individuals to cooperate together in an
interdependent effort in pursuit of common, super-ordinate goals, and the individuals should
not be placed in competition with each other.

803 See the discussion above at pages 54-56.
Integrated education programs have shown promise in terms of providing opportunities for the type of contact that tends to reduce inter-group hostility and prejudice. Integrated education programs focus on bringing children from different ethnic groups together in the same school. (In many polarized societies, education tends to be segregated, whether by law, geographic separation, or informal preference.) Both the U.S. and Northern Ireland have experience with integrated (or desegregated) schooling. Empirical research on the impact of integrated schooling in these countries, particularly Northern Ireland, suggests that it can result in a reduction of prejudice and inter-group hostility.


But see H. M. Proshansky, “The Development of Intergroup Attitudes” in L.W. Hoffman and M.L. Hoffman, eds., Review of Child Development Research, vol. 2 (New York: Russell Sage Foundation, 1966) 311; N.H. St. John, School Desegregation: Outcomes for Children (New York: Wiley, 1975) at 121. Some studies found that intergroup contact would not necessarily result in improved attitudes. See e.g., M.W. Carithers, “School Desegregation and Racial Cleavage, 1954-1970: A Review of the Literature” (1970) 26:4 Journal of Social Issues 25 at 41. The results of some of the studies that found little change in attitudes or a worsening of attitudes and increased intolerance may be linked to the circumstances in which the contact occurred. As one study noted, “[c]ontact between two previously separate and even hostile groups does not automatically have salutary effects. The precise conditions of contact are crucial in determining what the outcome of the contact will be.” See J.W. Schofield, “Black-White Contact in Desegregated Schools” in M. Hewstone and R. Brown, eds., Contact and Conflict in Intergroup Encounters (Oxford: Basil Blackwell, 1986) 79 at 80 [emphasis added]. There is thus an imperative to ensure that integrated schooling is carefully designed to ensure that contact between students from different ethnic groups occurs in conditions that have been found to be conducive to reducing hostility and prejudice. See also Thomas Pettigrew, “Future directions for intergroup contact theory and research” (2008) 32:3 International Journal of Intercultural Relations 187 [Pettigrew, “Future directions”]. Pettigrew notes that there is a difference between contact that occurs through simple desegregation and contact that occurs in settings that emphasize integration.
In addition to education, sports programs and programs designed to improve local communities that require the participation of community members (e.g., group projects to construct wells or to improve the local school facilities) may offer good opportunities to promote contact.807 There is, however, a paucity of studies that analyze the types of public policies and programs that create conditions for the type of contact that can reduce inter-group hostility and prejudice. There is therefore a need for further study of the types of public policies and programs that can promote conflict-reducing inter-group contact.808

808 See Pettigrew, “Future directions”, supra note 806.
Chapter 6
Conclusion

1. Introduction
This dissertation has explored the problem of violent ethnic conflict in ethnically polarized
developing countries using the concept of social capital. In Chapter One, I assessed the impact
that violent ethnic conflict has on development. I adopted Amartya Sen’s understanding of
development as freedom809 and argued that development encompasses social, political, and
economic growth and progress. I argued violent ethnic conflict has a devastating impact on the
well-being of all members of society and subverts social, political, and economic stability and
growth. To paraphrase Collier and Hoeffler and Reynal-Querol, violent ethnic conflict is
“development in reverse”.810 Thus, addressing violent inter-ethnic conflict should be an
imperative when formulating strategies for development in ethnically polarized societies.

Chapter One also explored key dimensions of ethnic affiliation and the root causes of ethnic
violence. I argued that ethnicity is a powerful vehicle for mass mobilization due to the
perception that ethnic ties are organic and primordial in nature and due to socio-psychological
processes that tend to propel individuals towards group identities. I also highlighted the role
that elites have in thrusting ethnic differences and competition into the centre of public life in
polarized societies. While ethnic elites around the world mobilize the masses on the basis of
ethnic affiliation in the competition for scarce social, political, and economic goods, in some
countries, this competition is restricted to institutional arenas while in others, such competition

810 See Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It
(Oxford: Oxford University Press, 2007) at 27 [Collier, Bottom Billion] and see Anke Hoeffler & Marta Reynal-
Querol, “Measuring the Costs of Conflict” (March 2003), online: Anke Hoeffler Home Page
<http://users.ox.ac.uk/~ball0144/hoereyque.pdf>.
sparks violence. The central question that emerged from this discussion was, how can ethnic conflict be channelled into and contained in institutional arenas so as to prevent violence and instability in a polarized society?

In Chapter Two, I argued that varying levels of intra-ethnic social capital and inter-ethnic social capital provide a framework for understanding why some countries are able to manage ethnic polarization without descending into violence while others are not. In countries with robust levels of inter-ethnic social capital, the coexistence of ethnic groups in the polity is governed by the norms of inter-ethnic social capital. These norms are: the right of each ethnic group to continued cultural and physical coexistence; the right of each group to participate in decisions in which the group has a material interest; and the rule of law. The civic compact emerges when these norms have been internalized by the general population such that elites find little popular support for radical strategies that violate these norms.

I argued in Chapter Two that most ethnically polarized developing countries do not have robust levels of inter-ethnic social capital, but rather are characterized by high levels of intra-ethnic social capital. In many developing countries, the ethnic group provides many of the basic social services that the state typically provides in developed countries. Thus, members of the ethnic group tend to affiliate primarily with their ethnic group while having only weak ties to the state. The juxtaposition of high levels of intra-ethnic social capital with low levels of inter-ethnic social capital creates elite incentive structures that are characterized by zero-sum,

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811 Intra-ethnic social capital refers to the social capital that exists within ethnic groups.
812 Inter-ethnic social capital refers to the social capital that exists between ethnic groups. It includes the networks of relationships that exist between members of different ethnic groups and the norms that govern the coexistence of the ethnic groups.
survival politics and the “dominate or be dominated” mentality. In this context, elites have incentives to pursue radical, extra-institutional strategies to advance their agendas, including violence and insurgency. These incentives may be altered, however, by cultivating inter-ethnic social capital.

High levels of inter-ethnic social capital reduce the costs and increase the benefits of adopting moderate and conciliatory strategies. As the civic compact begins to emerge, a political market for moderation develops. Ultimately, although there may continue to be ethnic rivalry and competition in the polity, the civic compact places limits on the types of strategies that may be adopted to advance the interests of the ethnic group. Elites have powerful incentives to work within the institutions of the state to advance the agenda of the ethnic group and only very weak incentives exist to adopt radical extra-institutional strategies such as insurgency.

Chapter Two introduced the challenging question of how to cultivate inter-ethnic social capital in polarised countries. I argued that institutions that embody the norms of inter-ethnic social capital—the right to participate, the right to continued existence, and the rule of law—can act as forums for conveying and re-enforcing these norms. As elites and the masses manage their public lives through such institutions, they begin to internalise the norms of inter-ethnic social capital. Over time, these norms become deeply embedded in the social fabric of a country, and the civic compact begins to emerge. However, problems of normative dissonance will subvert the functioning of even the best designed institutions in a polity that has been subject to survival politics. Institutional reform must be accompanied by a normative shift away from survival politics to the norms of inter-ethnic social capital. I argued that when ethnic groups
reach moments of “hurting stalemates” in violent conflict, the peace process affords a fragile opportunity to commence the cultivation of inter-ethnic social capital.

Chapters Three, Four, and Five focused on how the peace process may be structured to promote the development of inter-ethnic social capital at the levels of the elites and of the masses. Chapter Three centred on cultivating inter-ethnic social capital at the level of the elites. Drawing on Axelrod’s theory of cooperation\textsuperscript{813}, I argued that when formal institutions are structured on the basis of the norms of inter-ethnic social capital, elites will gradually internalize these norms as they interact with each other on a repeated basis within these institutions. The internalization of these norms is initiated during the peace process. By integrating the norms of inter-ethnic social capital into the structure of the peace process, elites have the opportunity to begin to learn to engage with each other on the basis of these norms. Moreover, structuring the peace process in this manner increases the likelihood that the institutions adopted during the peace process also embody the norms of inter-ethnic social capital and that these institutions are perceived to be legitimate. There is therefore an imperative to actualize the norms of the right to participation, the right to continued existence, and the rule of law in the process and procedures that are adopted during the early stages of transition out of violent conflict. Chapter Three also highlighted the centrality of the assistance of neutral third parties to the cultivation of inter-ethnic social capital, a subject to which I will return below.

Chapters Four and Five focused on the development of inter-ethnic social capital at the level of the masses. Different strategies must be adopted for cultivating inter-ethnic social capital at the level of the masses. Inter-ethnic social capital is diffused to and internalized by the general population principally through the interactions that the masses have with the institutions of the state. When state institutions are designed in a manner that integrates the norms of inter-ethnic social capital, then repeated interactions with these institutions offer opportunities to convey and to re-enforce these norms. As the masses increasingly internalize the norms of inter-ethnic social capital, their perception of the legitimacy of these institutions also increases. Over time, the civic compact begins to emerge and it becomes increasingly unthinkable to support radical, extra-institutional strategies that violate the norms of inter-ethnic social capital.

Before the institutions of the state can effectively diffuse the norms of inter-ethnic social capital, however, the relationship between the state and the masses must be rehabilitated. The rehabilitation of this relationship, I argued, has two principal dimensions. First, the legitimacy of the state must be re-established. Second, the masses must develop a sense of ownership of state institutions. Cultivating inter-ethnic social capital at the level of the masses during the early stages of the peace process focuses on these two key dimensions of rehabilitating the relationship between the state and the general population. I argued that the processes and procedures adopted to restore the state’s legitimacy and to foster a sense of ownership of public institutions must embody the norms of inter-ethnic social capital. Thus, the very processes used to lay the foundation for the emergence of the civic compact provide an opportunity to actualize the norms of inter-ethnic social capital in the experiences of the masses and so to begin the internalization of these norms.
Chapter Four focused on re-establishing the legitimacy of the state. Given the abuse of state power and the commission of atrocities, the legitimacy of the state to hold the monopoly on the use of force in the polity must be re-established. I argued that the task of re-establishing the state’s legitimacy involves fostering a collective renunciation of survival politics and violence as acceptable means of advancing the interests of the ethnic group in the polity. I proposed that truth commissions can force a population to confront the legacy of violence and atrocities that have been committed and that can engender a resolve to prevent future descents into violent conflict. I further argued that accountability mechanisms, including trials and lustration processes, should be incorporated into the peace process as part of the measures adopted to re-establish the legitimacy of the state. The procedures adopted in truth commissions, trials, and lustration processes must be designed with a view to actualizing the norms of inter-ethnic social capital into the experiences of the masses.

In Chapter Five, I addressed how the general population may develop a sense of ownership over state institutions as part of the process of rehabilitating the relationship between the masses and the state. Given that ethnic groups play a central role in delivering key social goods and services to their members, the state often has little relevancy in the lives of the general population. Moreover, the legacy of state violence and atrocity alienates the population from the state. In order to establish the foundation for the civic compact, which involves the rejection of extra-institutional strategies to advance the agenda of the ethnic group, a sense of public ownership over state institutions must be fostered. This sense of public ownership is vital to developing an generalized expectation that elites should work within state institutions rather than adopt radical, extra-institutional strategies. I argued that extensive public participation in the peace process, coupled with efforts to make the peace
process and state institutions representative of the population as a whole, could promote a sense of public ownership of state institutions. I also argued that the state must become more relevant in the lives of the masses in order to further the sense of public ownership over state institutions; greater relevancy of the state can be fostered by ensuring that the state begins to deliver vital social services that have previously been provided by the ethnic group to its members.

The discussion in Chapter Five raised the issue of how general population should be engaged in the peace process. I rejected an approach to fostering inter-ethnic social capital that is based on the promotion of reconciliation between ethnic groups. While inter-ethnic social capital certainly includes networks of cross-ethnic relationships, I argued that priority should be given to fostering the norms of inter-ethnic social capital during the peace process. Efforts to promote the formation of inter-personal relationships between members of different ethnic groups at an early stage in the transition out of violence will likely have a de-stabilising impact on the peace process and trigger a radicalization of ethnic claims. Contact between members of different ethnic groups should certainly not be restricted, but such contact should also not be promoted as a policy objective until much later in the transition period.

Cultivating the norms of inter-ethnic social capital after periods of violence and atrocity will be a very challenging task given the profound levels of mistrust, fear, and suspicion that permeate inter-ethnic relations. Nevertheless, I maintain that the best hope for a transition to stability and peace is to focus on developing institutions that can mediate the relations between ethnic groups in the polity. Ethnic groups need not trust each other so long as they can trust the
institutions that govern their relations with each other. Thus, the key priority is to rehabilitate
the relationship between the masses and the state and its institutions. The manner in which
public ownership of state institutions is developed during the peace process plays a central role
in the rehabilitation of this relationship and in establishing state institutions as “honest brokers”
between ethnic groups in the polity.

Throughout this dissertation, I have made reference to the role that neutral third parties (the
international community) such as peacekeeping forces have in the process of cultivating inter-
ethnic social capital. The international community must be involved in the management of the
transition out of violence. Although the scope of this dissertation does not allow me to probe
in great detail the nature of the role of the international community, in this Conclusion I will
outline the role that third parties can play in setting the foundation for the emergence of the
civic compact. I will also highlight some of the incentives that the international community
may have to become involved in the management of peace processes around the world. This
discussion will also serve to identify areas that require further study in order to advance the
understanding of the development of social capital in ethnically polarized countries.

2. The role of the international community
Perhaps the most important role of the international community in transition periods is that of
peacekeeper814. As I discussed in Chapter Three, the immediate post-conflict period is
characterized by a security gap and a credibility gap. The security gap exists because there is
no neutral force within a country that can offer protection to groups in the peace process. As a

814 I use the terms “peacekeeper” and “peacekeeping force” throughout this discussion. However, in some cases,
an international military force may play a role more akin to peacemaker than peacekeeper. For the purpose of this
discussion, the semantics used to describe the role of an international military force are not as important as the fact
that such a force is necessary to help manage the peace process and to prevent a return to violence.
result, each ethnic group must guarantee its own security. In this context, it is difficult for ethnic groups to commit to a ceasefire or demobilization since such steps would make the groups highly vulnerable. Without a third party to offer protection and to enforce commitments made by all parties, the best interests of the group are to remain armed and to reserve the right to use force, at least defensively. Given that it is not uncommon to misperceive actions as threats in tense situations, the security gap often coincides with security crises and rising tension that spills into violence.

The credibility gap refers to the fact that ethnic groups regard each other with deep suspicion and mistrust such that commitments made by other ethnic groups during the peace process are not viewed as credible. In this context, it is difficult for groups to reach agreement on key aspects of the peace process, including, for example, demobilization and ceasefires. Even when ethnic groups have reached tentative agreements on various issues, each group has a strong incentive to defect from its commitments since it has very little assurance that other groups will honour their reciprocal commitments. Indeed, there is an advantage to defecting first since the element of surprise can offer strategic benefits. Moreover, defecting first prevents losses that will follow from allowing another group to defect first.

In combination, the security gap and the credibility gap heighten each group’s insecurity and create incentives to resist adopting conciliatory measures that would otherwise move the peace process forward. The security gap and the credibility gap perpetuate the “dominate or be dominated” mentality and obstruct the emergence of the norms of inter-ethnic social capital. For example, it is difficult to promote the right of all groups to continued cultural and physical
existence when each group perceives that its own survival is at stake. Until a group’s security is assured, the group will have little incentive to have regard for the right of other group’s continued existence where such other groups are viewed as a threat. Similarly, the security gap and the credibility gap undermine the norm of the right of each group to participate in decision-making processes in the polity. Since each group would prefer to dominate in the polity given the incentives created by security gap and the credibility gap, it is difficult to promote the norm of the right to participation as long as the security gap and credibility gap continue to exist. Finally, the security gap and credibility gap subvert the emergence of the norm of the rule of law. Ethnic groups have little incentive to agree to a joint set of rules to govern their coexistence in the polity (including, for example, a peace agreement and constitutional arrangements). They also have no real means of enforcing such rules, whether it be the terms of a peace agreement or the provisions of a newly adopted constitution. Under such circumstances, the rule of law has little meaning.

The presence of a neutral third peacekeeping force can overcome the security gap and the credibility gap. A peacekeeping force drawn from the international community can offer protection to ethnic groups, thereby heightening their sense of security. Rather than having to trust other ethnic groups to exercise restraint, each ethnic group can rely upon the peacekeeping force to contain hostilities and to protect its physical safety. A peacekeeping force can also bridge the credibility gap by verifying that ethnic groups have met their commitments. Ethnic groups can rely on the scrutiny of the peacekeeping force rather than the assurances of rival groups to ensure that each group honours commitments made with respect to demobilization, ceasefires, and other aspects of peace agreements.
In essence, the ability of peacekeeping forces to monitor the fragile peace following a ceasefire and to ensure that each group honours its commitments with respect to ceasefires, demobilization, and so forth helps to alter the incentive structures of elites. The presence of a peacekeeping force reduces the risk to each group’s security and thus reduces the costs of taking conciliatory measures in the peace process. Moreover, the presence of such a force to oversee the implementation of a peace plan increases the probability that a failure to adhere to commitments made in the peace process will be detected and sanctioned. Overall, then, the participation of an international peacekeeping force in the peace process can lower the risk of cooperating while increasing the potential costs of defection in the peace process.

Without the assistance of the international community to provide security during the transition period, it is difficult to imagine how a peace process could advance. In a very real sense, the international community can promote the cultivation of the norms of inter-ethnic social capital by providing the initial guarantees of each group’s right to continued existence. The international community can also begin the cultivation of the right to participation by insisting that all constituent ethnic groups be given the right to participate in peace talks and by ensuring that the masses are fully engaged in the peace process. Moreover, the participation of a peacekeeping force in the peace process can help to foster the return to the rule of law by reintroducing accountability and by creating a context in which ethnic groups can begin to govern their lives together in the polity through democratic processes rather than through arbitrary measures.
Collier argues that managing security in post-conflict societies normally requires the presence of an external military force for approximately ten years.\textsuperscript{815} He further argues that this external military force must have a mandate that includes fighting to preserve the peace and that contributing governments must be willing to accept the causalities that occur as a result of this mandate.\textsuperscript{816} In return for this external security guarantee, the post-conflict government must be required to reduce the size of its military radically.\textsuperscript{817} As Collier puts it, “[the post-conflict government] has to learn to rule by consent rather than oppression.”\textsuperscript{818} I agree substantially with Collier’s argument, although I argue that an international peacekeeping force (or external military force, to use Collier’s term) will likely be required to be deployed for up to two decades. I discussed my reasons for advocating a much longer deployment than the decade recommended by Collier in Chapter Three.

In addition to the important role of providing an external military force to bridge the security gap and the credibility gap, there are two other key roles for the international community in helping countries transition out of periods of violent conflict. First, the international community must provide assistance in the form of financial aid and other resources (e.g., skilled personnel and physical resources like computers for various processes, trials, and commissions). As I noted in Chapter Five, the government must begin to provide basic socio-economic services such as health care and education as soon as possible in order to foster a greater sense of public ownership of state institutions at the level of the masses. However,

\textsuperscript{815} Collier, \textit{Bottom Billion}, supra note 810 at 177.
\textsuperscript{816} \textit{Ibid.}
\textsuperscript{817} Collier does qualify his argument with the statement that the police force in post-conflict countries will need to be expanded to deal with the crime wave that results when ex-combatants turn to crime. \textit{Ibid.} at 177-178.
\textsuperscript{818} \textit{Ibid.} at 177.
most governments of countries emerging from periods of violent conflict do not have adequate resources to provide such services. The assistance of the international community is pivotal in this regard. Notably, since one of the goals associated with providing basic socio-economic services is the cultivation of closer links between the masses and the government, it is important that the government is seen to be providing these services rather than international aid agencies or NGOs. This suggests that transfers of funds must be made to governments for the provision of such socio-economic services rather than the provision of goods and services in kind. There is scope for the donation of resources rather than funding in other contexts, however. For example, as I noted in Chapter Four, domestic war crimes trial proceedings have been hampered in countries like Rwanda by the lack of basic resources. The international community could make an important contribution to domestic proceedings such war crimes trials and truth commissions simply by providing basic resources needed to accomplish administrative tasks.

Second, the international community must provide support for the cultivation of the norms of inter-ethnic social capital by sanctioning behaviour that subverts these norms. In Chapter Three, I described several different types of sanctions that may be applied to pressure ethnic groups to refrain from adopting radical, extra-institutional strategies. These sanctions include measures such as suspending diplomatic ties with a country or expelling a country from an organization such as the British Commonwealth. Such measures have both been employed in the case of Fiji, for example. They also include the adoption of domestic legislation aimed at stemming the flow of funding from a country to radical groups in the polarized country. An example is the anti-terrorist and money laundering legislation that has been adopted in many countries to target groups such as Al Qaeda and the Tamil Tigers. The international
community may also adopt positive measures to reward compliance with the terms of a peace treat. Examples include trade preferences and the removal of travel restrictions that have been imposed on key members of a radical group’s leadership. What is important is that countries have various “sticks” and “carrots” that can be employed to create incentives for acting in ways that are consistent with the norms of inter-ethnic social capital and for rejecting radical, extra-institutional strategies.

3. Incentives of the international community to provide assistance

While there is a pivotal role for the international community to play in creating conditions for the emergence of the civic compact, it is also clear that there are obstacles to the involvement of the international community. In particular, many countries are reluctant to send their own troops into other countries to help maintain peace, especially where conditions are very unstable and the risk of casualties is high. Politically, sending a country’s own citizens to fight in another country’s civil war often is not appealing to the electorate. The danger of deploying a country’s troops in unstable regions far removed from the country and the financial strain that assistance involves act as powerful disincentives to providing troops and even funding to fragile, post-conflict countries. The fallout from the American intervention in Somalia and the criticism of the U.S. administration’s involvement in Iraq and NATO’s involvement in Afghanistan illustrate the risks of deployment abroad and the potential political costs involved with such deployment. Moreover, many countries do not want to appear to be violating the sovereignty of post-conflict countries.  

819 Thus, although the international community may be very well placed to intervene in countries emerging from periods of violent ethnic conflict, it is often able to find excuses for not doing so.

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819 See Collier, ibid. at 178.
Nevertheless, it would be a mistake to believe that the international community is loathe to intervene in the affairs of unstable countries in all cases. The reality is that there is a long history of outside intervention in the ethnic and religious affairs within states. From the treaties in Europe mandating protection of religious minorities to India’s intervention in the conflict between East and West Pakistan to the involvement of Great Britain, Greece, and Turkey in the conflict in Cyprus, stronger countries have demonstrated a willingness to become involved in the domestic affairs of other states. Moreover, former colonial powers have become involved in conflicts in their former colonies even after the colonies have gained independence, although in some cases this involvement did not help to stabilise the situation in the former colonies. For example, the British had an ongoing role in Zimbabwe throughout the 1970s and both France and Belgium sent troops to Rwanda in the early 1990s to assist the Habyarimana regime defend against an invasion by the Tutsi-led Rwandan Patriotic Force (RPF). Still, international intervention in the domestic affairs of a state remains the exception to the rule of respect for the sovereignty of states; moreover, a general unwillingness to risk one’s own troops and expend scarce resources in conflicts abroad continues to pervade the international community.

One of the key questions, then, raised by my dissertation is: what are the prospects for the success of my proposals, given the important role of the international community in facilitating the emergence of the civic compact and the potential reluctance of other countries to become involved?

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involved in fragile, post-conflict societies? I argue that there are factors that militate in favour of intervention in such societies notwithstanding the inherent risks involved. Below, I identify two broad categories of incentives for countries to offer assistance to ethnically polarized societies emerging from periods of violent conflict, namely, interest-based incentives and humanitarian-based incentives. Although a full investigation of these factors is beyond the scope of this dissertation, the discussion below serves to highlight some of the most important incentives for countries to provide assistance with the cultivation of inter-ethnic social capital in other countries.

3.1. **Interest-based incentives**
Interest-based incentives are those that relate to the ambitions and concerns of countries vis-à-vis their relative place in the larger international community and vis-à-vis stability within their own borders. There are three primary interests in this regard: hegemonic ambition, regional stability, and domestic peace and order. These interests may overlap in some cases; they may also overlap with more altruistic and humanitarian motives for intervention. While these interests provide incentives for countries to intervene in the domestic affairs of other countries, the incentives do not always align with strategies that are most appropriate for cultivating inter-ethnic social capital. Each of the aforementioned three interest-based incentives is discussed below.

3.1.1. **Hegemonic ambition**
A country’s desire to expand its influence and to secure a hegemonic role in its own geographic region or on a global basis can serve as an incentive to intervene in the domestic affairs of other countries. India’s interventions in both Sri Lanka and the conflict between East Pakistan (now Bangladesh) and West Pakistan have been characterized by some scholars

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822 The reference to hegemonic ambition and regional stability is borrowed from Cooper & Berdal, *supra* note 820.
as efforts by India to consolidate its regional power. India had geostrategic interests in both Sri Lanka and Pakistan. In Sri Lanka, India intervened in 1987 after the Sri Lankan government imposed a blockade of the Jaffna Peninsula, cutting off the Tamil population from supplies. After India provided assistance to the Tamils located on the Jaffna Peninsula, the Sri Lankan government reluctantly agreed to accept the assistance of an Indian peacekeeping force in implementing a peace agreement between the Sri Lankan government and Tamil extremists.

A number of factors were likely influential in India’s decision to intervene in the conflict between Tamils and the Sinhalese. First, it is likely that India, as the major power in the region, believed that it had a right or a duty to intervene. Second, India had an interest in keeping other major powers out of the region. Given that Sri Lankan President J.R. Jayewardene had attempted to bring foreign (British or US) forces into Sri Lanka, India may have felt it necessary to assert itself in order to safeguard its sphere of influence. Third, India and Sri Lanka did not enjoy good diplomatic relations, particularly since Sri Lanka had allowed Pakistan to use its airports during the 1971 conflict between East and West Pakistan. Sending in a peacekeeping force allowed India to assert its dominance over Sri Lanka and weaken a potential rival in the region. At the same time, however, India’s interests were not aligned with the creation of a separate Tamil state in the region since such a state would create secessionist pressure within India itself, given the large Tamil population in

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823 See Stephen M. Saideman, “Overlooking the Obvious: Bringing International Politics Back into Ethnic Conflict Management” (2002) 4:3 International Studies Review 63 [Saideman, “Overlooking”] and Cooper & Berdal, ibid. Note that Cooper and Berdal posit that India’s intervention in Sri Lanka and in the conflict between East and West Pakistan may have been motivated by hegemonic ambitions.
824 Cooper & Berdal, supra note 820 at 123.
825 Ibid.
826 Ibid.
827 This argument is based on realist logic: states will support groups in other countries if such support will weaken a political adversary in the other country. See Kenneth N. Waltz, Theory of International Politics (New York: Random House, 1979) and Stephen M. Walt, The Origins of Alliances (Ithaca, NY: Cornell University Press, 1987).
the state of Tamil Nadu. The balancing of India’s interest in a weakened Sri Lankan state with India’s interest in preventing a division of Sri Lanka may explain why India’s initial intervention on behalf of Tamils in 1987 was strong enough to force Sri Lanka to agree to accept an Indian peacekeeping force but not so overpowering that Sri Lanka was forced to accepted Tamil secession. Finally, there was a connection between India and Sri Lankan Tamils: a large number of Tamils live in the Indian state of Tamil Nadu. The troubles in Sri Lanka had also led to an increase in Tamil refugees in India. Moreover, many Tamils are classified as “Indian” rather than Sri Lankan under Sri Lanka’s citizenship laws.828 Thus, there was likely domestic pressure in India supportive of intervention.

Indian intervention in Sri Lanka was likely motivated by a number of factors, including India’s desire to solidify its position as a regional power. The support that India provided to East Pakistan in 1971 in the latter’s conflict with West Pakistan appears to have been motivated primarily by India’s hegemonic ambitions. Pakistan posed a threat to India and tension between India and Pakistan was (and remains) high. Moreover, prior to East Pakistan’s secession, Pakistan was geographically divided by a thousand miles of Indian territory, which split the country into East and West Pakistan.829 Given the tensions between India and Pakistan and the exposure of the Indian territory between East and West Pakistan, the civil war gave India the opportunity to weaken its Pakistani adversary and strengthen its strategic position.830

828 Cooper & Berdal, supra note 820 at 123.
829 Ibid. at 125.
Scholars have debated whether South Africa’s intervention in the domestic crises in various African countries, including Zimbabwe, Lesotho, Burundi, Democratic Republic of the Congo and the Sudan, among others, represent an attempt to establish South Africa as the hegemonic regional power. Since the end of apartheid, South Africa’s intervention in other countries has involved the use of both “hard” power (use of military might e.g., sending troops into Lesotho in 1998) and “soft” power (use of persuasion, mediation, and peer pressure, e.g., the “quiet” diplomacy employed to engage Zimbabwe’s President Mugabe). Proponents of the theory that South Africa’s approach to foreign affairs is motivated by a desire to consolidate its status as the regional hegemon in Africa point to the country’s use of hard power and its military and economic might. Other scholars, however, argue that South Africa is seeking to lead Africa along a path of multilateralism rather than hegemonic unilateralism. While South Africa enjoys military and economic dominance on the African continent, proponents of the “regional leader” thesis argue that South Africa has not used this dominance to impose its own will. Rather, South Africa has espoused multilateralism through African solidarity, partnerships, and regional cooperation and favoured the use of “soft power” initiatives.

Incentives to intervene in another country’s domestic affairs which stem from hegemonic ambition may not serve the need to cultivate inter-ethnic social capital in ethnically polarized countries well. Countries driven to intervene by their own hegemonic ambitions are likely to be less concerned with adopting strategies that will promote inter-ethnic social capital and

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832 Ibid. at 160. See also Allister Sparks, Tomorrow is Another Country: The Inside Story of South Africa’s Negotiated Settlement (Johannesburg: Jonathan Ball, 2003).
833 Kagwanja, ibid. at 160-161.
834 Ibid. at 161.
more interested in adopting measures aimed at securing their own interests. Such measures could include supporting one party in the conflict at the expense of others rather than seeking to provide neutral assistance. At the same time, countries that intervene in the domestic affairs of other countries sometimes find that the situation is politically untenable and too costly to sustain. Once a country finds that its hegemonic ambition is no longer served by its intervention, it will seek to end the provision of assistance. Thus, the country will withdraw from the country emerging from violent conflict long before gains have been made and consolidated in the peace process. This was the case in Sri Lanka, for example, when the Indian peacekeeping force withdrew after two years, leaving very little accomplished in terms of establishing an enduring peace.

### 3.1.2. Regional stability
Some interventions are motivated by a desire to preserve regional stability. In some cases, conflict between groups within a country can ignite a larger conflict in the region in which the country is located. This is particularly true where ethnic divisions cross state borders, such as in the Great Lakes region of Africa where Hutus and Tutsis are the dominant groups in Burundi and Rwanda and Hutu and Tutsi refugees live in the Democratic Republic of the Congo (DRC), Tanzania, and Uganda. The Mbeki government in South Africa, for example, and the African Union (AU) both expressed serious concerns in 2005 that the activities of rebels[^835] in eastern Congo threatened to trigger violent conflict across the Great Lakes region[^836]. Although the African Union announced that it would send between 6,000 and 7,000 troops into the eastern region of the DRC to disarm rebel forces, the AU had difficulty securing...  

[^835]: The rebels consisted primarily of ex-FAR (Rwandan Armed Forces) fighters and former members of the Interahamwe, the extremist Hutu civilian militia from Rwanda. The presence of these rebels was a threat to the Tutsis living in the region. The rebels were also a threat to the fragile Government of National Unity in the DRC.  
[^836]: Kagwanja, *supra* note 831 at 177.
funding for this deployment.\textsuperscript{837} Notwithstanding the presence of a UN peacekeeping force in the DRC (MONUC), the DRC remains in crisis and the threat of an expansion of the conflict remains.

In some cases, regional stability concerns involve not only concerns about the expansion of the conflict to other countries, but also worries that the expansion of the conflict will draw larger, more dangerous parties into the conflict. A good example is NATO’s involvement in Kosovo. NATO’s intervention in Kosovo was motivated in part by a concern that the conflict in Kosovo might spread to Macedonia, which would then bring Greece and Turkey into opposite sides of the conflict.\textsuperscript{838} Such an expansion of the conflict would have a highly destabilizing effect on the region. Once the Kosovo conflict did spread to Macedonia, NATO became very active in Kosovo and Macedonia in an effort to contain the conflict and to avoid a direct confrontation between Greece and Turkey.

Concerns about regional stability can also have an economic dimension. Investors are hesitant to invest in countries located in proximity to unstable states and unstable regions. The risk that their assets could be compromised if the conflict spreads, in addition to the risk that critical supply chains and access to markets could be cut-off, makes investing large sums of money unpalatable. Moreover, Murdoch and Sandler found that a country’s geographic proximity to

\textsuperscript{837} Ibid.
\textsuperscript{838} Saideman, “Overlooking”, supra note 823 at 80.
countries experiencing civil wars results in a significant negative impact on that country’s GDP, even if the country is not immediately adjacent to the country in crisis.  

In South Africa, the African National Congress (the ANC) government was willing to intervene in crises across the African continent because it recognized that a healthy continent was essential for the flourishing of South Africa. “Stabilising Africa was the ANC’s strategy to improve the image of Africa to attract foreign investment and provide a new frontier for South Africa’s investment and trade.” Under Mandela and Mbeki, South Africa demonstrated that it was willing to exercise both hard power (e.g., in Lesotho) and soft power (e.g., in Zimbabwe) in order to promote democracy and human rights; both the Mandela and the Mbeki administrations viewed the lack of democracy and human rights in Africa as being directly related to the continent’s instability, unrest, and lack of economic growth. Thus, Mandela’s 1993 statement that “South Africa’s foreign policy will be based on our belief that human rights should be the core concern of foreign policy” was more than ideological commitment to human rights: it was also an articulation of the strategy for attracting foreign investment to South Africa.

A desire to ensure regional stability offers more promise for the cultivation of inter-ethnic social capital than hegemonic ambition since the former has as its primary objective long term peace and stability rather than the narrow interests of the hegemonic power. Nevertheless,

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839 James C. Murdoch & Todd Sandler, “Civil Wars and Economic Growth: Spatial Dispersion” (2004) 48 American Journal of Political Science 138. Murdoch and Sandler postulate that refugee flows may be a potential causal factor of this negative economic impact, however, their study does not explicitly test for the nature of the impact of refugee flows.

840 Kagwanja, supra note 831 at 161.

841 Ibid. at 162.

states that intervene in other countries’ civil wars in order to preserve regional stability will have their own interests in mind when they formulate their intervention strategies. These strategies may or may not align with the cultivation of inter-ethnic social capital, particularly since states are motivated to minimize risk to their own armed forces. Saideman notes, for example, that there is evidence that casualty avoidance in the UN and NATO forces was a top priority for the policymakers who formulated strategies for the international interventions in Kosovo and Bosnia. Moreover, situations involving concerns about regional stability may raise free rider problems. States may prefer to look to other states to carry the burden and risk of intervention rather than take action themselves. In an important sense, then, the cultivation of inter-ethnic social capital may be best served when a desire to maintain regional stability is complemented by a state’s narrow self-interest in restoring stability to a country gripped by civil war. Where a state’s narrow self-interest is engaged, the free rider problem diminishes, although it may not disappear entirely, depending on the nature of the interests at stake. The engagement of a state’s narrow self-interest does not, however, eliminate the problem related to the preference for low-risk intervention strategies rather than strategies that are best-suited to the promotion of inter-ethnic social capital.

3.1.3. Domestic peace and order
One of the most powerful incentives to intervene in violent conflict occurring within another country is a state’s own security. Most conflicts, including intrastate conflicts, have spill-over effects such as refugee migration. Where these spill-over effects pose a threat to the domestic peace and order of a country, incentives develop for the country to assist the country embroiled in conflict to resolve or to manage its conflict and so to return to a stable existence. One example is Britain’s interest in assisting to broker and then to maintain peace in Cyprus. The

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843 Saideman, “Overlooking”, supra note 823 at 82.
Cypriot conflict primarily engages Greek and Turkish interests. However, Britain has had an interest in maintaining sovereign base areas in Cyprus. Britain thus has had an ongoing interest in the maintenance of stability and peace between Greeks and Turks in Cyprus. Accordingly, when Cyprus received its independence in 1960, its constitution was guaranteed by Greece, Turkey, and Britain. When conflict later broke out in Cyprus, Britain undertook a peacekeeping mission in the country and later supported the UN Peacekeeping Force in Cyprus (UNFICYP).844

Migration, especially refugee migration, from countries experiencing violent internal conflict is perhaps the single most important factor generating incentives related to domestic peace and order. The negative externalities associated with migration, especially refugee population flows, create significant incentives for other countries to become involved in the domestic affairs of a country in crisis. Dowty and Loescher go as far as to argue that “international intervention as a response to refugee flows is quietly becoming a de facto norm in state declaration and practice.”845

The Economist reported in 2008 that the number of migrants in the world, both legal and illegal, is thought to be approximately 200 million (roughly three percent of the world’s population).846 The United Nations High Commissioner for Refugees (UNHCR) reports that there were approximately 42 million forcibly displaced persons at the end 2008, including 15.2 million refugees, 827,000 asylum seekers (cases pending), and 26 million internally displaced

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844 The discussion of the British role in Cyprus is based primarily on Cooper & Berdal, supra note 820 at 120-122 and 135.
persons (IDPs). These figures do not reflect the number of voluntary migrants who leave troubled countries as a result of growing inter-ethnic tension and the poor political, economic, and social conditions that tend to plague ethnically-polarized developing countries.

Migration of an ethnically-polarized country’s citizens abroad carries consequences for the host countries of such migrants, particularly where this migration includes large flows of refugees. There are three broad types of negative externalities that result from migration out of a troubled country: economic costs to the host country; negative repercussions for public health; and security-related issues. First, refugee migration imposes economic costs on host countries related to the care of refugee populations; these costs are often very high and thus represent a significant economic burden. Salehyan notes, for example, that the Indian government estimated that it had incurred $175 million in costs over a six month period caring for refugees entering the country as a result of the conflict between East and West Pakistan in 1971. In 1999, during his tenure as Minister of Finance of Albania, Anastas Angjeli noted that the Albanian government calculated that the cost of receiving and accommodating Kosovar refugees was more than $650 million.

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849 *Ibid.* at 7. Salehyan notes that although refugees may contribute positively to host countries in the long-run, they typically impose short-term costs on host countries that are largely related to their care. Notably, there is a paucity of empirical data on and rigorous study of the economic cost of hosting refugee populations.


851 Anastas Angjeli, “The Political Impact and Economic Cost to Albania of the Crisis in Kosovo” (1999) 10:3 Mediterranean Quarterly 7 at 11. This article did not specify the currency of dollar amounts. Angjeli indicated
The economic costs of caring for refugee populations must be juxtaposed with the potential economic gains associated with receiving such populations.\textsuperscript{852} Some scholars have found that the costs of caring for refugees do not appear to be off-set by contributions that refugees make to economic activity in their host countries, at least not in the short-term.\textsuperscript{853} However, other scholars argue that positive economic gains do exist.\textsuperscript{854} Ruiz, for example, found that Afghan refugees in urban areas of Pakistan, particularly in Peshawar, helped to boost the local economy by starting small businesses and by providing cheap labour for Pakistani businesses.\textsuperscript{855} Moreover, in some cases, host countries may in fact gained skilled labour as a result of emigration from troubled countries, resulting in a net gain for the destination/host country.

Second, refugee flows carry consequences for public health in host countries. For example, in a study of the impact of refugees from Burundi and Rwanda on the health of local children in

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\textsuperscript{853} See e.g. Kalena Cortes, “Are Refugees Different from Economic Immigrants? Some Empirical Evidence on the Heterogeneity of Immigrant Groups in the United States” (2004) 86 Review of Economics and Statistics 465. Cortes, for example, found that refugees are less likely to make contributions to productive economic activity compared with voluntary labour migrants. See also Salehyan, supra note 848. Salehyan comments, “refugees are not selected for their skills, may have suffered war trauma making employment difficult, and may have lost their assets prior to flight” (at 7).

\textsuperscript{854} See e.g. Jennifer Alix-Garcia, The Effects of Refugee Inflows on Host Country Populations: Evidence from Tanzania, working paper, Department of Economics, University of Montana (April 2007). Alix-Garcia found that proximity to refugee camps was associated with an increase in trade in the local village and some indicia of wealth (e.g., electricity and ownership of televisions) among local populations in Western Tanzania.

Tanzania, Baez documented a range of adverse impacts on the local children’s health. Baez found that there was a material increase in the incidence of infectious diseases among local children and an increase of approximately seven percent in the mortality rates of children under the age of five. Baez further found that childhood exposure to the massive refugee flows from Burundi and Tanzania resulted in a reduction of height in early adulthood (a sign of poorer health), reduction in schooling, and reduction in literacy.

Refugee camps are typically crowded, unsanitary, and lacking in basic infrastructure necessary to maintain good public health. Consequently, diseases run rampant through refugee populations and spread to host populations. Montalvo and Reynal-Querol found that the arrival of refugees has had negative consequences for the health of the host countries’ populations in terms of the transmission and persistence of malaria. Other studies have pointed to the correlation between refugee flows and the spread of diseases such as tuberculosis, HIV/AIDS, cholera, and other infectious diseases. Local host populations also suffer from the contamination of water supplies, poor sanitation, the diversion of scarce health care resources to refugee populations, and the collapse of health care facilities in the face of the overwhelming need of the refugee population. Baez suggests that each of these factors may

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have played a role in engendering the negative impact on the health and well-being of local Tanzanian children who were exposed to large refugee flows from Rwanda and Burundi.\(^{859}\)

Finally, refugee flows can compromise the security and stability of host countries. Refugee flows have been linked to at least three security- and stability-related concerns in host countries. First, the results of an empirical analysis conducted by Salehyan and Gleditsch suggest that the inflows of refugees from neighbouring countries significantly increase the risk of civil war in the host country.\(^{860}\) The increased risk of civil war in the host country is frequently linked to the second security-related concern, namely, the increased strain on diplomatic relations between the host country and the country in crisis which can culminate in armed hostilities.

The deterioration of diplomatic relations can be linked in part to the activities of “refugee warriors”. Refugee warriors “are those organised elements of exiled communities, typically intermingled with a refugee population and based in a country of asylum, who are engaged in a wide range of armed campaigns against their country of origin.”\(^{861}\) Refugee warriors often base their operations from within refugee camps and typically enjoy at least a degree of support from (or the indifference of) political actors in the host country. Consequently, the host

\(^{859}\) Baez, \textit{supra} note 856 at 24-26.


\(^{861}\) Gil Loescher \textit{et al.}, “Protected refugee situations and the regional dynamics of peacebuilding” (2007) 7 Conflict, Security & Development 492 at 496. The term “refugee warrior” was coined by Zolberg, Suhrke and Aguayo in 1989; they defined refugee warriors as “highly conscious refugee communities with a political leadership structure and armed sections engaged in warfare for a political objective, be it to recapture the homeland, change the regime, or secure a separate state”. See Aristide R. Zolberg, Astri Suhrke & Sergio Aguayo, \textit{Escape from Violence: Conflict and the Refugee Crisis in the Developing World} (New York: Oxford University Press, 1989) at 275. For a critical assessment of the concept of the “refugee warrior” and the role of refugees in conflict diffusion, see Reinoud Leenders, “Refugee Warriors or War Refugees? Iraqi Refugees’ Predicament in Syria, Jordan and Lebanon” (2009) 14 Mediterranean Politics 343.
country can become implicated in the crisis occurring in the country of origin of the refugee warriors. In some cases, the host country’s complicity in dealing with refugee warriors can become a significant source of tension between the host country and the country of origin.

One of the best known examples of the impact of refugee warriors on regional security is Rwanda’s decision to intervene in Zaire, now the Democratic Republic of the Congo (DRC), in light of the militarization of refugee camps in the DRC and the presence of the ex-Rwandan Armed Forces (ex-FAR) and interahamwe militias in such camps.862 When the DRC’s President Mobutu Sese Seko proved neither willing nor capable of preventing the militarization of the refugee camps in Zaire, Rwanda took a number of measures to remove him forcibly from power. Rwanda armed Tutsis in the DRC in their battles against Mobutu’s forces and the militant Hutu refugees hosted by the DRC. Rwanda also armed and supported the Alliance of Democratic Forces for the Liberation of the Congo (ADFL). With the assistance of Rwandan forces, the ADFL attacked and gained control over Goma. Soon after, the ADFL extended its offensive westward from Goma to the capital city of Kinshasa, while Rwandan troops invaded eastern DRC and began to dismantle refugee camps. The DRC’s army collapsed under the ADFL’s attacks and Rwanda supported the installation of the ADFL’s leader, Laurent Kabila, as the new President of the country. As Salehyan notes, the refugee crisis created by the Rwandan genocide “led to both instability in Zaire…and a military invasion by Rwanda to

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attack the refugee camps, combat ex-FAR militants, and retaliate against Mobutu for his support.”  

Third, in some cases, the influx of refugees can disrupt the delicate balance of power between the ethnic groups in the host country and/or exacerbate existing inter-ethnic tensions. Loescher argues that “in countries which are divided into antagonistic racial, ethnic, religious, or other groupings, a major influx [of refugees] can place precariously balanced multi-ethnic societies under great strain and may even threaten the political balance of power.” This is particularly true in regions where ethnic group divisions spill across international borders. When members of one ethnic group spill over the border to a neighbouring country with similar ethnic cleavages, the sudden influx of migrants may impact the delicate balance between ethnic groups in the host country, triggering inter-ethnic conflict. The Macedonian Deputy Foreign Minister articulated this type of security concern in 1999 when he expressed reluctance to allow Kosovar Albanian refugees to enter Macedonia, stating that the arrival of a mass of Kosovar Albanians “threatened to destabilise Macedonia’s ethnic balance.”

Similarly, the inflow of Sunni Muslim refugees from Afghanistan to Pakistan’s North West Frontier Province (NWFP) increased existing tensions between Sunni Muslim and Shia

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863 Salehyan, *ibid.* at 20.
Muslim populations in Pakistan.\textsuperscript{867} Prior to the influx of the Sunni refugees from Afghanistan, the Shia population had enjoyed a numerical preponderance in NWFP. The large flow of Sunni Muslims into NWFP began to erode the dominance enjoyed by the Shia population.\textsuperscript{868} In other regions, the reverse process occurred: Pakistani localities that had once been dominated by Sunnis are now characterized by a numerical preponderance of Shias as a result of the migration of Afghan Hazara Shias into the localities.\textsuperscript{869} These shifts in the relative populations of Sunnis and Shias have escalated tensions between these two communities, resulting in an increasing amount of violent encounters between Sunnis and Shias.\textsuperscript{870}

Although middle and great powers have domestic peace and order-related incentives to intervene in the civil wars of other countries, often developing countries have the greatest incentives to intervene in the internal affairs of a country in crisis in response to refugee flows. According to the UNHCR, at the end of 2008, developing countries hosted 80 percent of the world’s refugee population (approximately 8.4 million refugees), of which the 49 Least Developed Countries (LDCs) provided asylum to 18 percent.\textsuperscript{871} This is not surprising given that refugee flows tend to be dictated by geography; developing countries likely carry the greatest burden with respect to caring for refugee populations because they tend to be in closest geographic proximity to countries in crisis.

\textsuperscript{868} Ibid.
\textsuperscript{869} Ibid.
\textsuperscript{870} Ibid.
\textsuperscript{871} UNHCR, 2008 Global Trends, supra note 847 at 7.
As the countries that experience the greatest impact of refugee flows, developing countries have the strongest incentives to assist and to intervene in countries in crisis. At the same time, these developing countries, especially the LDCs, are not nearly as well placed as developed countries to address the many needs of a country emerging from periods of violent ethnic conflict. Moreover, these countries, by virtue of their geographic proximity, are more likely to be experiencing political, social, and economic pressures that make these countries more vulnerable to instability within their own borders and thus even less capable of responding to crises in other countries. By contrast, developed countries, which have greater access to the resources necessary to stabilise a country emerging from violent ethnic conflict, tend to be farther removed from refugee flows. Those countries which are best placed to stabilise fragile countries thus have less migration-related incentives to intervene.

This is not to say that developed countries have no incentives to provide assistance to countries emerging from periods of violent ethnic conflict. The care of refugees and the integration of the refugees into their societies create pressure for developed countries to address the root causes of refugee migration. Indeed, many developed countries appear to be struggling to various degrees with issues surrounding the integration of migrants (both voluntary and involuntary, such as refugees) into local society. In 2008, *The Economist* published a special report on migration which included the following observation about the current ethos in many developed countries with respect to immigration:

> Italians blame gypsies from Romania for a spate of crime. British politicians of all stripes promise to curb the rapid immigration of recent years. Voters in France, Switzerland and Denmark last year rewarded politicians who promised to keep out strangers. In America, too, huddled masses are less welcome as many presidential candidates promise to fence off Mexico. And around the rich world, immigration has been rising to the
top of voters’ list of concerns – which for those who believe that migration greatly benefits both recipient and donor countries, is a worry in itself.\textsuperscript{872}

Developed countries may also have security-related concerns that the migration of more moderate populations from certain countries such as Iran leaves those countries in the hands of radicals and extremists. Due to the exodus of moderates, migration risks creating states that become increasingly radical and thus dangerous for the international community. It is in the interests of the security of developed countries like the United States and Great Britain, both of whom are identified as enemies of radical regimes, to stabilize fragile countries and to promote democratization and human rights abroad.

Middle-income countries and regional powers are also struggling to deal with migrant populations within their borders. South Africa has attracted a large immigrant population, comprised of both legal and illegal migrants. In 2008, brutal violence targeted at foreign workers from other African countries broke out in South Africa. Evidence of xenophobic attitudes can also be found in Morocco, where one newspaper warned that “black locusts” – African migrants – were coming.\textsuperscript{873} Russia is reported to expel traders from Georgia and elsewhere in the Caucasus while Libya occasionally deports African migrants.

As developed countries struggle to address the integration of migrants into local society, many of these countries are adopting measures to shore up their borders in an effort to keep illegal migrants out of the country. Both the EU and the United States have taken steps to exert better control over their southern borders, including deploying high-tech devices to track and to

\textsuperscript{872}Alex Webb, “Leaders: -- Keep the borders open” \textit{The Economist} 386-8561 (5 January, 2008) 8.

\textsuperscript{873} “You don’t have to be rich” \textit{The Economist} 386:8561 (5 January 2008) 12.
intercept illegal migrants seeking entry into Europe and the United States, respectively.\textsuperscript{874} South Africa has also attempted to tighten its border; it reportedly deported an average of 4,000 people per week in 2007.\textsuperscript{875} India has constructed a 2.5 metre high iron barrier along the length of its border with Bangladesh (a 4,100 kilometre boundary) in order to stem the flow of Bangladeshis into India.\textsuperscript{876} The efforts taken by developed and middle-income countries to keep migrants from illegally crossing into their territory is further evidence of the pressure on governments to exercise better control over migration.

The challenge of integrating migrants into local society and the perceived cost of caring for displaced populations\textsuperscript{877} create incentives for developed and middle-income countries to address the root causes of population movements. Providing assistance to countries emerging from violent ethnic conflict and working with such countries in crisis to develop inter-ethnic social capital represents an investment in managing the issues related to migration. This investment may pay long-term dividends with respect to the need to continue to support such countries in the future. Furthermore, there is growing evidence that suggests that peace and stability in one country has regional pay-offs given the link that civil war has with poor economic performance in neighbouring countries\textsuperscript{878} and conflict diffusion\textsuperscript{879}. As Murdoch and

\footnotesize{\begin{itemize}
\item \textsuperscript{874} Ibid.
\item \textsuperscript{875} Ibid.
\item \textsuperscript{876} Ibid.
\item \textsuperscript{877} I refer to “perceived” costs of caring for displaced populations since there is evidence that the immigration of migrants into a country does not necessarily impose significant economic costs on the destination country and, in some cases, results in a net gain for the destination country. See Trebilcock & Sudak, \textit{supra} note 852. Nevertheless, the public perception that migrant populations do impose economic costs on a country can have political consequences even if the reality does not support that perception. Such a public perception creates pressure on politicians to do something to address migration and may result in greater public willingness to expend national resources on stabilizing countries abroad.
\item \textsuperscript{878} See Murdoch & Sandler, \textit{supra} note 839.
\item \textsuperscript{879} See Salehyan & Gleditsch, \textit{supra} note 860; M. Ayoob, \textit{The Third World Security Predicament: State Making, Regional Conflict and the International System} (Boulder, CO: Lynne Rienner, 1995); and B. Buzan, “Third world
Sandler note, “policies to bring peace to civil-war-torn countries have a return not only for the conflict-ridden country, but also for its neighbors.” It could be that the most efficient strategy for stabilizing regions is the intervention in the domestic affairs of an ethnically polarised country emerging from violent conflict to stabilise such a country and to promote the emergence of inter-ethnic social capital in that country. For developed countries, there may be added incentives to provide assistance with the promotion of inter-ethnic social capital if the polarized country is located in a region with a valuable resource (e.g., oil) or if the polarized country is located in proximity to a country that poses a security risk to the international community (e.g., Afghanistan).

While concerns related to domestic peace and order provide strong incentives for countries to intervene in other countries embroiled in violent ethnic conflict, these concerns do not necessarily give rise to an incentive to provide the intensive assistance necessary to cultivate inter-ethnic social capital. Policymakers are likely to consider the extent of the national interest at stake, the costs of various strategies for stabilizing conflict-ridden countries, and, ultimately, to adopt the strategy with the lowest degree of acceptable risk given the interests at stake. Sending troops into a country locked in violent ethnic conflict carries high risk and will often not be the strategy preferred by policymakers. Yet, troops are necessary to police ceasefires and to help implement fragile peace agreements. In many cases, the domestic interests at stake may not be sufficient to generate the incentives to provide the degree of assistance necessary to cultivate inter-ethnic social capital.

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Even where countries do provide troops, as they have in various troubled countries around the world such as Afghanistan and Iraq, these countries may not be perceived as “neutral third parties”. Instead, parties to the conflict may be suspicious of the motives of donor countries and may perceive that the donor countries are motivated first and foremost by their own narrow national interests rather than by doing what is best for the country in crisis. For example, American involvement in Iraq has been highly criticized as being motivated by a desire to secure the oil held by Iraq rather than by the desire publicly espoused by American politicians, namely the spread of democracy and human rights. When the motives of donor countries are impugned, the credibility of the donor countries to act as neutral third parties is undermined. Strong national interests in intervening in the civil war of another country may thus actually impair the ability of the donor country to contribute effectively to the development of inter-ethnic social capital.

### 3.2. Humanitarian-based incentives
Humanitarian-based incentives are incentives related to a desire to minimize human suffering and to promote the well-being of others. Humanitarian-based incentives typically arise when the scope and brutality of a civil war is so intense that people in various countries around the world align themselves with the citizens of the country caught in the civil war. Outside countries develop incentives to intervene largely as a result of the public outcry against the violence and suffering occurring in the country dealing with violent ethnic conflict. Emigration from countries locked in civil war also results in large Diaspora communities abroad, which in turn may pressure the governments of their adopted countries to intervene in the domestic affairs of their home countries. For example, the large Tamil population in India created political pressures for India to intervene in the Sri Lankan conflict.
Humanitarian-based concerns are often not sufficient in and of themselves to result in foreign intervention in a country’s civil war. Humanitarian-based concerns must generally be coupled with geostrategic interests to trigger foreign intervention. This may explain why the break-up of the former Yugoslavia attracted the attention of the West while the international community abandoned countries like Rwanda and Burundi to civil war and genocide. Yugoslavia engaged NATO’s interests and was geographically proximate to Western Europe; Rwanda and Burundi were culturally and geographically far removed from the West and had little strategic importance. Ultimately, however, foreign intervention in the former Yugoslavia did not prevent genocidal massacres such as Srebrenica, although this intervention may make it less likely that such massacres will re-occur in the future.

An important development that followed the juxtaposition of the West’s intervention in the former Yugoslavia, including Kosovo, but its failure to do so in Rwanda, is the emergence of the doctrine of the responsibility to protect (R2P). The responsibility to protect involves three primary “pillars”. First, each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Second, the international community has a duty to assist individual states to develop the capacities necessary to be able to protect their populations. The international community must also assist the United Nations in developing an early warning system to identify states at risk of failing in their duty to protect their populations. Finally, where a State is manifestly failing to

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882 *2005 World Summit Outcome*, GA res. 60/1, UN GAOR, 60th Sess., UN Doc. A/60/L.1 (2005) at para. 138-139 [2005 World Summit Outcome]
protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, the international community has a duty to intervene in order to protect the populations at risk. The international community’s intervention must begin with diplomatic, humanitarian, and peaceful measures. The intervention must be timely and decisive and should move from diplomacy to progressively more coercive measures. Where peaceful measures fail, the international community has a responsibility to use collective military force to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. These three pillars are articulated in the Outcome Document from the 2005 World Summit. Since then, the international community, international organizations, and scholars have begun to explore what the responsibility to protect means in practical terms and how to implement this norm. In September 2009, the United Nations General Assembly adopted its first resolution on the responsibility to protect. This resolution merely takes note of the Secretary General’s report on the doctrine and a debate in the General Assembly, in addition to committing to continued consideration of the responsibility to protect.

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883 See 2005 World Summit Outcome, ibid.
884 See e.g. Secretary General, Implementing the Right to Protect, UN Sec. Gen., 2009, UN Doc. A/63/677 and The responsibility to protect, GA Res. 63/308, UN GAOR, 63rd Sess., UN Doc. A/Res/63/308 (2009).
885 A number of international organizations which focus on the responsibility to protect have been created. Examples include International Coalition for the Responsibility to Protect (http://www.responsibilitytoprotect.org/); Global Centre for the Responsibility to Protect (http://globalr2p.org/); Asia-Pacific Centre for the Responsibility to Protect (http://www.r2pasiapacific.org/); and R2P Coalition (http://r2pcoalition.org/).
888 Secretary General, Implementing the Right to Protect, UN Sec. Gen., 2009, UN Doc. A/63/677.
889 This debate occurred on July 23, 24, and 28, 2009.
At the present time, the responsibility to protect is still emerging as an international norm and doctrine. It thus does not yet carry significant weight in terms of prompting states to act to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity.

However, if the norm continues to evolve and gain greater legitimacy and recognition in the international community, it could provide a strong basis for states to intervene in the domestic affairs of other states that are locked in violent ethnic conflict. What remains to be seen is the parameters for such intervention, including the range of strategies that may be adopted to protect populations. The protection of populations does not necessarily imply the adoption of measures that are conducive to the cultivation of inter-ethnic social capital. Nevertheless, the emphasis on the early prevention of conflict, including the duty of the international community to offer assistance to individual states that will advance the protection of populations, does offer some hope that the responsibility to protect doctrine may advance the cultivation of inter-ethnic social capital.

4. Conclusion
The above discussion of the incentives that the international community has for assisting with the cultivation of inter-ethnic social capital in ethnically polarised developing countries points to at least three important topics that merit further study. First, a fuller exploration of the incentives that the international community has for intervening in countries in crisis is necessary. More empirical research on the macro-economic costs associated with migration, for example, would help to sharpen the understanding of the consequences of conflict for the international community. Moreover, a better understanding of the negative externalities

890 See e.g. Cooper & Berdal, supra note 820 at 138-140.
associated with violent ethnic conflict and the positive externalities associated with the growth of inter-ethnic social capital within a country would help law and development scholars to formulate a case for international intervention in the domestic affairs of a country in crisis.

Second, the costs of ethnic conflict should be studied from a regional perspective rather than just a narrow, country-specific perspective. That is, the impact of ethnic conflict should be evaluated in reference to the effect that the conflict has on the country in crisis and the countries surrounding this country rather than just on the country in crisis alone. It is becoming increasingly clear that conflict in one country has an impact on social, economic, and political growth of the entire region in which the country is located. The nature of this impact and the reasons for the diffusion of the negative effects of conflict require further exploration. A better understanding of the impact that ethnic conflict has on an entire region serves to strengthen the case for international intervention in the domestic affairs of a country in crisis. It also helps to illustrate the efficiencies that may be gained with respect to the development of a region as a whole by providing assistance to a country emerging from violent ethnic conflict. In this regard, taking a regional perspective to assessing the costs of violent ethnic conflict helps to strengthen the incentives of other countries to invest in the cultivation of inter-ethnic social capital.

Finally, research on various approaches to structuring international assistance should be undertaken with a view to developing models that align the incentives of countries to provide assistance to countries in crisis with their capacities and level of assistance. In the discussion above, I noted that most refugees are hosted by developing countries, including LDCs, yet
these countries lack sufficient resources to respond effectively to the crises caused by violent ethnic conflict in neighbouring countries. Developed countries may have the expertise, financial resources, and physical assets necessary to deploy peacekeeping forces, but often lack the political will to do so in light of the physical risk to their troops and the overall incentives they have to stabilise countries in crisis. The countries in direct proximity to a country in crisis have the greatest incentive to provide assistance with the cultivation of inter-ethnic social capital. Such countries are likely to be more willing to deploy their own military to undertake peacekeeping operations than countries that are farther removed from the conflict. Approaches to international intervention should be developed that focus on blending troop support from regional actors (including regional powers such as South Africa) with financial and logistical support from developed countries. Such approaches would capitalise on the synergies existing between developing countries with high incentives to intervene but few resources to do so and developed countries with weaker incentives for intervention but greater capacity to support peacekeeping. Study of how developing and developed countries may partner to provide the international assistance necessary to promote the cultivation of inter-ethnic social capital in polarised countries could therefore lead to better approaches to international intervention in countries emerging from violent conflict.

Violent ethnic conflict continues to subvert efforts to promote political, social, and economic development in polarized countries around the world. In this dissertation, I have drawn attention to the role that inter-ethnic social capital can play in managing the coexistence of ethnic groups in the polity and in creating a political culture where leaders can focus on adopting policies for growth rather than for domination of other groups. I have developed strategies for cultivating inter-ethnic social capital at the level of both the elites and the masses.
However, the implementation of these strategies is not possible without the commitment of the international community to assist countries emerging from periods of violent conflict with the cultivation of the civic compact. The research I have proposed above would build upon the work in this dissertation and further advance the understanding of how inter-ethnic social capital may be fostered so as to promote development in ethnically polarised countries.