

# HYBRID MODELS OF JUSTICE AND RWANDA'S POST-GENOCIDE RESPONSE

by

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**Abstract:**

Transitional justice is guided by three main theories of justice: retributive, restorative, and reparative. Currently, the theories are predominantly perceived as mutually exclusive rather than mutually reinforcing. This paper seeks to reconceptualize the way scholars and practitioners comprehend and use the theories by looking at the goals and the unique focus of each theory. Through this analysis it is demonstrated that the theories can be compatible and reinforcing, thus opening the door to hybrid models or mechanisms of justice that blend various theories together. Rwanda's post-genocide response is a contemporary example of a hybrid model and a hybrid mechanism. To date, the Rwandan response is predominantly retributive but does utilize the hybrid mechanism of the *gacaca* courts. Despite best intentions and significant advancement, the post-genocide response has yet to achieve reconciliation. To improve this, future responses or mechanisms in Rwanda should be more restorative and reparative in nature.

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## **Part I: Complementarity in TJ Theories - Moving Towards a Hybrid Model**

*“The logic of law will never make sense of the illogic of genocide.”<sup>1</sup> - Larry Langer*

*“In a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence. There are simply too many victims and too many perpetrators.”<sup>2</sup> - Martha Minow*

The conditions that initially gave rise to modern transitional justice (TJ), namely WWI and WWII, are no longer as relevant as they once were. The conditions in which TJ operates were historically viewed as exceptional or extraordinary, yet in contemporary times these conditions are increasingly normal. Contemporary conditions are characterized as: “War in a time of peace, political fragmentation, weak states, small wars, and steady conflict.”<sup>3</sup> Furthermore, in addition to these conditions, it is clear that “over 40 percent of post-conflict societies return to conflict within a span of five years.”<sup>4</sup> So the current approach to TJ still faces several challenges that need to be addressed. Although TJ has become increasingly normalized, the issues it seeks to address are continually changing. As the dynamics of violent conflict continue to evolve, it is imperative that TJ also adapts and is attuned to the current contextual realities of the violent conflicts it seeks to confront. Although the debate within TJ has shifted from whether to pursue a form of justice, to what form the justice seeking-process should take, it

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<sup>1</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, (Boston: Beacon Press, 1998), 5.

<sup>2</sup> Minow, *Between Vengeance and Forgiveness*, ix.

<sup>3</sup> Ruti Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003), 90.

<sup>4</sup> Patricia Lundy and Mark McGovern, “Whose Justice? Rethinking Transitional Justice from the Bottom Up,” *Journal of Law and Society* 35, no. 2 (2008), 279.

is critical to question and understand from where the challenges associated with TJ mechanisms and theories stem.<sup>5</sup>

In order to provide such an analysis, Part I will outline three significant goals of TJ to evaluate the three most prominent guiding theories of justice: retributive justice, restorative justice, and reparative justice. Subsequently, the three theories will be critically reviewed in conjunction with the tools or mechanisms associated with them. This examination will demonstrate that contrary to popular belief, the theories of justice seek to achieve similar goals while also bringing their own unique focus to the TJ debate. Therefore, it will be argued the theories should be pursued in conjunction with each other in a hybrid model in order to most effectively meet the overarching goals of transitional justice. Subsequently, Part II will assess the post-genocide transitional justice response in Rwanda with the goal of hybridity in mind.

### Goals of Transitional Justice

Transitional justice encompasses a variety of both judicial and non-judicial mechanisms that seek to deal with large-scale abuses of human rights during periods of transition, which includes periods of regime change, war, civil war, or genocide. The corresponding mechanisms are selected and designed to seek justice, address the need and desires for accountability, and ultimately foster reconciliation in post-conflict societies.<sup>6</sup> There are many goals that TJ seeks to attain after conflict. Of importance to many scholars and this paper are three main goals: sustainable peace, accountability, and reconciliation. The relationship between these goals is complex but ultimately what should guide TJ programs. Within the field of TJ literature, justice

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<sup>5</sup> Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability After War*, (Cambridge, UK: Polity, 2007), 2.

<sup>6</sup> Kerr and Mobekk, 3

is a concept that is almost universally sought after, yet incredibly difficult to define. This is partially because “conceptions of justice vary among individuals, communities and cultures.”<sup>7</sup>

As such, this paper chose to utilize the three outlined goals as the standards for determining the critical components in pursuit of justice. Therefore, before moving forward, it is necessary to define these goals.

Peace is often conceptualized in two ways: *negative peace*, “which represents an absence of direct violence such as a cessation of hostilities” and *positive peace*, which moves beyond merely an end in direct violence to a normative shift within society.<sup>8</sup> A normative shift is where the conflicting parties’ attitudes towards each other are altered and tempered with respect for the other. A positive peace means that the fear of harm or danger that was prevalent in the conflict has subsided. The preferred concept for this paper, *sustainable peace*, builds upon the definition of negative and positive peace. It refers to: “a situation characterized by the absence of physical violence; the elimination of unacceptable political, economic, and cultural forms of discrimination; a high level of internal and external legitimacy or support; self-sustainability; and a propensity to enhance a constructive transformation of conflicts.”<sup>9</sup> This conception of peace is beneficial as it moves beyond negative peace and narrow conceptions of justice to address underlying socio-economic factors and root causes that precipitated the conflict. Building sustainable peace has both short-term and long-term objectives. In the short-term, sustainable peace requires a maintenance of negative peace in order to move forward and build positive

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<sup>7</sup> Harvey M. Weinstein, Laurel E. Fletcher, Patrick Vinck, and Phuong N. Pham, “Stay the hand of justice: Whose priorities take priority?” in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, eds. Shaw, Rosalind, Lars Waldorf, and Pierre Hazan, (Stanford, CA: Stanford UP, 2010), 37.

<sup>8</sup> Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (Malden, MA: Polity Press, 2002), 12.

<sup>9</sup> Luc Reyhner and Thania Paffenholz, *Peacebuilding: A Field Guide*, (Boulder, Colo: Lynne Rienner Publishers, 2001), 12.

peace and implement TJ. In the long-term, sustainable peace seeks to build security in the political, economic, and social aspects of society as well as addressing the underlying causes of the conflict that stem from these aspects.<sup>10</sup> It is within this long-term context that TJ operates. However, in order to achieve sustainable peace in the pursuit of TJ, negative peace is a necessary precondition for any justice-seeking process and its corresponding goals.

Accountability is another essential goal and facet of transitional justice.<sup>11</sup> In a TJ context, it is inherently linked to the desire “to see an ‘end to impunity’ for those responsible for gross violations of human rights.”<sup>12</sup> While accountability can be associated with judicial approaches, it can also operate at a non-judicial level by “establishing patterns of abuse and creating institutional government and security sector responsibility.”<sup>13</sup> Essentially, accountability seeks to generate responsibility for actions and functions as a major goal for many TJ mechanisms.

Reconciliation is ultimately the end goal of many TJ initiatives. In “Stay the Hand of Justice: Whose Priorities Take Priority,” Weinstein et al. aptly describe the strained relationship between justice and reconciliation:

We need to calibrate our expectations. Many scholars and practitioners assume that transitional justice will lead to reconciliation and forgiveness, deter future abuses, combat impunity, promote social reconstruction, and alleviate the effects of trauma. [The expectations] of trials should be limited to an agreement that retributive punishment is appropriate and sufficient in and of itself; that reconciliation processes may be of another order entirely, and that the relationship between justice and reconciliation remains unclear. While truth commissions, trials, vetting, memorials, and reparations may all play some as-yet-undefined role in the social reconstruction of societies, the contributions will vary depending on context and on the priorities assigned to them by those affected.<sup>14</sup>

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<sup>10</sup> Wendy Lambourne, “Chapter 1: Transformative justice, reconciliation and peacebuilding,” in *Transitional Justice Theories*, Ed. Buckley-Zistel, Susanne, (Abingdon, Oxon: Routledge, 2014), 22.

<sup>11</sup> Lambourne, 32.

<sup>12</sup> Kerr and Mobekk, 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> Weinstein et al., 31.

Although reconciliation is ultimately the long-term end goal, there are many factors and steps in-between, such as sustainable peace and accountability, that must be achieved. Rachel Kerr accurately describes the role reconciliation plays in the TJ process: “Reconciliation will very rarely be brought about by any type of transition justice mechanism on its own, and will not appear in the immediate aftermath of a transitional justice process.”<sup>15</sup> Thus, it is imperative that TJ theories and proposals are realistic about the fulfillment of goals, especially that of reconciliation. Furthermore, achieving sustainable peace and accountability are merely necessary conditions that lay the groundwork for reconciliation; and are by no means sufficient factors to guarantee reconciliation. Reconciliation is a process that cannot be forced. Instead, justice-seeking processes must seek to create the most suitable environment for reconciliation to occur.

### Theories of Transitional Justice

The following section will discuss the theories of justice by examining: the theoretical grounding, associated mechanisms, and challenges presented by transitional justice. It will be demonstrated that rather than each theory correlating with a particular transitional justice goal, each theory seeks the same goals of accountability and eventually reconciliation but is focused on addressing the imbalance created by crime at a different level of analysis. The presentation of theories will be presented in order of analysis-levels, from the narrowest to the widest.

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<sup>15</sup> Kerr and Mobekk, 122.

### *I. Retributive Justice*

According to Martha Minow, “Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by [the] principle of proportionality and individual wrongs. Retribution motivates punishment out of fairness to those who have been wronged and reflects a belief that wrongdoers deserve blame” and proportional punishment.<sup>16</sup> The idea of proportional punishment is based on the notion of ‘just dessert’ and it often serves as a preliminary motivation, yet retribution transcends desires for vengeance with its call for punishments to fit the crime and to treat similar cases alike.<sup>17</sup> Retributive justice seeks to address the crime itself by condemning the act or denouncing previous wrongs while reinforcing rules and norms.

Punishment or retribution is used to achieve a host of important functions such as restoring a balance between perpetrator and victim that was fractured or lost by the commission of the crime. As Jonathan Wolff notes, retribution and theories of punishment can emphasize different justifications: deterrence, rehabilitation, retribution, incapacitation, and communication.<sup>18</sup> Although these justifications all have several merits and drawbacks, of particular importance to this paper is the communicative justification. This theory articulates that the act or crime, whether intentional or not, sends an erroneous message about the value of the victim compared to the criminal, primarily that the victim is worthless.<sup>19</sup> Thus according to the theory it is through retribution that “the community corrects the wrongdoer’s false message that the victim was less valuable than the wrongdoer; through retribution, the community reasserts

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<sup>16</sup> Minow, *Between Vengeance and Forgiveness*, 12.

<sup>17</sup> Lavinia Stan and Nadya Nedelsky, *Encyclopedia of Transitional Justice*, Vol. 1. (Cambridge: Cambridge University Press, 2013), 289.

<sup>18</sup> Jonathan Wolff, *Ethics and Public Policy: A Philosophical Inquiry*, (London: Routledge, 2011), 117.

<sup>19</sup> Mani, 35.

the victim's value by inflicting a publicly visible defeat on the wrongdoer.”<sup>20</sup> This revalidation of the victim's worth demonstrates a focus on victims of crime and seeks to restore the balance caused by the perpetrators actions.

Retribution seeks to “restore both victims and offenders to their rightful position: it bestows satisfaction and psychological benefits to the victims, denies wrongdoers any unfair advantages, and reinforces the rules that have been broken.”<sup>21</sup> However, this idea of restoration becomes challenging in the instances of gross violations of human rights or instances of rape and murder, as the question becomes: restoration to what state exactly? It also should be noted that the victim is not the sole concern of retributive justice. By promoting principles of proportional punishment, for example, the offender's rights are also respected since untempered vengeance runs the risk of disproportionate harm. Within the theory at least, retribution balances the rights and needs of both the victims and perpetrators.

There is some debate as to whether retributive justice is forward or backward-looking in its aims. The answer is that it can be both. By focusing on the commission of the act, retributive justice is inherently backward-looking; “its *raison d'être* is rooted in the past.”<sup>22</sup> Yet, this feature does not preclude it from having any forward-looking objectives. In fact, retributive justice may be considered forward-looking when it is justified for deterrence purposes and to restore moral order.<sup>23</sup> As such, retributive justice can be both forward and backward-looking, which lends itself well to transitional justice goals. This is particularly true for sustainable peace which is ultimately forward-looking.

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<sup>20</sup> Minow, *Between Vengeance and Forgiveness*, 12.

<sup>21</sup> Stan and Nedelsky, 289.

<sup>22</sup> Mani, 34.

<sup>23</sup> Stan and Nedelsky, 90.

Altogether, the objectives of retributive justice are to “restore balance, achieve equity, receive equivalence” and obtain accountability.<sup>24</sup> It seeks accountability by holding the offender responsible for his or her actions and addressing the crime itself. Through this, it also implicitly seeks to restore the balance negatively impacted by the act and to lay the groundwork for reconciliation. The unique feature about retributive justice is that of deterrence, where punishment adds a cost to committing a crime that hopefully will prevent future instances of the crime occurring. Within a TJ-context, “retribution encompasses a set of state-sanctioned measures that seek to pursue justice and inflict punishment on offenders by using legal or extralegal means. Postwar trials, purges, expulsions, and executions are prominent examples of retribution.”<sup>25</sup> Given the diverse array of mechanisms, the focus of this paper will shift to briefly examining one of the most frequently used TJ mechanisms associated with retributive justice: trials.

Within TJ, there are many different types of trials: ad hoc international criminal tribunals; international trials at the International Criminal Court; national trials; and localized trials. The following section will highlight some of the merits and demerits that are generalizable traits of most trials. There are many parallels that can be drawn between goals of retributive and transitional justice and the objectives and merits of trials. For one, trials attempt to transfer and temper desires for revenge by shifting the justice process to the state or official bodies. This transfer “cools vengeance into retribution, slows judgement with procedure, and interrupts, with documents, cross-examination, the presumption of innocence, and end the vicious cycle of blame and feud.”<sup>26</sup> Trials also lend themselves to creating credible documents of events, as well as

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<sup>24</sup> Stan and Nedelsky, 89.

<sup>25</sup> *Ibid.*

<sup>26</sup> Minow, *Between Vengeance and Forgiveness*, 26.

acknowledging and condemning the acts or crimes: “Thus they help to articulate both norms and a commitment to work to realize them.”<sup>27</sup> These features, presented in their ideal form, coalesce with many of the principles of retributive justice. Trials also embody retributive principles of accountability, especially individual accountability, as well as act as a deterrent mechanism and ensure that the desire for punishment is met.<sup>28</sup> In addition, trials can contribute to establishing the rule of law, provide a much-needed record of the conflict, albeit limited, and establish a pattern of events.<sup>29</sup>

Yet for all of these benefits, many scholars question the relationship of trials and reconciliation. Due to the individualistic focus of many criminal trials, the trial process may not be adequate for what the larger post-conflict population desires.<sup>30</sup> As such, reconciliation may be hampered if trials are the only mechanism pursued and the populace desires a complete telling of the story in order to bring the horrific events to a close.<sup>31</sup> Nonetheless, appealing to the desire for accountability, Larry May contends that:

Trials have played a significant role in reconciliation since their inception. The main idea here is that what community members most want, in many cases, is that the perpetrators be identified and appropriately punished for what they have done. Such an understanding turns on the fact that the perpetrator gets his or her comeuppance and is no longer seen as having committed harms with no cost.<sup>32</sup>

In addition to this rationale, May also advocates that trials should take a defendant-oriented approach by balancing the needs of the victims and respecting the rights of the accused and perpetrators within the larger population: “Such considerations make trials focus on goals that

<sup>27</sup> Minow, *Between Vengeance and Forgiveness*, 50.

<sup>28</sup> Kerr and Mobekk, 46.

<sup>29</sup> *Ibid.*

<sup>30</sup> Larry May, *Genocide: A Normative Account*, (Cambridge: Cambridge University Press, 2010), 250.

<sup>31</sup> May, 250.

<sup>32</sup> *Ibid.*

are not necessarily opposed to reconciliation.<sup>33</sup> This balance between offender and victims is closely related to the focus of retributive justice. Although not quite as simple in practice, in theory, reconciliation is possible.

In practice, trials are susceptible to a variety of shortcomings, particularly in TJ contexts. To name a few, trials have been charged with being cumbersome, slow, bureaucratic, top-down, biased, and at times a form of victor's justice.<sup>34</sup> As seen with the International Criminal Tribunals of Rwanda and the Former Yugoslavia (ICTR and ICTY), there is also a tendency for trials to lack an effective outreach program or co-ordination effort with the local post-conflict population.<sup>35</sup> Furthermore, it is frequently noted that in practice, trials tend to marginalize victims and are disconnected from local populations and conditions.<sup>36</sup>

However, despite these shortcomings, trials should not be discarded wholesale. In fact, according to Martha Minow: "even when marred by problems of retroactive application of norms, political influence, and selective prosecution, however, trials can air issues, create an aura of fairness, establish a public record, and produce a sense of accountability."<sup>37</sup> Gary Bass notes that hosting trials after instances of war can have a profound impact as the treatment of perpetrators can mean the difference between war and peace in the future: "If the job is well done, as after [WWII], it may lay the foundation for a durable peacetime order; if botched... it may spark a new outbreak of war."<sup>38</sup> This demonstrates the intrinsic link between peace and the success or failure of retributive mechanisms, at least in theory. Many of the faults that arise in

<sup>33</sup> May, 266.

<sup>34</sup> Kerr and Mobekk, 46-47.

<sup>35</sup> Kerr and Mobekk, 50.

<sup>36</sup> Lundy and McGovern, "Whose Justice?," 270.

<sup>37</sup> Minow, *Between Vengeance and Forgiveness*, 50.

<sup>38</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton, N.J: Princeton University Press, 2000), 6.

the use of trials, are not necessarily indicative of faults within retributive justice as a theory. The differences that arise when translating theory into practice may be more emblematic of a deeper issue where the theory is disassociated from the practical realities and conditions of post-conflict societies. Overall, through this examination of retributive justice and trials, it is apparent that the level of analysis at which retributive justice operates is at a narrow individual level. The clear focus is on the imbalance created by the crime between victims and perpetrators.

## *II. Restorative Justice*

Restorative justice tends to refer to “a process of resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, eventually, also engaging the communities in resolution of that conflict.”<sup>39</sup> Restorative justice tends to conceptualize crime differently than retributive justice. It believes that crime creates a tear or wound in the community or social fabric, thus damaging the web of relationships.<sup>40</sup> However, this conception is not necessarily opposed to retributive conceptions of crime. Instead, it seeks to consider the consequences of crime in a larger context. Fundamental to this understanding of crime is the principle focus of needs and harms rather than ‘just deserts’.<sup>41</sup> The distinct dimension of restorative justice is the focus on addressing the crime at a more intangible level, namely the harmful side-effects of crime on interpersonal relationships. From this

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<sup>39</sup> Holger-C. Rohne, Jana Arsovska and Ivo Aersten, “Chapter 1: Challenging Restorative Justice - State-based Conflicts, Mass Victimization and the Changing Nature of Warfare,” in *Restoring Justice After Large-Scale Violent Conflicts: Kosovo, DR Congo and the Israeli-Palestinian Case*, ed. Aertsen, Ivo, (Cullompton, Devon, UK: Willan, 2008), 15.

<sup>40</sup> Howard Zehr, *The Little Book of Restorative Justice*, (Pennsylvania: Good Books, 2002), 20.

<sup>41</sup> Zehr, 18.

grounding, restorative justice makes a fundamental and unique contribution to the theories of justice: the expansion of the stakeholders.

In *The Little Book of Restorative Justice*, Howard Zehr argues that at some level, restorative justice was a reaction to perceived failures in retributive justice mechanisms, specifically that the needs of victims were not being met and that the existing definition of acceptable participants or stakeholders included in justice processes was too narrow.<sup>42</sup> In addition to conceptualizing crime in terms of harm, restorative justice also holds that wrongs or harms result in obligations between victims, offenders, and the community: “Therefore restorative justice emphasizes offender accountability and responsibility... [It] promotes engagement or participation [which] suggests that the primary parties affected by crime - victims, offenders, and members of the community - are given significant roles in the justice process.”<sup>43</sup> This is one of the most significant contributions of restorative justice as it seeks to not only acknowledge the crime but also understand how crime impacts communities, perpetrators, and victims.

This approach is actually somewhat similar to retributive justice in that it seeks to balance the rights of all stakeholders. Where the two theories depart is how broad the definition of stakeholder should be. In regards to the search for reconciliation, restorative justice views the participation of all parties as a fundamental component of the justice process that in turn builds relationships and the creation of agreements centered around a desired outcome between victims and offenders.<sup>44</sup> An additional strength of this approach is that by incorporating the community

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<sup>42</sup> Zehr, 13.

<sup>43</sup> Zehr, 23-24.

<sup>44</sup> Rohne et. al., 15.

into the justice process, it may assist in addressing issues of bystanders to crime by emphasizing that crime effects everyone not just the victim.

Although this theory has many merits, it also suffers from several shortcomings. Despite advocating for a bottom-up and victim-centred approach, restorative justice is often critiqued on its applicability to large-scale conflicts and its contributions to peace building.<sup>45</sup> In the conventional understanding of restorative justice, meaning not in a transitional justice setting, the theory focuses on responding to a specific interpersonal event or crime, much like retributive justice.<sup>46</sup> As such, this conception is “much narrower and specific than the complex approach of peace building... however, it constitutes only one aspect or - metaphorically speaking - a ‘tool in a tool-box’ that contributes to the pursuit of overall peace.”<sup>47</sup> One of the most challenging aspects to applying restorative justice to instances of mass-violence and genocide is the damaged social relations left in their wake:

The devastating effects on intergroup relations produce a deep sense of mistrust towards the ‘other’ collective and its members. Looking at the aftermath of violence it is evident that restoration is needed, but restoration of what?...The major challenge posed to restorative justice in the context of large-scale conflicts is the fact that the incident at the micro-level cannot be isolated from its more general - historical, political, and social - context. In such cases, a violent incident is strongly embedded in - and therefore a part of - the conflict at a macro-level.<sup>48</sup>

Furthermore, crucial to the understanding of restorative justice is an implied responsibility of the offender to take active steps to repair the harm done by their actions.<sup>49</sup> This idea presupposes several societal conditions that, in the context of mass violence, may not exist. Thus, on its own,

<sup>45</sup> Rohne et. al., 16.

<sup>46</sup> Rohne et. al., 17.

<sup>47</sup> *Ibid.*

<sup>48</sup> Rohne et. al., 16, 19.

<sup>49</sup> Zehr, 28.

restorative justice may not have sufficient impetus nor incentive for offenders to engage with the justice-seeking process.

The final challenge for restorative justice is that it tends to be practised in instances of minor offences and “in cases such as murder, the harm obviously cannot be repaired... putting right implies reparation or restoration or recovery, but these ‘re’-words are often inadequate. When a severe wrong has been committed, there is no possibility of repairing the harm or going back to what as before.”<sup>50</sup> Therefore in the wake of a genocide with extraordinary levels of mass participation such as Rwanda, restorative justice may be an inadequate response to a majority of the crimes. Restorative justice’s non-adversarial and victim-centred approach are often translated into mechanisms such as truth commissions or alternatives to prosecutions.<sup>51</sup> As such, the focus will now shift to briefly examining the most commonly associated restorative transitional justice mechanism: truth commissions.

Since 1974, the popularity of truth commissions (TCs) has increased with more than 25 commissions being established world-wide.<sup>52</sup> Many proponents of TCs argue that they are a “restorative justice process... [and] because of its non-punitive core, it is of more use in a post-conflict society, and in particular that it will lead to reconciliation of societies after war, more so than different types of trials.”<sup>53</sup> Truth commissions are non-judicial bodies established in order to serve a number of functions such as investigating human rights abuses, documenting disappeared persons, generating an official account of the events, and creating a public space to acknowledge the crimes committed.<sup>54</sup> Even though TCs examine the involvement of individual perpetrators,

<sup>50</sup> Zehr, 28-29.

<sup>51</sup> Stan and Nedelsky, 289.

<sup>52</sup> Kerr and Mobekk, 128.

<sup>53</sup> Kerr and Mobekk, 135.

<sup>54</sup> Kerr and Mobekk, 129.

much of their attention is focused on victims whether it is by taking testimony or providing an account of the patterns of violence over time.<sup>55</sup> In addition, TCs are relatively less expensive than other TJ mechanisms. This is important because “as with all transitional justice mechanisms, having sufficient resources is vital to ensure its successful implementation. Compared to other mechanisms, TCs are not wildly expensive when set against the huge costs of international courts.”<sup>56</sup> Yet even though TCs may be less expensive than trials, some post-conflict societies still may not have sufficient resources to conduct such a process. In addition to having sufficient resources and reasonable mandates, like most TJ mechanisms, TCs need to be unbiased and impartial in order to succeed.<sup>57</sup>

Similar to restorative and retributive justice, TCs tend to be both backward and forward-looking as they seek to generate accountability and pave the way for reconciliation: “The aim of a TC is to establish not only truth, in its many forms, but also accountability for human rights abuses; in this way, it can complement trials. By starting a process of acknowledgement and potential reconciliation, a TC can strengthen democratic transition in the aftermath of war.”<sup>58</sup> Although it is tempting to argue that TCs are weak in generating accountability, it is nevertheless a restorative goal that TCs strive for. Although this will be discussed further later in the paper, it is worth noting that truth commissions can coalesce with other mechanisms and theories of justice. For example, truth commissions can also complement reparative justice aims by designing reparations programs and supplying the government with recommendations and information necessary to create institutional change.<sup>59</sup>

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<sup>55</sup> Priscilla B. Hayner, *Unspeakable Truths*, (New York: Routledge, 2003), 22.

<sup>56</sup> Kerr and Mobekk, 130.

<sup>57</sup> Kerr and Mobekk, 145.

<sup>58</sup> Kerr and Mobekk, 138-139.

<sup>59</sup> Hayner, 22.

In spite of all the benefits truth commissions can provide, they also suffer from some significant drawbacks. For one, despite the efforts of even the most extensive TCs such as the South African Truth and Reconciliation Commission, many victims still demand punishment of the perpetrators.<sup>60</sup> Another issue also lies in the unacknowledged problematic nature of truth and the assumption that a single truth can be established, and is required in order to establish reconciliation.<sup>61</sup> These issues of desire for punishment and truth and memory, however, are minimal compared to the practical realities of truth commissions and their victim-centred approach.

Although restorative justice and ideal models of truth commission seek to be victim-centric, in practice many truth commissions still leave victims feeling neglected and open to revictimization. Due to limited resources and time, many truth commissions ultimately only investigate a small proportion of cases and focus on the pattern of abuses instead of individual harms. This can lead to individual victims feeling disillusioned by the process and wanting more.<sup>62</sup> Furthermore, because TCs are purported for their restorative nature, “the potential for revictimization is frequently underestimated. Crucially, it has been found that reliving trauma through truth-telling can serve to slow down the process.”<sup>63</sup> Despite TCs relationship to restorative justice, there is a clear divergence from fundamental theoretical principles when put into practice. Patricia Lundy and Mark McGovern aptly note that both trials and truth commissions can suffer from similar shortcomings. Some of the shortcomings that both mechanisms can share include a top-down narrow focus, partial truth, marginalization of victims,

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<sup>60</sup> Hayner, 3.

<sup>61</sup> Kerr and Mobekk, 131.

<sup>62</sup> Kerr and Mobekk, 137.

<sup>63</sup> *Ibid.*

exclusion of socio-economic factors, and tendency to be influenced by politics.<sup>64</sup> Although truth commissions seek to be victim-oriented like the theory from which they are based, victim groups are often still neglected and do not feel that offender accountability has been achieved.

Moving forward, however, it is important to recognize that expecting any one TJ mechanism to achieve healing is expecting too much especially “in circumstances where therapy and victim support are scarce. Truth commissions should have more limited and realizable criteria, focusing on accountability, emphasizing the acknowledgement of the gross violations of human rights that have taken place.”<sup>65</sup> Once again, similar to this paper’s analysis on retributive justice and trials, there is a difficulty in translating theories of justice to transitional justice conditions.

One concluding remark about restorative justice is that through this examination of restorative justice and truth commissions it is apparent that the level of analysis at which restorative justice operates is at a communal and interpersonal level. Unlike retributive justice where the focus is on the crime itself, the clear focus of restorative justice is on the imbalance created by the crime on relationships and a social level. In addition, several scholars acknowledge that restorative justice may not be an answer to all situations, nor should it replace retributive justice.<sup>66</sup> It is also worth noting that the purposes of trials and truth commissions are relatively analogous.<sup>67</sup> As such, this complementarity is conducive to a hybrid model of justice in TJ. In general practice, trials seek to focus on perpetrators, and truth commissions attempt to balance the focus more towards the victim; yet both mechanisms rarely fulfill their

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<sup>64</sup> Lundy and McGovern, 270-271.

<sup>65</sup> Kerr and Mobekk, 137.

<sup>66</sup> Zehr, 12.

<sup>67</sup> Teitel, “Transitional Justice Genealogy,” 79.

expectations.<sup>68</sup> Furthermore, “despite the shortcomings of both mechanisms, most studies restrict themselves primarily to these two mechanisms and debate their merits and demerits, instead of looking beyond them in search of other approaches and solutions.”<sup>69</sup> As such, it is appropriate that the focus of this paper will diverge from this approach and shift to a brief analysis of reparative justice and corresponding mechanisms before addressing the theories of justice within the context of TJ.

### *III. Reparative Justice*

Reparative justice is a victim-centred approach that aims to redress past wrongs, which includes but is not limited to: “reparations, damages, remedies, re-dress, restitution, compensation, rehabilitation, and tribute.”<sup>70</sup> Reparatory goals seek to “promote healing, restore dignity, and clarify the historical truth… [and] is both backward- and forward-looking in purpose.”<sup>71</sup> It is backward looking in the sense that it seeks to repair the damage the crime has created, yet it also seeks peace and reconciliation to move forward.<sup>72</sup> Furthermore, through the redress or restoration of imbalance, reparative justice also seeks to promote reconciliation.

Of the three justice theories examined in this paper, it is by far the most versatile in terms of manifestations of TJ mechanisms. Many of its mechanisms overlap or work in tandem with mechanisms associated with restorative and retributive justice. Some scholars, like Rama Mani, prefer the term distributive justice to acknowledge the more unique socio-economic features of

<sup>68</sup> Mani, 109.

<sup>69</sup> *Ibid.*

<sup>70</sup> Ruti Teitel, *Transitional Justice*, (Oxford: Oxford University Press, 2000), 119.

<sup>71</sup> Stan and Nedelsky, 288.

<sup>72</sup> Teitel, *Transitional Justice*, 127.

the theory.<sup>73</sup> Yet distributive justice and reparative justice are not the same: distributive justice is but one aspect of the larger theory. Due to the diverse and overlapping nature of reparative justice, this analysis will differ slightly in structure from the sections on retributive and restorative justice. This section will outline and examine material and moral reparations in a general sense and contextualize this analysis through the use of reparations schemes.

At times reparatory justice may appear similar in objectives to restorative or retributive justice. In spite of that, it distinctly seeks to restore conditions and repair the social capital of a society. Although social capital is commonly attributed to Robert Putnam's work, the World Bank provides this succinct and less abstract definition:

Social capital refers to the institutions, relationships, and norms that shape the quality and quantity of a society's social interactions. Increasing evidence shows that social cohesion is critical for societies to prosper economically and for development to be sustainable. Social capital is not just the sum of the institutions which underpin a society – it is the glue that holds them together.<sup>74</sup>

In essence, restoring social capital is linked to restoring social trust and cohesion, as well as civic engagement in civil society.<sup>75</sup>

In some ways, reparative justice overlaps aspects of retributive justice and restorative justice; it seeks to address the crime, ensure that perpetrators do not unfairly benefit at the expense of their victims, and restore the balance in relationships, albeit at more of a societal and institutional level. However, at the heart of reparative justice theory lies a paradox: “they intend to return the victim to the position he or she would have been in had the violations not occurred - something that is impossible to do” especially in the context of genocide or murder on a large-

<sup>73</sup> Mani, 6.

<sup>74</sup> World Bank, "What is Social Capital," World Bank, <http://go.worldbank.org/K4LUMW43B0> (accessed 04/23, 2014). <http://go.worldbank.org/K4LUMW43B0>

<sup>75</sup> Joanna Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti*, (British Columbia: UBC Press, 2010), 15.

scale.<sup>76</sup> Although some reparations emerge as alternatives to punishment, this is not always the case. On a theoretical level, reparative justice seeks to promote responsibility, recharacterize the nature of the wrong, bring peace, and enable societal reconciliation.<sup>77</sup> Where this differs from restorative justice is that:

The shift in emphasis from victims' harm to state's wrongdoing is clear in moral reparations. As with criminal justice, in the state's assumption of responsibility is expressed through its public redress, wrongdoing is identified and, relatedly, blame is assumed for past wrongs. In addition to sanctioning wrongdoers, reparations vindicate victims. Through formal legal responses recognizing the juridical status of the disappeared, reparatory justice reconstruct the borders of political community.<sup>78</sup>

This further demonstrates that the difference between restorative justice is in the level of analysis. Restorative justice's level of analysis addresses the communal and interpersonal level, whereas reparative's scope is much broader in that it seeks to address imbalance on an institutional and civil society level.

In order to understand the theory in practice, a distinction will be drawn between material and moral reparations before discussing the reparations in general. World War II and the subsequent post-war response was significant for transitional justice in many ways. With respect to reparations, the German term *Weidergutmachung* was a guiding principle meaning to 'to make good again'.<sup>79</sup> In practice however, the notion that reparations could fulfill the objective of making good again was rejected by victim groups in favour of the Hebrew term *shilumim*, which means to make amends or to bring about peace.<sup>80</sup> This was a beneficial reconceptualization of reparative justice because it was more attuned to the conditions it sought to address.

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<sup>76</sup> Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas," *Hastings International and Comparative Law Review* 27.2 (2003-2004), 158.

<sup>77</sup> Teitel, *Transitional Justice*, 127.

<sup>78</sup> *Ibid.*

<sup>79</sup> Teitel, *Transitional Justice*, 124.

<sup>80</sup> *Ibid.*

Furthermore, it also correlates with the transitional justice goal of sustainable peace through the restoration of balance.

Material reparations can be given to both individuals and collectives. Individual reparations may include: return of property, job, or freedom, medical or psychiatric therapy, or a form of compensation such as a lump-sum payment or pension.<sup>81</sup> Moral reparations on an individual level, seek to restore dignity, reputation, and equal status in the public eye as well as repair shame and humiliation created by the crime.<sup>82</sup> To some, moral reparations can be “as important - often more important - than material ones.”<sup>83</sup> The diversity of moral reparations mechanisms is astounding. They include: apologies, official government or institutional acknowledgement of wrong, monuments, preservation of archives or sites, creation of museums of remembrance, and education.<sup>84</sup> In some instances, moral reparations may include, “most importantly for many victims, that those responsible suffer consequences, whether it criminal, civil or administrative - that they are brought to justice, and removed from positions of power.”<sup>85</sup> This highlights two critical aspects of reparative justice. For one, it articulates the institutional and societal level scope of justice and secondly, that retributive and reparative justice can be complementary. Due to the versatility of reparative justice practices, they have become an important response in “the contemporary wave of political transformation.”<sup>86</sup> Yet, in spite of this, “few reparations have actually been paid for in the wake of mass atrocities.”<sup>87</sup> This is concerning

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<sup>81</sup> Roht-Arriaza, 159.

<sup>82</sup> Teitel, *Transitional Justice*, 126.

<sup>83</sup> Roht-Arriaza, 159.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Teitel, *Transitional Justice*, 127.

<sup>87</sup> Roht-Arriaza, 158.

and indicates that one possible answer lies in the challenges it faces with implementing reparative mechanisms in transitional settings.

Similar to other theories, reparative justice faces challenges translating theory into practice in transitional justice contexts. The sheer number of victims and amount of devastation that is created in situations of genocide and widespread conflict places severe limitations on reparation programs.<sup>88</sup> In addition to the inadequacy of dealing with structural discrimination, individual reparation schemes are “both unlikely in poor states and inadequate to meet the needs of post-conflict societies.”<sup>89</sup> Furthermore, “most communities affected by genocide or massive conflict were desperately poor before the conflict started - indeed, in many cases poverty and inequality are key underlying causes of the violence. Widespread destruction of property, crops, infrastructure and services during conflict only make poverty worse.”<sup>90</sup> Despite these challenges, this also emphasizes an important transitional justice condition that needs to be addressed, namely socio-economic conditions. Nonetheless, of all the theories and mechanisms examined in this paper, reparatory justice is the only theory that recognizes the importance of repairing discrepancies in socio-economic and underlying conditions. Unlike retributive and restorative justice, its level of analysis extends to a much larger scale of institutional and societal level imbalances created by crime.

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<sup>88</sup> Roht-Arriaza, 181.

<sup>89</sup> Roht-Arriaza, 185.

<sup>90</sup> Roht-Arraiza, 186.

### Complementarity of Theories

It is clear that “there are no tidy endings to mass atrocity,” but this should not dissuade scholars and practitioners from pursuing transitional justice.<sup>91</sup> Every response must begin from the acknowledgement that “*no* response can ever be adequate when your son has been killed by police ordered to shoot at a crowd of children; when you have been dragged out of your home, [or] interrogated and raped in a wave of ‘ethnic cleansing’ ... closure is not possible.”<sup>92</sup> The search for the perfect response in TJ can be misleading and is not grounded in the realities of the conflict, but this should not deter a response. Rather, this should prompt the field to take a step back and understand why challenges arise, capture learning, and improve the response. Through the analysis of the guiding theories and associated tools, a general pattern surfaces in that there is great difficulty in translating theory into practice. As such, the following section will address the complementarity of theories and push for a more hybridized approach to TJ. It will be argued there is a great need for a reconceptualization of justice theories so that they are viewed as mutually reinforcing and therefore amenable to being pursued in conjunction.

#### *I. The Theories as Complementary and Mutually Reinforcing*

It is evident throughout the examination of the theories, that at the most fundamental level, they aspire for similar goals: maintain peace, attain accountability, and eventually reconciliation. Nonetheless, retributive and restorative justice are often conceptualized as diametrically opposed. However, further examination of the fundamental principles reveals that they actually have much in common:

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<sup>91</sup> Minow, *Between Vengeance and Forgiveness*, x.

<sup>92</sup> Minow, *Between Vengeance and Forgiveness*, 5.

A primary goal of both retributive theory and restorative theory is to vindicate though reciprocity, by evening the score. Where they differ is in what each suggests will effectively right the balance... theories of justice acknowledge a basic moral intuition that a balance has been thrown off by a wrong done. Consequently, the victim deserves something and the offender owes something.<sup>93</sup>

This is also true for reparative justice. Each theory seeks to achieve similar goals and the differences between theories may not be at odds with each other. Rather, the differences and unique focuses may just be different strengths that each theory can bring to the table.

Retributive's strength lies in its ability to address the crime specifically; Restorative's strength in expanding the stakeholders and focusing on the side-effects of crime on communal and interpersonal relationships; Reparative's strength in addressing the side-effects of crime on civic society and social capital, which is effectively an institutional and societal level focus (see Figure 1 in Appendix). Each theory does not necessarily oppose each other. Instead they focus on addressing the imbalance caused by crime as well as achieving peace, accountability, and reconciliation at different levels. Therefore, rather than seeing the theories in opposition of each other, they should be conceptualized together as a whole.

There is a tendency within transitional justice, whether intentional or unintentional, to conceptualize matters in dualistic terms: "peace versus human rights, reconciliation versus justice, [and] retributive versus restorative justice."<sup>94</sup> Instead there needs to be a reconceptualization of theory, because "we need to be able to simultaneously hold multiple and apparently contradictory perspectives in order to transcend the dominant, Western worldview of justice which often serves more to divide and separate than to unite and reconcile."<sup>95</sup> By

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<sup>93</sup> Zehr, 58-59.

<sup>94</sup> Lambourne, 35.

<sup>95</sup> *Ibid.*

reconceptualizing theories as mutually reinforcing, a much more coherent and realistic understanding of transitional justice can be achieved.

One example of the mutually reinforcing nature of the theories is that “equity in resources and power cannot be meaningfully instituted unless the normative and institutional framework of rule of law regime is put in place to safeguard equitable distributions.”<sup>96</sup> Thus, this illustrates an example where reparative justice and retributive justice must work together. Further to this point, it becomes obvious that “the interdependence and mutual reinforcement between the three dimensions of justice make it desirable and even necessary to address all three simultaneously in the aftermath of conflict.”<sup>97</sup> This approach, however, also demands that scholars and practitioners critically examine the theories and tools and acknowledge the limitations within them, as well as the unique strengths of other approaches. In the case of trials, it is only when “we acknowledge that prosecutions are slow, partial, and narrow, can we recognize the value of independent commissions, investigating the larger patterns of atrocity and complex lines of responsibility and complicity.”<sup>98</sup> Acknowledging the strengths and limitations of each approach as well as seeing them as mutually reinforcing, lends itself to a more holistic approach to and response from transitional justice.

Part of the problem within the current conceptualization of theories and mechanisms is the mandates attached to them in practice. Mandates given to transitional justice responses can create challenges if not appropriately analyzed and appreciated. Although “expansive claims may be tempting in order to convince international and national audiences to fund and support [TJ

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<sup>96</sup> Mani, 10.

<sup>97</sup> Mani, 11.

<sup>98</sup> Minow, *Between Vengeance and Forgiveness*, 9.

efforts]... exaggerated assertions are bound to yield critical and even hostile disappointment.”<sup>99</sup>

Furthermore, the current “overselling of the capacity of major legal institutions to deliver forgiveness, reconciliation or other features associated with post-conflict nation-building may well encourage unrealistic public expectations and ultimately an unfair assessment that such institutions have ‘failed’.”<sup>100</sup> Although these two quotes pertain to legal responses in particular, it can be extended to other mechanisms as well. Any transitional justice theory or mechanism that is given too broad a mandate will be vulnerable to these challenges. If a broad mandate is sought, a holistic and multifaceted or multi-theory approach should be taken. If only one transitional justice mechanism or theory will be used, then the mandate needs to be scaled back, realizable, and attuned to the strengths of the theory. In a practical setting this can be seen in truth commissions: “truth commissions that are employed alone, with no other transitional justice initiatives, have a negative impact on democracy... but truth commissions contribute positively when combined with trials and amnesty.”<sup>101</sup> Overall, several prominent scholars are increasingly critical of a one-size fits all approach and recognize that it matters in what order and combination of mechanisms or theories are used. This recognition is one of most important next-steps within the study and practice of TJ.

## *II. Hybrid Models*

Earlier in this paper, it was noted that Kerr believes that “Reconciliation will very rarely be brought about by any type of transition justice mechanism on its own, and will not appear in

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<sup>99</sup> Minow, *Between Vengeance and Forgiveness*, 49.

<sup>100</sup> Kieran McEvoy, “Letting go of legalism: Developing a ‘thicker’ version of transitional justice,” in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Eds. McEvoy, Kieran and Lorna McGregor, (Portland, OR.: Hart Publishing, 2008), 30.

<sup>101</sup> Hayner, 26.

the immediate aftermath of a transitional justice process.”<sup>102</sup> In light of the complementarity of the theories of justice and their unique features, it is appropriate to consider the option of hybrid models of justice. Hybrid models can refer to several different processes and mechanisms. One of the most common conceptions in TJ literature is the blend of international and national actors in the justice process or mechanism such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Sierra Leone process. This type of hybridity is not the focus of this paper. Rather, this paper addresses models or mechanisms that combine the different theories of justice rather than different levels of actors.

Hybrid models that combine theories of justice can manifest in two ways: ‘menu-style justice’ and hybrid mechanisms. A ‘menu-style justice’ model is a term used by Weinstein et. al when they describe TJ as “a menu of options for mechanisms - driven by the principles of accountability - from which countries may pick and choose to craft a considered response to a period of widespread violence or repression.”<sup>103</sup> This hybrid model of justice involves incorporating different mechanisms and theories of justice by offering several different mechanisms either consecutively or concurrently. This allows victims or the post-conflict population a relative choice to gravitate towards the type of justice that meets their needs.

One of the most prominent and reasonably successful examples of a menu style TJ model is the response to the Holocaust and WWII. Although initially fairly retributive with the Nuremberg and Tokyo Trials, the response also extended to using restorative and reparative mechanisms. In addition to the trials there were restitution schemes for property seized under Aryanization, as well as compensation programs for harm done to life, persons, freedom, and career or educational advancement. The German word *Wiedergutmachung*, meaning to make

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<sup>102</sup> Kerr and Mobekk, 122.

<sup>103</sup> Weinstein et. al, 36.

whole or good again, is embodied in the various reparation payments to survivors and the state of Israel as well as various other reparation mechanisms that were created over time. There has also been several symbolic reparations made in regards to memory and memorialization. Many books, movies, and memorials have been created around the world as well as an open public discussion and academic study of the Holocaust. Despite the potential advantages of a hybrid approach, Weinstein et. al question “whether we remain too fixed in our perspective, and whether we have limited our range of option, prematurely being closed to other interventions that might be dramatically different.”<sup>104</sup> Altogether, the TJ response to the Holocaust is one of the most holistic and successful hybrid models to date.

Hybrid models can be extensive but also lengthy and costly. Yet ‘menu-style justice’ is not the only form of hybrid justice where different theories of justice are combined. Mechanisms can also be hybridized when two or more theories of justice operate in one mechanism. The *gacaca* courts in Rwanda are one such example of a hybrid mechanism as it mediates between retribution and reconciliation. Some mechanisms can be adapted from their original purpose and structure to incorporate values or goals from different theories. Larry May has suggested that there is potential to adapt trials to be more restorative. He suggests that in order to promote reconciliatory aspects of trials, trials should be separated into two parts: one that focuses the individual’s role within the conflict and the second focusing on the conflict in general.<sup>105</sup> The most prominent example of this kind of trial is that of Adolf Eichmann in 1961.

The Eichmann Trial did not follow a traditional narrow retributive framework as it expanded its focus to victims and the historical narrative:

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<sup>104</sup> Weinstein et. al, 36.

<sup>105</sup> May, 250.

Whereas the trials at Nuremberg were built on material evidence and a dispassionate case for the guilt of Nazi officers, the Eichmann trial had a much larger role for victim testimony as part of its goal of teaching about the Holocaust... The emphasis on victim testimony during the Eichmann trial laid the foundation for new approaches to considering justice in the period after war and has made an impact far beyond the scope of the Holocaust.<sup>106</sup>

In *Eichmann in Jerusalem*, Arendt recalls that the Eichmann Trial lasted for one hundred and twenty one court sessions and of those sessions Eichmann was on the stand for thirty-three and a half sessions and the victims were on the stand for twice as many sessions.<sup>107</sup> The Eichmann Trial's specific focus on the Holocaust and use of victim testimony despite its irrelevance to Eichmann's case changed "the relationship between the experiences of victims, their impact on society, and the demands of justice in the aftermath of war and mass atrocity."<sup>108</sup> Even if a survivor did not get to testify, the Eichmann Trial brought the Holocaust and survivor stories back into the public realm of discussion, acknowledgement and academic study, and thus provided the survivors with much needed resolution and recognition. As such, this approach to justice differs significantly from the traditional narrow trial structures. The difficulty with this adaptation, however, is its applicability to other post-conflict societies and if it is merely a symbolic trial or if all trials should adapt to this model. The discussion on the *gacaca* courts in Rwanda in Part II of this paper will further explore the strengths and weaknesses of hybrid mechanisms.

Martha Minow argues that "survivors differ remarkably in their desires for revenge, for granting forgiveness, for remembering, and moving on."<sup>109</sup> It is therefore very important that

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<sup>106</sup> Sonali Chakravarti, "More than 'Cheap Sentimentality': Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions," *Constellations* 15.2 (June 2008), 231.

<sup>107</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York: Penguin Books, 2006), 223.

<sup>108</sup> Chakravarti, 223.

<sup>109</sup> Minow, *Between Vengeance and Forgiveness*, 135.

victims' needs are understood in a broad sense throughout TJ endeavours. Survivors require different things from the justice process and in order to restore a victim's dignity, TJ efforts should respect the victim's personal responses. In addition, efforts should respect their needs while providing different avenues to pursue their notion of justice between vengeance and forgiveness.<sup>110</sup> Hybrid models and mechanisms may be the most promising avenue to achieving these goals as well as balancing the concerns of various stakeholders: victims, perpetrators, and society.

### Conclusion of Part I

The theories of justice, retributive, restorative, and reparative justice, are the fundamental guiding principles of transitional justice. They are the foundation upon which scholars and practitioners shape their responses to crimes against humanity, genocide, war crimes, and mass violence. There needs to be a reconceptualization of theory that views the theories of justice not in opposition to each other but instead as mutually reinforcing, complementary, and something to be pursued concurrently in order to achieve the broad mandate of sustainable peace, accountability, and reconciliation. It is essential to break away from dualistic conceptions and offer a variety of mechanisms and forms of justice to maximize each of their unique strengths and hopefully overcome each other's shortcomings. A hybrid theory model of justice may be the most promising approach in the process of transitional justice. The following section will examine the case of the Rwandan genocide as it's response has been nothing short of innovative. By utilizing several mechanisms, it is somewhat of a menu-style approach to justice, albeit

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<sup>110</sup> Minow, *Between Vengeance and Forgiveness*, 135.

predominantly retributive. Yet, it also employs the aforementioned hybrid mechanism - the *gacaca* courts.

## **Part II - Violence begets Violence: Rwanda's Response to Genocide**

*"Hate for hate only intensifies the existence of hate and evil in the universe. If I hit you and you hit me and I hit you back and you hit me back and go on, you see, that goes on ad infinitum... It just never ends. Somewhere somebody must have a little sense... [and] cut off the chain of hate, the chain of evil."*<sup>111</sup>  
*- Martin Luther King Jr.*

*"The problem of justice... is not a simple problem of texts and courts. It concerns finding an intermediary way between classical justice, the reconstitution of the social fabric, and the prevention of another tragedy, another genocide."*<sup>112</sup>

In 1994, the Tutsi population of Rwanda was systematically murdered in a genocide perpetrated by the Hutu political elite. The death toll of this event ranges anywhere from 500,000 to 1 million people. As the world commemorates the twentieth anniversary of the genocide this year, it is also timely to reflect on and assess the transitional justice (TJ) process in Rwanda. In the wake of absolute destruction and unprecedented participation of ordinary people in the genocide, Rwanda's response is nothing short of innovative, but controversial. Although the approach is primarily retributive by employing the International Criminal Tribunal for Rwanda (ICTR) and the national courts, the reinvention of the local *gacaca* courts is perhaps one of the most compelling contributions and experiments in contemporary TJ as it combines retributive and restorative justice while fostering local participation. Although it has strengths and weaknesses, the Rwandan TJ process exhibits many features of a hybrid model of justice. The

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<sup>111</sup> Martha Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, (Princeton, NJ: Princeton University Press, 2002), 17.

<sup>112</sup> Urusaro Alice Karekezi, Alphonse Nshimiyimana, and Beth Mutamba, "Localizing justice: *gacaca* courts in post-genocide Rwanda," in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, eds. Stover, Eric and Harvey M. Weinstein, (Cambridge: Cambridge University Press, 2004), 71.

following section will briefly review the merits and flaws of the various retributive, restorative, and reparative mechanisms employed in the Rwandan genocide: the ICTR, national genocide trials, *gacaca*, and reparative mechanisms (memory, reparations, and education). From this analysis, it will become evident that despite significant retributive achievements, the Rwandan process needs to emphasize more restorative and reparative mechanisms moving forward as well as acknowledging a more inclusive conception of the victim group.

### Existing Conditions and Context for Post-Genocide Justice in Rwanda

Before evaluating the various Rwandan TJ initiatives, it is essential to acknowledge and appreciate the conditions in which the mechanisms operate and were created. It is too easy, and erroneous, for scholars to dismiss certain contributions and strengths of the Rwandan mechanisms based on the imperfect results isolated from context. Rather, it is more appropriate to temper judgement in relation to the conditions and challenges that faced and continue to face post-genocide Rwanda.

Firstly, the genocide itself is distinct from other instances of mass violence in many ways: the astounding “number and concentration of deaths, the intensity of killing, the extensive use of rape as a form of ethnic violence, and the massive involvement of the Rwandan population.”<sup>113</sup> It would be a mistake, however, to assume that all Hutus participated directly in genocide. The large number of perpetrators, approximately 650,000 people, is about one-tenth of Rwanda’s Hutu population, which by inference, means that nine-tenths of the Hutu population did not directly participate in the killing.<sup>114</sup> This number, however, does not include bystanders,

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<sup>113</sup> Erin Daly, "Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda" *New York University Journal of International Law and Politics* 34, no. 2 (2002): 355.

<sup>114</sup> Daly, 364.

collaborators, or non-violent property crimes. It is estimated that nearly two million people of various ages, sex, and status, were somehow involved in the massacre, making the task of accountability “dantesque and practically impossible.”<sup>115</sup> Nonetheless, the new government in Rwanda, lead by the Rwanda Patriotic Front (RPF or PFR), seized the opportunity to attempt to end centuries of cycles of violence through accountability-seeking mechanisms.

Already an impoverished and struggling country before the genocide, in the wake of wanton destruction and violence, the country was left in shambles. Economically, the World Bank regarded Rwanda to be the poorest nation on earth plagued with no running water, no electricity, a devastated agricultural sector, high inflation, no governmental structures, no financial and judicial infrastructure, no police services, and almost every building was damaged.<sup>116</sup> Of particular concern to any TJ program, especially retributive mechanisms, was the state of the Rwandan judiciary. The 1994 genocide decimated the legal profession. Only forty magistrates, a handful of judges, and fifty practising lawyers remained, many of whom did not previously practice criminal law.<sup>117</sup> Furthermore, the mass violence destroyed the already fragile inter-group relations and left the country with a deep sense of mistrust on both sides. This mistrust is further complicated by the significant human rights violations committed by the RPF army (RPA) itself, which is currently unacknowledged and will be discussed further in this paper.

As Helen Hintjens notes, it would be a mistake to portray the genocide as the outcome of deeply entrenched ethnic or tribal hatred: “In Rwanda only some forms of hatred were

<sup>115</sup> Révérien Rurangwa, *Genocide: My Stolen Rwanda*, (London: Reportage Press, 2009), 14.

<sup>116</sup> Daly, 366.

<sup>117</sup> Payam Akhavan, "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda," *Duke Journal of Comparative & International Law* 7, no. 2 (1997): 339.

Daly, 368.

deliberately nurtured; inter-Hutu rivalries were actively suppressed. Hatred was only legitimate when directed towards a specific target, identified by the state.”<sup>118</sup> Since the creation and artificial distinction of the two ethnicities during colonization, there has been a constant struggle for control, resulting in the marginalization and victimization of both Hutus and Tutsis. Hintjens also notes that although there had been considerable violence previously, the Rwandan ‘Revolution’ (1959-1962) was one of the first instances where Tutsis were killed.<sup>119</sup> As such, Rwanda seems to be an instance of great significance and relevance to the term employed by Martha Minow, ‘cycles of hatred’. Minow writes, “Cycles of violence sometimes then make perpetrators and their supporters victims of new waves of vengeful responses. How those survive understand and remember what happened can have real consequences for the chances of renewed violence.”<sup>120</sup> Instead of cycles of hatred however, it is more appropriate to see Rwanda’s experience as cycles of injustices or cycles of victimization. As such, it is indispensable that Rwanda’s pursuit of TJ addresses the underlying causes of genocide and balance the concerns of all the victims, both Tutsi genocide victims and survivors and Hutu victims of RPF violence.

### The International Criminal Tribunal for Rwanda (ICTR)

The Rwandan TJ process is predominantly retributive. This was a conscious choice by policy makers as criminal prosecutions were favoured by the victims; were thought to be more appropriate to handle the horrific nature of the crimes; would generate the necessary accountability needed before reconciliation; and would be more effective in ending the deeply

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<sup>118</sup> Helen M. Hintjens, "When Identity Becomes a Knife: Reflecting on the Genocide in Rwanda," *Ethnicities* 1, no. 1 (2001): 26.

<sup>119</sup> Hintjens, 32.

<sup>120</sup> Minow, *Breaking the Cycles of Hatred*, 115.

entrenched culture of impunity.<sup>121</sup> The Rwandan view of justice has steadfastly insisted that retributive justice was a precondition for reconciliation.<sup>122</sup> To cope with the incredible number of accused, the Rwandan retributive system streamed the accused into four categories of perpetrators, resembling a ‘big fish’ and ‘small fry’ approach. The categories as established by the 1996 Organic Law are:

Category 1 (planners, organizers, those in positions of authority, notorious murderers [with zeal or excessive malice], and sexual torturers); Category 2 (perpetrators of intentional homicide or serious bodily assault causing death); Category 3 (perpetrators of other serious assaults); and Category 4 (perpetrators of property offenses).<sup>123</sup>

It should be noted that later in the justice-seeking process, category 3 and category 4 were collapsed into a single category. Subsequently, this paper will refer to the three categories to reflect the current legislation. The following section will review the mandate and scope of the ICTR as well as its corresponding merits and demerits.

In response to the Rwandan genocide, the UN Security Council established the ICTR in November 1994 in order to prosecute the most serious offenders and organizers of the genocide.<sup>124</sup> According to Payam Akhavan, the success or failure of the ICTR is dependent on its ability to address the root causes of the conflict, particularly the incitement to ethnic hatred and violence and the impunity that is a recurrent cause of the massacres.<sup>125</sup> As mentioned earlier, the Rwandan retributive mechanisms have streamed offenders into four categories, of which the

<sup>121</sup> Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity*, (Abingdon, UK: Routledge, 2013), 64.

<sup>122</sup> Daly, 374-375.

<sup>123</sup> Mark A. Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge: Cambridge University Press, 2007), 73.

<sup>124</sup> Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, (Cambridge: Cambridge University Press, 2010), 20.

<sup>125</sup> Payam Akhavan, “Justice and Reconciliation,” 333-334.

ICTR seeks to try category one offenders with specific emphasis on those in positions of leadership and authority. The ICTR by no means can or is intended to replace the national genocide trials. Rather Akhavan notes that “far from being mutually exclusive, concurrent trials before the ICTR and national courts are mutually reinforcing... we should get in the habit of thinking about the ICTR and the Rwandan process as complementary rather than competing. [Both] have the same objectives and the same goals.”<sup>126</sup> This highlights the very limited scope and mandate that the ICTR seeks to fulfill.

Although it is easy to point out the flaws of ad hoc tribunals, it is important to recognize that they can make significant positive contributions to both international law and the post-conflict country(s). The ICTR has contributed many benefits to the TJ process in Rwanda that can be categorized under overall fairness and prevention of future violence and stability. To be clear, the ICTR alone cannot expect to be a sufficient mechanism to produce reconciliation and accountability: “to expect that the ICTR would have brought immediate relief and reconciliation to the survivors of the massacres in Rwanda misapprehends the social devastation left in their wake.”<sup>127</sup> Nonetheless, the contributions that the ICTR makes to the TJ process are necessary and significant in and of themselves.

The ICTR helps contribute to overall fairness and impartiality in several ways. Although often criticized for its slow progress and operational difficulties, the ICTR has demonstrated the ability to hold fair trials that respect the rights of the accused.<sup>128</sup> This is particularly important because the impartiality of trials is fundamental to ending cycles of violence. As noted in Part I of this paper, Gary Bass underscores the fundamental role of fairness postwar trials: “The

<sup>126</sup> Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no. 1 (2001): 26.

<sup>127</sup> Akhavan, “Beyond Impunity,” 9-10.

<sup>128</sup> Akhavan, “Beyond Impunity,” 8.

treatment of humbled or defeated enemy leaders and war criminals can make the difference between war and peace. If the job is done well... it may lay the foundation for a durable peacetime order; if botched... it may spark a new outbreak of war.<sup>129</sup> Ensuring fair trials that respect the rights of the defendants in the ICTR aids in this endeavour.

After a genocide with mass participation, such as the Rwandan genocide or the Holocaust, it can be tempting to collectivize guilt on all members of the perpetrator group. Trials are important in this respect because they individualize responsibility and reduce the likelihood of undifferentiated mass vengeance.<sup>130</sup> Furthermore, the global reach and support for an international tribunal increases the ability to arrest suspects who flee worldwide, which has proved to be true in the case of the ICTR.<sup>131</sup> By prosecuting those most responsible for the planning and orchestrating of genocide and crimes against humanity, it sends a communicative message to the post-war population, future political parties within Rwanda, and around the world that there are consequences for these actions as they are both crimes against the people of Rwanda and humanity. The international dimension to the trial also can temper the accusations of victor's justice and provide legitimacy to the proceedings. Although the ICTR is sometimes accused of focusing solely on Hutu perpetrators whilst ignoring the Tutsi reprisal killings, the procedural fairness of the trials and scope of the trials aims at ensuring fair treatment of the accused.<sup>132</sup>

Another benefit received from the ICTR is that it aids in the prevention of future violence from both sides as well as bolstering stability and negative peace. One of the most important

<sup>129</sup> Bass, 6.

<sup>130</sup> Daly, 375

<sup>131</sup> Megan M. Westberg, "Rwanda's use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR." *University of Kansas Law Review* 59, no. 2 (2011): 258.

<sup>132</sup> Jones, *Genocide: A Comprehensive Introduction*, (New York: Routledge/Taylor & Francis, 2006), 536.

contributions of the ICTR is the incapacitation of extremist Hutu leadership. The international scope and reach of arrests has helped undermine the capacity of the extremists to renew their efforts, thus making accountability an essential and continuous factor.<sup>133</sup> Akhavan notes that overall, the ICTR has significantly contributed to peace building in post-war Rwanda because it has marginalized “nationalist political leaders and other forces allied to ethnic war and genocide, [discouraged] vengeance by victim groups, and [transformed] criminal justice into an important element of the contemporary international agenda.”<sup>134</sup> These benefits are absolutely critical, and often overlooked, for the maintenance of stability and peace in post-conflict Rwanda. As mentioned in Part I of this paper, negative peace is a necessary precondition for positive peace. Although Rwanda may have not reached a state of positive peace, nurturing and maintaining a negative peace must be present before there can be a normative and psychological change among the groups.

In general, the ICTR tends to be criticized on the basis that it is bureaucratic, costly, slow, and inaccessible and detached from ordinary Rwandans. One of the most prominent flaws regarding the TJ plan for Rwanda was the divide between the international conception of justice and the Rwandan conception of justice. This is most apparent in the separation of the ICTR and the Rwandan national courts. While the ICTR focused on the biggest perpetrators, it left “the lower-level perpetrators to the Rwandan national courts.”<sup>135</sup> At a theoretical level, this is an effective strategy to cope with the massive number of perpetrators. However, there was a distinct discontinuity in conceptions of justice between the two courts. The national courts imposed the death penalty and the ICTR proceedings did not, “leading to the paradox that *génocidaires* could

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<sup>133</sup> Akhavan, “Beyond Impunity,” 9.

<sup>134</sup> *Ibid.*

<sup>135</sup> Clark, 20.

escape execution at the ICTR, while their underlings could be (and were) sentenced to death.”<sup>136</sup>

Although the death penalty is no longer employed, it still sends a confusing message that can undermine the deterrent, proportional punishment, and fairness aspects of retributive justice.

From a local and community standpoint, the ICTR has not been considered in a positive manner by ordinary Rwandans:

Most of them believe that the form of justice that the tribunal represents has nothing to do with them and is simply incapable of helping them to solve their problems. Often the ICTR is just associated with scandals... In fact, it actually appears that more Rwandans are largely unaware of the ICTR’s work.<sup>137</sup>

Part of this may lie in the fact that the ICTR is located in Tanzania, thus inaccessible to many Rwandans. Due to the lack of community participation in the justice process, the international institutions “tend to remain institutions of, and seemingly for the international community, with the development of international criminal law as their chief aim.”<sup>138</sup> Again, the lack of community ownership and distance from the post-conflict population limits the effectiveness and reach of the ICTR’s contributions. In order to compensate for this, the ICTR needed to improve its community outreach and publicity of the trials: “In a country with an impoverished, largely rural and illiterate population, justice rendered by the International Tribunal in Arusha can have no reality or appreciable effect without a systematic effort aimed at the widespread dissemination of knowledge about the trials.”<sup>139</sup> Granted, both the ICTR and International Criminal Tribunal for the Former Yugoslavia (ICTY) were newer and unprecedented mechanisms at the time and as such, a learning process. Although the public outreach has

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<sup>136</sup> Jones, 536.

<sup>137</sup> Paul Christoph Bornkamm, *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, (Oxford: Oxford University Press, 2012), 30.

<sup>138</sup> Patricia Lundy and Mark McGovern, “The Role of Community in Participatory Transitional Justice” in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Portland, OR: Hart Publishing, 2008), 107.

<sup>139</sup> Akhavan, “Justice and Reconciliation,” 342.

improved, the Rwandan government and the international community should keep this lesson in mind moving forward with other TJ initiatives.

Although it has been twenty years since the genocide, the ICTR and its impact are still taking shape. It is clear that it is a long-term project and will need to be evaluated with contextual realities in mind. It is unreasonable to expect a single international ad hoc tribunal to achieve widespread effective prevention and deterrence in a post-war population scarred by rampant impunity, rape, looting, and murder. International criminal prosecutions “may strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.”<sup>140</sup> Overall, the ICTR has relatively successfully achieved its mandate of fairly prosecuting the main orchestrators and those most responsible for the Rwandan genocide. Despite some faults, it has helped contribute to the overall stability and negative peace in the region by preventing a resurgence or renewal of the conflict.

### Rwandan National Genocide Trials

The decision to hold criminal prosecutions as well as hold all perpetrators accountable ushered in a 1996 Organic Law to specifically address the crimes committed during the genocide. This law created the Special Chambers within the existing court system to handle genocide cases, the four categories of crimes and corresponding penalties, the confession and guilty plea procedure, and provisions for claiming damages.<sup>141</sup> The benefits of the Rwandan genocide courts overlap many of the benefits of the ICTR, such as individualizing responsibility,

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<sup>140</sup> Akhavan, “Beyond Impunity,” 31.

<sup>141</sup> Prevent Genocide International, “Organic Law no. 08/96 of August 30, 1996,” <http://www.preventgenocide.org/law/domestic/rwanda.htm> (accessed 06/16, 2014).

removing serious offenders from society, and generating accountability and punishment proportionate to responsibility and actions. As such, the following section will outline the criticisms of the national courts first, then provide some positive aspects distinctive of the national trials.

Overall, the national trials have been far from ideal. The Rwandan genocide trials are criticized for being slow and cumbersome, overwhelmed by the number of perpetrators and lack of judicial infrastructure, and unable to provide a sense of accountability, fairness, and justice for both Tutsis and Hutus. Gerald Gahima is one of the most insightful resources for any study of TJ in Rwanda as he is currently a judge with the War Crimes Chamber of the Court of Bosnia-Herzegovina, served as vice president for the Supreme Court of Rwanda in Kigali and was previously the prosecutor general in Kigali (1993-2003).<sup>142</sup> Heavily involved in the TJ process in Rwanda, he attributes the slow pace of the trials to “cumbersome and time-consuming legal procedures, inadequate personnel, lack of adequate skills, lack of basic resources” which lead to ineffectively dealing with the caseload and low levels of public confidence.<sup>143</sup>

Despite the charges that the Rwandan courts lacked funding, by March 1998 the courts received more than \$17 million USD for administration of justice and another \$13 million in grants, yet the Rwandan justice system still struggled as it also lacked a favourable political and social climate needed to function impartially and effectively.<sup>144</sup> The ‘Confession and Guilty Plea Procedure’ allows for offenders in categories two and three to receive a reduced sentence in

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<sup>142</sup> Beloit College, "Gerald Gahima," <http://www.beloit.edu/weissberg/chair/goldstone/accountability/gahima/> (accessed 06/16, 2014).

<sup>143</sup> Gahima, “Transitional Justice in Rwanda,” 67.

<sup>144</sup> Akhavan, “Beyond Impunity,” 25.

exchange for a full confession.<sup>145</sup> Although the Rwandan genocide trials move at a faster pace than the ICTR, especially in light of the ‘Confession and Guilty Plea Procedure’, it still remains relatively slow and subject to deep criticisms.<sup>146</sup>

To further the obstacles to justice and accountability, the sheer number of perpetrators accused and in custody completely overwhelmed the already fragile justice system. Not only was the justice system overwhelmed but the prisons also became dangerously overcrowded with rapidly deteriorating conditions. The resulting efforts to unblock the prisons, namely releasing many inmates, lead to the perception of compromised accountability and injustice; as one genocide survivor notes: “the courts churn out hearings, hand down a few months community service, and that’s it. The blood of innocents is whitewashed. The dust of bodies is swept under the wide carpet of history with the brush of phoney justice.”<sup>147</sup> While the ICTR handled the most serious offenders and the courts worked their way down from there, the justice system was overwhelmed by the thousands of “ordinary executioners.”<sup>148</sup> As such, it became quite apparent early on that the prosecution of genocide through the domestic criminal justice system was impossible prompting the government to look for ways to combat the overwhelming number of perpetrators.

The Rwandan genocide trials are often criticized by both Hutus and Tutsis for different reasons. As noted in the quote from the survivor above, some Tutsi survivors do not feel that justice nor accountability is being achieved. On the other side of the spectrum, the deliberate silence and lack of acknowledgement of Hutu victims of RPF violence in public and the justice

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<sup>145</sup> William A. Schabas, "Genocide Trials and Gacaca Courts." *Journal of International Criminal Justice* 3, no. 4 (2005): 885.

<sup>146</sup> Daly, 368.

<sup>147</sup> Rurangwa, 71.

<sup>148</sup> *Ibid.*

system creates a sense of one-sided, victor's justice. This is one of the more dangerous aspects of the Rwandan TJ process as it has the potential to continue to fuel the cycles of victimization and experiences of injustice. Overall, the entire justice process is challenged by "the instability and the debilitating struggle for daily survival [which removes] the consideration of prosecutions and reconciliation from people's immediate concern."<sup>149</sup> Yet it is this contextual consideration that should temper criticisms and lend itself to appreciating the significant accomplishments and achievements that the genocide trials have produced.

In the context of all transitional justice trials and the state of Rwandan society and judicial system, the Rwandan genocide trials have achieved some significant feats. As William Schabas notes:

Considering the impoverishment of Rwanda's justice system prior to the genocide, and the resource problems that continue to confront development in that country, 10,000 trials is an impressive figure by any standard. It is better than the record of many European countries following the Second World War. Arguably, Rwanda has done more in this respect, in the 10 years following the end of the conflict, than did the national courts of Germany, Italy, and Austria from 1945-1955.<sup>150</sup>

In addition, the courts have benefitted both Rwanda and TJ as a whole. For one, the Rwandan genocide courts have created a wealth of case law and jurisprudence as well as aided in gathering information regarding the dynamics of genocide itself.<sup>151</sup> This is particularly true in the instance of the success of the 'Confession and Guilty Plea Procedure' which, in combination with extensive amounts of trials, has helped produce a considerable and detailed account of the genocide.<sup>152</sup>

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<sup>149</sup> Akhavan, "Beyond Impunity," 23.

<sup>150</sup> Schabas, 888.

<sup>151</sup> Schabas, 889.

<sup>152</sup> *Ibid.*

This experience, although not without its faults, is absolutely critical to creating a solid foundation for the Rwandan judiciary. It should be noted that although “the conditions in Rwanda do not entirely favour national trials,” the trials should not be abandoned because in the long-run these trials help give the judiciary necessary experience for future sustainability.<sup>153</sup> Furthermore, due to the limited scope of the ICTR, without the Rwandan genocide trials, the aftermath of the genocide could have been disastrous. Both trials were necessary mechanisms to help tackle the obstacle of overwhelming numbers of perpetrators. For even though the ICTR handled the most serious offenders, “countless victims have to live next to neighbours who participated in the killings. Channelling the desire for vengeance into legal process, even with the imprisonment of thousands, bought time until circumstances improved and mitigated the severity of retaliatory abuses.”<sup>154</sup> Yet even with both of these trials and the process of streaming offenders based on varying levels of responsibilities and harm, the TJ process in Rwanda still struggled, thus leading to the adaptation of the traditional Rwandan *gacaca* courts.

#### Between Retributive and Restorative Justice: Rwanda’s *Gacaca* Courts

Even between the Rwandan national courts and the ICTR, there were so many individuals accused of crimes that the two judicial bodies could not try them all in less than two hundred years time.<sup>155</sup> As such, in 1999, the Rwandan government began to adapt the traditional *gacaca* courts to handle more minor crimes from the genocide caseload. Continuing with the streaming of offenders in the national courts and ICTR, the formal court system still handles category one

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<sup>153</sup> Akhavan, “Beyond Impunity,” 26.

<sup>154</sup> Akhavan, “Beyond Impunity,” 24-25.

<sup>155</sup> Trudy Govier, *Taking Wrongs Seriously: Acknowledgement, Reconciliation, and the Politics of Sustainable Peace* (Amherst, NY: Humanity Books, 2006), 275.

offenders and the *gacaca* deal with categories two and three.<sup>156</sup> Officially established in 2001, approximately 12,000 courts operated all over Rwanda in order to alleviate the shortcomings of the ICTR and national courts mentioned above.<sup>157</sup> The government hoped that this would achieve several goals:

reveal the truth about what happened in 1994, expedite the resolution of the caseload, help promote the eradication of impunity, promote the unity and reconciliation of Rwandans and prove that Rwandan society had the capacity to settle its own problems through a justice based on Rwandan custom.<sup>158</sup>

The word ‘*gacaca*’ in the national language of Rwanda, kinyarwanda, means on the grass; it refers to the traditional practice of dispute resolution where local leaders or elders would sit on the grass and discuss property, inheritance, family, and occasional minor criminal disputes.<sup>159</sup>

The post-genocide *gacaca* courts differ rather significantly from their original form as they have been envisioned and adapted to the conditions and crimes created by the genocide.

The commencement of the genocide *gacaca* courts began with popular elections for the judges that would serve each regional court. Once the courts were organized a general community assembly was called to recall how the massacres happened and compile a list of accused. Subsequently, judges would meet in private to stream the offenders by the categories of offences outlined in Rwandan law and hold trials at the corresponding level of court or cell.<sup>160</sup> In terms of the general procedure of a *gacaca* court, on a fixed date the *gacaca* councillor in the region calls together the concerned parties: victims or witnesses, accused, and members of the

<sup>156</sup> Rosemary Nagy, “Traditional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda’s Gacaca Courts,” in *Reconciliation(s): Transitional Justice in Postconflict Societies*, ed. Joanna Quinn, (Montreal: McGill-Queen’s University Press, 2009), 93.

<sup>157</sup> Nagy, 87.

<sup>158</sup> Gerald Gahima, "Accountability for Atrocity: Lessons from Rwanda," *Georgetown Journal of International Affairs* 8, no. 2 (2007): 161-162.

<sup>159</sup> Schabas, 891.

<sup>160</sup> Karekazi, 72.

court. The concerned parties are given a chance to air their concerns and debate before a solution is proposed.<sup>161</sup> If the proposed solution is not agreeable, then the parties may take it to the next higher cell or court, much like a judicial appeal system. Compared to their traditional use, the genocide *gacaca* trials are more formal, no longer voluntary, more punitive, and the victim is not always present.<sup>162</sup> Yet at the same time, the trials are still local, participatory, and emphasize reconciliation. In spite of being more punitive than traditional *gacaca*, the genocide *gacaca* possesses the ability to commute sentences to community service or reparations.<sup>163</sup>

Of particular importance for this paper, is the unique way in which the *gacaca* blends together retributive and restorative justice as well as local participation and ownership. Unlike formalized Western models of justice that tend to allow only one form of justice, traditional institutions tend to combine various forms of justice while supporting community values.<sup>164</sup> Adapting a traditional mechanism to help confront crimes against humanity and genocide is both unique and controversial. Given the hybridity of justice and the unprecedented scope of the traditional mechanism, the *gacaca* is a significant experiment within TJ. As such, the following section will briefly present some of the merits and demerits of the *gacaca* system.

In general, the benefits of the *gacaca* courts is that they are faster and more cost-effective than the other trials, as well as being local, communal, and participatory. The use of over 12,000 courts throughout the country ensures a far-reaching impact and systematic confrontation of genocide, especially compared to the reach of the national and international trials. Despite many caveats, even the critics of the *gacaca* courts agree that they are able to handle and dispose of

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<sup>161</sup> Karekazi, 73.

<sup>162</sup> Karekezi, 74.

<sup>163</sup> *Ibid.*

<sup>164</sup> Lambourne, 21.

cases faster than the national genocide trials.<sup>165</sup> Part of this speed is attributable to the guilty plea and confession program as this allows the *gacaca* courts to reduce the amount of suspects in custody in a cost-effective manner, thus improving some of the pre-trial detention conditions.<sup>166</sup> Although the focus on individuals makes it difficult to determine the cause and responsibility of the genocide, the substantial amount of trials at the *gacaca* level of low-ranking perpetrators helps create a much deeper understanding of the conflict and genocide in general.<sup>167</sup>

In contrast to the perception that the ICTR was an institution by and for the international community, the *gacaca* courts enjoy a relatively positive perception: “Many in the Hutu community felt that the Tutsi dominated the formal justice system... Many more Hutu participated in the debate on the establishment of the Gacaca than had taken part in the earlier consultations.”<sup>168</sup> This perception is beneficial because if a TJ process is too victim-oriented, there is a tendency for those in the perpetrator group to feel victimized or re-victimized. It is crucial that justice and accountability seeking processes seek to balance the rights of the victims and offenders in order to break cycles of violence and victimization, especially in Rwanda.

Another beneficial feature of the *gacaca* is the localized nature of justice as well as the integration of restorative and retributive goals. The advantage of a hybrid mechanism, like the *gacaca*, is that it can “promote additional goals not normally associated with criminal trials. Gacaca is inherently a participatory and communal enterprise. Traditionally and as applied to genocide, its aim is to strengthen the communities in which it operates.”<sup>169</sup> This approach fosters local ownership of the justice process as well as a community-building activity.

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<sup>165</sup> Gahima, “Alternatives to Prosecution,” 166.

<sup>166</sup> *Ibid.*

<sup>167</sup> May, 270.

<sup>168</sup> Gahima, *Transitional Justice in Rwanda*, 304.

<sup>169</sup> Daly, 375-376.

Although it is too soon to tell how successful this community-building aspect has been, it is clear that the *gacaca* courts face some contextual challenges that may or may not be beneficial to its cause. After the genocide, although a significant proportion of the Tutsi population was killed, the end of the conflict was marked by the return of hundreds of thousands of returning Tutsi refugees that almost returned Rwanda to pre-genocide Tutsi population numbers.<sup>170</sup> Due to this mass return, many in Rwanda had no connection to the area they were living in or the genocide. This could be beneficial or detrimental as Daly notes:

there may be no such thing as community... It may mean that there is little commonality to draw on as people attempt to work together in the *gacaca* process. On the other hand, it might conduce to a more positive outcome. People may not have the shared experience of a brutal and divisive past, but they do share the hope of a common future.<sup>171</sup>

It is difficult to tell which one of these situations is the case so far in Rwanda, although with the courts coming to a close, more research and information will hopefully come to fruition.

Despite being an innovative response to the 1994 genocide and shortcomings of the criminal justice system, the *gacaca* courts are not without their faults or controversy. In general, the criticisms levied against the *gacaca* courts is that they are overly retributive, possess selectivity and bias, are hindered by a deep sense of mistrust and fear of safety, and have created more suspects rather than less. It is clear that ideally, the *gacaca* process helps mediate between retribution and reconciliation. However, one worry is that the ICTR is detrimentally putting pressure on the *gacaca* to be more retributive and punitive thus moving away from the traditional restorative goals:

It is true that achieving both retribution and reconciliation is a delicate balance, and if pressure is exerted to move the *gacaca* process more in line with standard trials, retribution tends to become more dominant over reconciliation. But this is not to say that

<sup>170</sup> Daly, 379.

<sup>171</sup> Daly, 380-381.

the balance between the two goals cannot be maintained - only that the delicacy of the balance needs to be protected from outside pressure that could disrupt the balance.<sup>172</sup>

Therefore, some of the problems associated with the *gacaca* process do not necessarily stem from the model itself, but rather from the pressures exerted on it. Nonetheless, the *gacaca*'s retributive elements tend to overtake its restorative elements, thus losing the benefits of hybridity and restorative justice to the detriment of Rwanda's TJ process.

Similar to the charges against the ICTR and the national genocide trials, the *gacaca* courts also have a one-sided mandate as the “offenses committed by the police or military forces affiliated with the present government do not fall under their jurisdiction. Such selectivity undermines credibility when the governing party refuses to admit its own misdeeds.”<sup>173</sup> This is particularly concerning in relation to breaking the cycles of violence that have plagued Rwandan history as it ignores the possibility and delegitimizes the victimhood of Hutus. The selection of and lack of training for judges is also a common criticism brought against the *gacaca* process. Yet, this was done not only for pragmatic necessity but a deliberate attempt to embody the underlying principles of social justice characteristic of the traditional *gacaca*.<sup>174</sup> Nonetheless, the lack of acknowledgement of RPF crimes undermines the fairness of the justice process and compromises the likelihood of lasting peace.

Despite being romanticized as the traditional and local justice way of justice, it is clear that the *gacaca*, like the national trials and ICTR, struggle to cope with the deep sense of mistrust, insecurity, and destruction of social relationships. These feelings dilute the quality and quantity of participation, which in turn diminishes the powerful potential of the *gacaca* courts.

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<sup>172</sup> May, *Genocide: A Normative Account*, 265-266.

<sup>173</sup> Govier, 206.

<sup>174</sup> Daly, 372-373.

This is furthered by the fact that many Rwandans have cited fear of exposing themselves to reprisals for participation in the justice system.<sup>175</sup> This suggests that although there is a relatively successful negative peace in Rwanda, there has yet to be a normative change where “deeper norms and mechanisms in a community to ensure that combatants do not return to conflict.”<sup>176</sup> Although the *gacaca* do not necessarily address the underlying socio-economic issues needed to achieve sustainable peace, they are still much more responsive to the needs of a post-conflict society and far-reaching than traditional retributive models.

Although not explicitly influenced by the Contact Hypothesis, there are many important parallels between the *gacaca*, the hypothesis, and the corresponding Robbers Cave Experiment. The Contact Hypothesis proposes that prejudice can be reduced by increasing contact between antagonistic groups as it can lead to growing recognition of similarities and a reduction in stereotypes.<sup>177</sup> This is very similar to what the *gacaca* courts are doing in the hope that it will bring about reconciliation. Yet what the Robbers Cave Experiment demonstrates is that contact alone is not enough and that there are necessary pre-conditions to reduce intergroup prejudice. The necessary pre-conditions include: groups being roughly equal in status, contact must be informal and permit disconfirmation of stereotypes, common goals, and cooperation and independence.<sup>178</sup> Although not exactly the same scenario, there are still important conclusions from the experiment that can explain some of the weaknesses of the *gacaca* courts. The most noticeable lesson is that many of the pre-conditions listed above are not present in Rwandan society. Furthermore, some of these pre-conditions could be met through reparative justice

<sup>175</sup> Govier, 205.

<sup>176</sup> Clark, 36.

<sup>177</sup> Brent Barry, “Contact Hypothesis,” in *Encyclopedia of Race, Ethnicity, and Society* ed. Richard T. Schaefer, (Sage Publications: Thousand Oaks, 2008), 331.

<sup>178</sup> Justin J. Lehmiller, “Robbers Cave Experiment,” in *Encyclopedia of Social Psychology* eds. Roy F. Baumeister and Kathleen D. Vohs, (Sage Publications: Thousand Oaks, 2007), 762.

measures such as roughly equal status and interdependence in achieving a common goal, or through restorative justice such as informal contact. At the same time, this theory could be beneficial to the study and pursuit of TJ moving forward in Rwanda and elsewhere in the world.

For the most part, the contribution of the *gacaca* process is mixed in that it achieved some of its explicit goals and failed at others. Part of this may be due to an overly ambitious mandate, but part of it also lies in the execution of putting the ideal model into practice and facing very challenging obstacles created by the genocide. In total, despite some substantial shortcomings, the *gacaca* has compelled Rwanda to confront the genocide, seek the truth at a local level, expedite trials, and have had a significant amount of perpetrators admit their wrongdoing and ask for forgiveness and aid in reconciliation.<sup>179</sup> However, as is the case with many transitional justice mechanisms, the potential and ideal are always challenged by the conditions created by the conflict and implementation. The *gacaca* should not be dismissed entirely but rather studied more extensively to capture learning to apply in the future.

### Reparative Justice in Rwanda: Memory, Reparations, and Education

Since 2003, it has become very apparent that there is a significant gap in conceptions and feelings of reconciliation between government discourse, which is positive and optimistic, and the realities of ordinary Rwandans who cited strong feelings of distrust, fear, and lack of choice in forgiveness.<sup>180</sup> The state of reparative justice in Rwanda's post-genocide response is concerning at best. Although there are many aspects and mechanisms that fall under reparative justice, this section will address Rwanda's position three interrelated areas: memory, reparations, and education of the genocide.

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<sup>179</sup> Gahima, "Alternatives to Prosecution," 177.

<sup>180</sup> Govier, 204-205.

The question of how much remembering and how much forgetting is called for after mass violence is always a delicate and sensitive issue. Rwanda's stance on memory is defined by forced social amnesia, repression and silence, and redrawing group boundaries. As one survivor notes: "the politics of the day is all about forgetting... Everyone pretends to be pretending to forget, survivors most of all."<sup>181</sup> Despite substantial rhetoric on forgiveness and reconciliation in Rwanda, it appears that the rhetoric does not correspond to the reality that is more akin to directed forgiveness.<sup>182</sup> As was the case of public discussion of the Holocaust before the Eichmann Trial, it appears that Rwandan society has reached a saturation point where survivors desire free and open space to speak, and new Tutsi immigrants, the international community, and Hutu perpetrators are tired of hearing about the genocide.<sup>183</sup> On a society-wide scale, the message from the government and President Kagame is that of repression as the population is told is to shut away their feelings.<sup>184</sup> Although "the only permitted discourse is along the lines of 'Reconstruction, Reconciliation.' This watchword - so noble in and of itself - stifles the cries of distress from survivors."<sup>185</sup> This response to genocide has consequences that impact other aspects of reparative justice such as compensation and education.

The Rwandan reconciliation programs hinge on the abolition of identity cards as well as tribal identity: "There would be no talk of Tutsi and Hutu... there are no Hutu and Tutsis: 'we are all Banya-Rwanda,' *one* Rwandan people. The very names 'Hutu' and 'Tutsi' became taboo in post-genocide Rwanda. This policy was aimed against ethnic and racial prejudice, but made it

<sup>181</sup> Rurangwa, 70-71.

<sup>182</sup> Govier, 264.

<sup>183</sup> Rurangwa, 70.

<sup>184</sup> Rurangwa, 77.

<sup>185</sup> Rurangwa, 117.

impossible to publicly reflect on what had happened.”<sup>186</sup> This strategy is aimed at what sociologists would term ‘redrawing group boundaries’ where individuals in different social groups come to see themselves as members of a single group. This is believed to lead to more positive attitudes towards each other, more positive contacts between groups, and reduces intergroup bias further.<sup>187</sup> Despite the theoretical underpinnings of this strategy, the desired results effectively have not occurred in Rwanda as the identities are firmly entrenched in the society. Furthermore, for some survivors, this may feel like a form of revictimization as their identity as Tutsi was degraded before the genocide and is subsequently stripped away after the genocide.

The combination of forced amnesia, redrawing group boundaries, and lack of acknowledgement of RPF crimes against Hutus created substantial obstacles for any reparation scheme to take place. The current reparation process that exists is considered inadequate by survivors and ignores Hutu victims altogether.<sup>188</sup> Reparative justice is absolutely critical for any transformation of negative to positive peace and fostering reconciliation on a society-wide scale. As Gahima notes, “the provision of reparations to victims of past abuses is considered critical to the process of reconciliation and healing societies that have experienced widespread legal abuse.”<sup>189</sup> Despite the obligation to provide reparations under international and Rwandan law, survivors have yet to receive reparations or compensation. In conjunction with the obstacles mentioned previously, financial constraints and RPF-based crime denial complicates the ability to provide a system of reparations because the government “cannot agree to a system of reparations that entails acknowledgement of the responsibility of its forces for atrocities; on the

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<sup>186</sup> Govier, 264.

<sup>187</sup> Matt Jarvis, *Theoretical Approaches in Psychology*, (Routledge: London, 2000), 139-140.

<sup>188</sup> Gahima, *Transitional Justice in Rwanda*, 304.

<sup>189</sup> Gahima, “Alternatives to Prosecution,” 176.

other hand, establishing a compensation mechanism that discriminates between victims on the basis of ethnicity would aggravate existing divisions.”<sup>190</sup> With respect to the financial constraints argument, Govier is correct in noting that not being able to do anything financially does not excuse doing nothing symbolically; This is especially true with reparative justice where symbolic aspects are underemphasized and monetary or material aspects are overemphasized, thus demonstrating “a misunderstanding of the nature and purpose of reparations.”<sup>191</sup> It is clear that the Rwandan program is lacking both in material and symbolic reparations and therefore leaving the underlying socio-economic causes of the conflict untouched.

Rwandan education post-genocide is an excellent example of the faults of the Rwandan reconciliation and reparative justice program. Although the popular slogan in Rwanda is “The Truth Saves,” there is a distinctive silence in the education system, particularly on Rwandan history.<sup>192</sup> Education is very important in Rwanda both substantively and instrumentally because it is important in itself but also because it is the “strongest determinant of occupational status and life chances.”<sup>193</sup> The education stream before the Rwandan genocide was a significant vehicle for fostering severe inequality between Hutu and Tutsis and as such plays a significant role in reconciliation. As King notes, although education can foster inequality, it can also foster equity and aid the process of reconciliation by building a sense of reciprocity, sense of a shared future, acknowledgement, and engage in perspective-taking.<sup>194</sup> Given the relationship between education and conflict, King also argues that the current education system exhibits dangerous parallels with pre-genocide and colonial schooling need to be addressed:

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<sup>190</sup> Gahima, “Alternatives to Prosecution,” 177.

<sup>191</sup> Govier, 196.

<sup>192</sup> Govier, 204.

<sup>193</sup> Elisabeth King, *From Classrooms to Conflict in Rwanda*, (New York: Cambridge University Press, 2014), 24.

<sup>194</sup> King, 33.

On one hand, some positive strides have been taken, especially in terms of access to basic education and classroom practices... that do not differentiate Rwandans. On the other hand, Rwanda's education system reflects and amplifies an exclusivist state. Ethnic trends... are worrisome and mirror past trends in how they differentiate, collectivize, and stigmatize Rwandans with new identities (survivor, perpetrator) that parallel their former ethnic groups. Tensions between groups of Hutu and Tutsi students are also rising... In terms of content and pedagogy, a single, homogenizing narrative is taught in schools. Promoting conformity and dangerously excluding the experiences of many Rwandans.<sup>195</sup>

These trends in post-genocide Rwandan education are concerning and are unlikely to aid in reconciliation efforts at the current trajectory.

Overall, the existing policies on memory, reparations, and education in conjunction with the lack of emphasis of reparative mechanisms are grossly inadequate to achieve any sense of accountability and reconciliation. While there is a clear emphasis on retributive justice as a deterrent, preventative and peace building mechanism, there has been little emphasis on restorative and reparative initiatives. Trials are but one mechanism that on their own cannot achieve a broad mandate of both accountability and reconciliation. The conditions in Rwanda today indicate that it is still a work in progress. Transitional justice initiatives are inherently long-term processes and must be if they are to be successful in any respect. The "divisions and conflicts, rooted in the country's violent past, have not been overcome by the traditional justice processes pursued to date. Far from expressing remorse and seeking forgiveness of the victims, most of the perpetrators of genocide remain in denial."<sup>196</sup> It is clear that Rwanda needs to explore alternative mechanisms such as a truth commission and effective and inclusive reparative mechanisms. Yet none of these mechanisms will be effective if the government does not acknowledge the crimes it committed against the Hutus during the conflict. The acknowledgement and acceptance of responsibility for these crimes is the absolutely necessary pre-condition for

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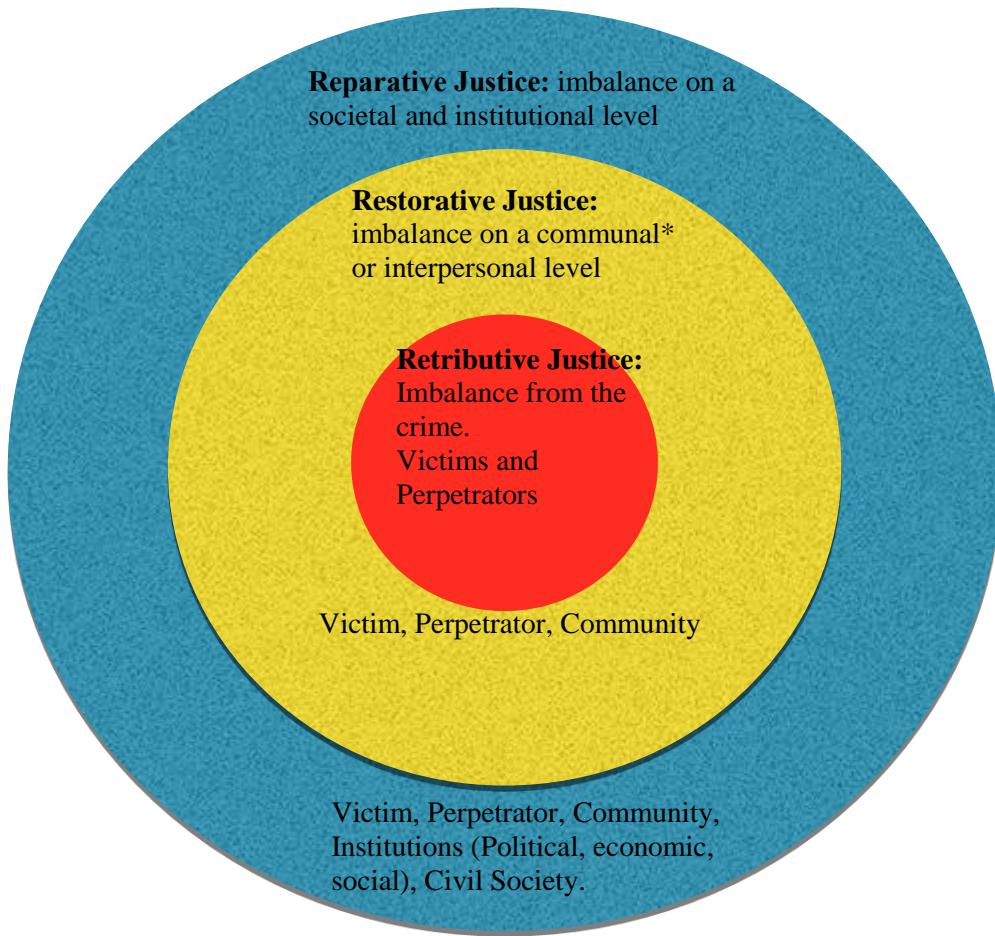
<sup>195</sup> King, 147-148.

<sup>196</sup> Gahima. *Transitional Justice in Rwanda*, 304.

any mechanism moving forward. Without it, the Rwandan process will have a hybrid style of justice but continue to deny the existence of Hutu victims, thus continuing the cycles of injustices.

## **Conclusion**

Throughout transitional justice literature, there is growing dissatisfaction with the current responses to mass violence, crimes against humanity, and conflict. To advance the study and practice of TJ further, the theory upon which it is built and guided needs to be reconceptualized. The theories of justice are not so much in opposition of each other but rather mutually reinforcing, especially in the contexts under which TJ takes place. Currently, there is no perfect response to the diverse array of conflicts that arise, but reconceptualizing theories of justice and examining hybrid models will help to break out of the current narrow approach. Utilizing a variety of mechanisms from various different theories or hybridized mechanisms that are tailored to the post-conflict society shows tremendous promise. Rwanda is one of the more contemporary examples that uses different mechanisms and a hybridized mechanism to confront the horror of the 1994 genocide. Although Rwanda may experience fatigue in the TJ process at this point in time, there is still much to be done. Retributive justice has played a significant role in generating accountability, yet as time passes there is still a wound in society. Rwanda must commit to pursuing mechanisms and theories that will specifically target this such as restorative and reparative justice. Despite incredible efforts so far, sustainable peace and reconciliation have not yet been achieved in Rwanda. Therefore, Rwanda remains a work in progress that still has the opportunity to be a success story.

**APPENDIX**

**FIGURE 1: Levels of Analysis within Theories of Justice - (p.24)**

\*This distinction is best understood in the way Howard Zehr presents it in *The Little Book of Restorative Justice*: ‘It may be helpful to differentiate between ‘community’ and ‘society.’ Restorative justice has tended to focus on the micro-communities of place or relationships which are directly affected by an offence but are often neglected by ‘state justice.’ However, there are larger concerns and obligations that belong to society beyond those who have a direct stake in a particular event. These include a society’s

concern for the safety, human rights, and general well-being of its members.”<sup>197</sup>

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<sup>197</sup> Zehr, 28.

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