Local Ownership, Local Engagement and the *Gacaca* Courts:

The Impact of Legal Pluralism on Rwanda's Transitional Justice Process

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1. Introduction

The Rwandan genocide occurred over 100 days between April and June 1994. It is estimated that between 800,000 and 1 million Rwandans were killed, while 2 million people fled to other countries and an additional 2 million were internally displaced.[1] The victims of the genocide were mainly Tutsi but many moderate Hutu were also killed. In the wake of the genocide, Rwanda was faced with not only a staggering death toll and refugee crisis but also the complete breakdown of societal and community relations. The Rwandan government approached post-conflict justice and reconciliation in three different ways. First, the International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council as an internationally-led court to indict and prosecute the leaders and planners of the genocide. With hundreds of thousands of genocide suspects having been detained and awaiting trial, the Rwandan government also undertook domestic prosecutions to bring justice to the lower-level perpetrators accused of involvement in the genocide. Finally, when the numbers of suspects awaiting trial still proved too onerous for the conventional legal system to handle on its own, the Rwandan government introduced a modernized form of *gacaca*[2] courts, a traditional Rwandan dispute resolution system, as a community-level court system to aid in clearing the backlog of detainees.

Rwanda's approach to transitional justice is unique and interesting because of the legally plural approach that was utilized. The internationally-led criminal tribunal operated in tandem with both domestic criminal trials and a reworked, community-based conflict resolution mechanism. The combination of three mechanisms operating under different sets of laws and at

[1] Rachel Kerr and Eirin Mobekk, *Peace & Justice: Seeking Accountability After War* (Cambridge: Polity Press, 2007), 54.
[2] *Gacaca* translates to "justice on the grass" in Kinyarwanda. It is so named because *gacaca* was conducted on a large clearing of grass.

different "levels" (i.e. international, national and local) created the opportunity to achieve many of the different goals of transitional justice and to address the needs and desires of the local population. However, it is undoubtedly the use of *gacaca* courts, a traditional practice that has been modernized for use post-genocide, that has attracted the most attention from transitional justice scholars.

The literature has analyzed the *gacaca* courts from many different angles. At the implementation stage, predictions for the success or failure of this new mechanism were prevalent. Throughout its work it was lauded for introducing a new form of participatory justice and simultaneously criticized for its lack of adherence to international legal norms. Even now that the work of *gacaca* has officially finished, it is likely that scholars will continue to research the long term impact that the institution has had on Rwandan society. This project seeks specifically to examine the operation of legal pluralism in the Rwandan transitional justice context and how it has influenced local engagement with and ownership of the *gacaca* process.

Although out of the three transitional justice mechanisms that operated in Rwanda *gacaca* seemed to offer the most potential for the local population to engage with it and take ownership of it, the literature suggests that, in practice, this was not necessarily the case. Even though *gacaca* operated in local communities, making it more accessible than the other transitional justice mechanisms, and was based on a customary practice that most Rwandans were familiar with, the level of engagement with the institution was not as high as would be expected, based on the available literature. The alienation of Rwandan citizens from the ICTR and domestic trials suggested that *gacaca* would offer a local alternative that the population would engage with in order to see justice done, discover the truth about the conflict and work towards reconciliation. However, a number of factors, including the radical alteration of the

gacaca system and government coercion, may have discouraged Rwandans from truly engaging with *gacaca*. This study first provides the context surrounding *gacaca*, including discussions of transitional justice, legal pluralism, local ownership and engagement and traditional practices, and then provides a discussion of how the local population interacted with the transitional justice process in Rwanda.

The first section of this study briefly discusses Rwanda's history, including colonization and the events leading up to the 1994 genocide, in order to contextualize the discussion of transitional justice that follows. The next section of this study gives an overview of the field of transitional justice in order to situate the Rwandan process within the field. First, different definitions of transitional justice are considered. Next, the section outlines the history and evolution of the field of transitional justice, beginning with the Nuremberg and Tokyo trials post-World War II and moving into the present day with the creation of the International Criminal Court, the emerging emphasis on local practices of justice and the connections that transitional justice has begun to make with different fields such as development. Finally, three different paradigms of justice (retributive, restorative and reparative) are examined, along with a brief discussion of the different transitional justice mechanisms that employ these paradigms.

The next section of the study considers the concept of legal pluralism. First, definitions of legal pluralism are offered as well as a discussion of the connection between colonialism and legal pluralism. The evolution of *gacaca* in Rwanda alongside the "formal," Western-style legal system that was introduced by the Belgian colonizers is discussed in order to demonstrate the legally plural system that existed in Rwanda even prior to the implementation of transitional justice mechanisms. Finally, legal pluralism in Rwanda post-genocide is discussed and the impact of the ICTR, domestic trials and *gacaca* on each other will be considered.

Next, the concepts of local ownership and local engagement are analyzed. The section considers different definitions found in the literature of local ownership and local engagement and ultimately offers a definition that makes a clear distinction between the two concepts. Then, the role of local ownership and engagement in transitional justice is examined. A variety of literature outlining the importance of promoting local ownership and engagement in transitional justice is surveyed in order to highlight why involving local populations is a necessary and crucial consideration in the field of transitional justice. To conclude, methods of promoting local ownership and engagement in transitional justice are presented.

In order to provide a better understanding of the nature of modernized *gacaca*, the next section examines different labels that are often used to categorize and describe *gacaca*. The distinction between formal and informal mechanisms is discussed. Then it is argued that the distinction is actually a false dichotomy and one that cannot be used to accurately characterize *gacaca*. Next, the concept of tradition and traditional practices is examined and it is argued that traditional is not a sufficient categorization for *gacaca*. This section also gives a brief overview of how *gacaca* as used post-genocide differs from its customary form.

Finally, the case of Rwanda is presented. This case study charts the evolution of *gacaca*, beginning with its use prior to colonialism and then describes the process of modernization that was undertaken by the Rwandan government in order to use the institution as a transitional justice mechanism. Then, an overview of Rwanda's other transitional justice mechanisms, the ICTR and domestic trials, is given, as well as an analysis of local engagement with and ownership of these mechanisms. Finally, an assessment of local ownership and engagement with regards to *gacaca* is presented.

Lastly, the study offers some final thoughts regarding why local ownership and engagement with the *gacaca* process has not been as extensive as might have been expected. The conclusion also identifies some gaps in the transitional justice literature, including the need for definitional clarity surrounding local ownership and engagement, as well as provides suggestions for further research in this area.

2. Background: The Rwandan Genocide

The origins of the Rwandan genocide are extremely complex; however, a significant amount of scholarship traces its roots to the Rwandan colonial experience. There is debate over how rigid the ethnic divide between Hutu and Tutsi was before colonization. There is evidence that the ethnic divide was exaggerated under the rule of *Mwami* (king) Rwabugiri, who ruled from 1860-1895. From 1894 until the end of World War I, Rwanda was part of German East Africa. The Germans chose to rule Rwanda indirectly through the *mwami* and his chiefs.[3] In 1924, Belgium became the administering authority of Rwanda under the League of Nations mandate system. Using the colonial divide-and-rule tradition, the Tutsi minority was designated the Belgian favourite and put in the position to govern.[4] Ethnic identities were reinforced and institutionalized with the distribution of ethnic identity cards.[5] In the late 1950s, however, both the Belgian colonial administration and the Roman Catholic Church switched their support to the Hutu politicians who were pushing for an independent Rwanda under Hutu rule.[6] Between 1959 and 1967 a series of attacks targeting the Tutsi minority occurred. It is estimated that 20,000 Tutsi were killed and many thousands were forced to flee to neighbouring countries. Rwanda was declared independent on 1 July 1962. Tutsi exiles launched an uprising in 1963 but this was quickly put down by the government and resulted in reprisals against local Tutsis.[7]

In July 1973, Major-General Juvénal Habyarimana seized presidency in a coup. There was little ethnic violence for the next seventeen years and although the Tutsis were still

[3] Paul J. Magnarella, "The Background and Causes of the Genocide in Rwanda," *Journal of International Criminal Justice* 3 (2005): 806.
[4] Adam Jones, *Genocide: A Comprehensive Introduction* (London: Routledge, 2011), 349.
[5] Gerald Caplan, "The 1994 Genocide of the Tutsi of Rwanda," in *Centuries of Genocide: Essays and Eyewitness Accounts*, ed. Samuel Totten,and William S. Parsons (New York: Routledge, 2013), 448.
[6] Ibid., 449.
[7] Kerr and Mobekk, *Peace & Justice,* 55.

institutionally discriminated against, they were provided physical safety.[8] Habyarimana maintained the system of ethnic identity cards, as well as the ethnic quota system of the previous regime whereby the proportion of Tutsi in schools, civil service and other employment sectors was officially limited to 9 percent.[9] On 1 October 1990, the Rwandan Patriotic Front (RPF) launched a military invasion of Rwanda. The RPF was comprised of Rwandan exiles that were operating from Uganda. The invasion resulted in outside assistance from France to prop up the existing regime, an exacerbation of the existing economic crisis in Rwanda and a growing climate of fear amongst Hutus.[10] Propaganda against Tutsis became common during this time and "Habyarimana's security forces indiscriminately interned and persecuted Tutsi solely because of their ethnic identity, claiming they were actual or potential accomplices of the RPF."[11]

A cease-fire was reached in July 1992 but negotiations were derailed by the resumption of fighting in northern Rwanda in February 1993.[12] Eventually in August 1993, talks in Arusha facilitated by Tanzania and the Organization for African Unity (OAU) took place between the Habyarimana government and the RPF. Despite strong opposition from the racist Hutu Power movement in Rwanda, the Habyarimana government signed a series of agreements with the RPF.[13] These included "accords for a ceasefire, power-sharing, return of refugees to Rwanda and integration of the armed forces."[14] The RPF would constitute 40 percent of the integrated military forces and 50 percent of the officer corps, as well as being allotted five ministries in the

[8] Caplan, "The 1994 Genocide," 451.
[9] Magnarella, "Background and Causes of the Genocide in Rwanda," 811.
[10] Jones, *Genocide*, 350-351.
[11] Magnarella, "Background and Causes of the Genocide in Rwanda," 812.
[12] Kerr and Mobekk, *Peace & Justice*, 55.
[13] Magnarella, "Background and Causes of the Genocide in Rwanda," 813.
[14] Ibid.

government.[15] The United Nations Assistance Mission for Rwanda (UNAMIR) was created to monitor the ceasefire and the implementation of the Arusha Accords. However, within Rwanda, Hutu Power portrayed the Arusha talks as negotiations between the RPF and its Hutu accomplices and a new, private radio station, *Radio Milles Collines*, began broadcasting anti-Accord and anti-Tutsi propaganda.[16]

Unfortunately the Accords were never implemented and on 6 April 1994 a plane carrying President Habyarimana was shot down near the Kigali Airport, triggering the slaughter of Tutsis and moderate Hutus. Hutu radicals were able to harness mass participation from the civilian population, largely as a result of their propaganda campaign. The killing went on for 100 days with no intervention by the international community. The violence was finally ended when RPF forces captured Kigali, sending the Hutu government fleeing into exile.[17] Aided by the French Opération Turquoise, two million Hutus, including thousands of *génocidaires*, were evacuated into refugee camps in Zaire.[18] The RPF and moderate Hutu parties formed a new government on 18 July 1994, but the country was in chaos and in desperate need of transitional justice measures to begin the slow process of rebuilding.

[15] Ibid.
[16] Ibid.
[17] Ibid., 56.
[18] Jones, *Genocide*, 359.

3. What is Transitional Justice?

Transitional justice undertakes the extremely difficult task of helping societies to deal with the aftermath of large-scale human rights abuses and mass atrocity. It is defined by the International Center for Transitional Justice as "the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses."[19] It has also been defined by the 2004 Report of the U.N. Secretary-General as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[20] From these definitions it is evident that transitional justice involves addressing a history of widespread wrongs through the use of mechanisms that will aid the society in moving towards a more desirable state.[21]

However, there are no concrete answers as to exactly what mechanisms or processes should be employed in the process of transition or what the "desirable state" to which a country should be transitioning is.[22] Given that each case of mass atrocity that transitional justice is employed to address is so unique, so too must be the responses that are created to deal with them. Thus, there is no one-size-fits-all solution and the shape that transitional justice takes varies greatly from case to case, depending on the context and the needs of the society.

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[19] International Centre for Transitional Justice, "What is Transitional Justice?," http://ictj.org/about/transitional-justice (accessed February 26, 2013).

[20] United Nations Security Council, "Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies," S/2004/616 (2004): 4.

[21] For another, comprehensive, perspective on what constitutes transitional justice, see Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

[22] For a discussion of the tensions that exist in transitional justice, see Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30 (2008): 95-118; and Neil J. Kritz, "The Dilemmas of Transitional Justice," in *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, Volume I, ed Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995), xix-xxx; David A. Crocker, "Transitional Justice and International Civil Society: Toward a Normative Framework," *Constellations* 5, no. 4 (1998): 492-517.

Transitional justice is a relatively new field of study. The Nuremberg and Tokyo trials after World War II are generally considered to be the first major transitional justice mechanisms to have been utilized.[23] The trials aimed to prosecute German and Japanese leaders who were considered to be the most responsible for war crimes and crimes against humanity.[24] These trials were important for two reasons: first, they affirmed the idea of individual criminal responsibility; and second, they set the legal foundation for subsequent trials such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Additionally, these post-WWII trials were significant because it was the international community that stepped in to implement these tribunals rather than allowing domestic courts to handle the cases or letting them go unpunished. Although these tribunals have often been accused of being nothing more than victor's justice, the intervention of the international community to ensure that crimes committed during the war did not go unpunished was an important milestone in the development of international law and in laying the foundation for transitional justice responses that would come later. However, after the Nuremberg and Tokyo trials, there was a long period of time when what we think of as transitional justice mechanisms were not utilized.

In the late 1980s and more generally after the Cold War, transitional justice mechanisms began to be implemented in a more widespread fashion as authoritarian regimes throughout Eastern Europe and Latin America began to transition to democracy. Paige Arthur writes that transitional justice as a field began to emerge in this era "as a response to these new practical

[23] For a different interpretation, that identifies the field of transitional justice as emerging in the late 1980s, see Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (May 2009): 321-367.

[24] For background on these trials, refer to Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011); Gueńaël Mettraux, ed., *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008); Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971).

dilemmas and as an attempt to systematize knowledge deemed useful to resolving them."[25] This wave of democratization, as it was perceived to be, was accompanied by the question of how to address the human rights abuses that had, in many cases, characterized these repressive regimes. Thus, in many ways, transitional justice in this period had dual intentions: first, to affirm the rights of individuals and provide redress for the abuses that were suffered and second, to facilitate a transition in political structure and strengthen the fragile, emerging democracies. Although judicial mechanisms were utilized, this period tends to be associated with "more diverse rule-of-law understandings tied to a particular political community and local conditions."[26] In contrast to Nuremberg and Tokyo's preoccupation with retribution and accountability, transitional justice mechanisms in the post-Cold War era evolved to consider questions surrounding peace and reconciliation. Thus, the development of truth-telling, amnesties, lustration and memorialization practices were important mechanisms associated with this phase of transitional justice.

This is not to say that international legal mechanisms disappeared altogether. In the mid-1990s, international criminal tribunals were utilized in the former Yugoslavia and Rwanda.[27] Both of these *ad hoc* international tribunals were created by the U.N. Security Council, indicating a turn back to international ownership and implementation of transitional justice. These experiments with international criminal mechanisms led to the establishment of hybrid tribunals in East Timor, Cambodia and Sierra Leone; combining international and domestic actors and laws.

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[25] Arthur, "How 'Transitions' Reshaped Human Rights," 324.
[26] Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16, no. 69 (2003): 71.
[27] See Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (New York: Oxford University Press, 2004); William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006); Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008).

However, the commitment to international criminal law was truly enshrined with the establishment of the International Criminal Court (ICC), the first permanent standing court designed to address genocide, crimes against humanity and war crimes.[28] Ruti Teitel describes the ICC as emblematic of the contemporary phase, which she terms the "normalization of transitional justice."[29] Indeed, it is hard to deny that the establishment of the ICC symbolizes an "entrenchment of the Nuremberg Model."[30] While the ICC symbolizes the progression of the rule of law and humanitarian norms, the contemporary period has also conceptualized transitional justice much more broadly than ever before. One aspect of this broadened conception has been the addition of new "tools" to the toolkit of transitional justice. This has involved an increased attention to customary and local practices.[31] Additionally, transitional justice scholars have started to explore linkages to areas such as development, democracy and human rights and how these considerations can impact both the pre- and post-transition environments.[32] Increasingly, there has been a recognition that "predominant views construct

[28] For background on the ICC, refer to Mark S. Ellis and Richard Goldstone, eds., *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* (New York: International Debate Education Association, 2008); Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008); William A. Schabas, *An Introduction to the International Criminal Court,* 4th ed. (Cambridge: Cambridge University Press, 2011).
[29] Teitel, "Transitional Justice Genealogy," 90.
[30] Ibid.
[31] See, for example, Rosalind Shaw and Lars Waldorf, with Pierre Hazan, eds., *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010); Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008); Patricia Lundy, "Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland," *International Journal of Transitional Justice* 3, no. 3 (November 2009): 321-340; Laura Arriaza and Naomi Roht-Arriaza, "Social Reconstruction as a Local Process," *International Journal of Transitional Justice* 2, no. 2 (2008): 157-172; Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006).
[32] See, for example, Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009); Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development," *International Journal of Transitional Justice* 2, no. 3 (December 2008): 253-265; Phuong Ngoc Pham, Patrick Vinck, and Harvey M. Weinstein, "Human Rights, Transitional Justice, Public Health and Social Reconstruction," *Social Science & Medicine* 70, no. 1 (January 2010): 98-105; Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, "The Justice

human rights violations fairly narrowly to the exclusion of structural and gender-based violence."[33] Thus, exploring the synergies between transitional justice and other disciplines opens the door for a move away from the "privileging of legal responses which are at times detrimentally abstracted from lived realities."[34]

The evolution of transitional justice demonstrates clearly that there are many different ways to approach "doing justice" in transitional contexts. As Jon Elster points out "retribution against wrongdoers… is one aspect of transitional justice. The other main aspect is reparation to victims."[35] Transitional justice mechanisms are often grouped into three broad categories or paradigms of justice: retributive, restorative and reparative. Each paradigm has a distinct approach to addressing the issue of justice in the aftermath of mass atrocity. Many of the mechanisms employed in transitional justice fit neatly under the umbrella of one paradigm of justice, while others blur the boundaries between the categories. In any case, these paradigms provide a useful starting point for understanding the array of approaches that can be employed in transitional contexts.

Retributive justice is primarily focused on punishment. This is the model that typically comes to mind at the mention of justice in the Western world. Retributive justice is much more focused on the perpetrator than on the victim and usually entails highly legalistic responses. In the context of transitional justice, retributive justice is primarily enacted through the use of trials. Trials do not focus on forgiveness or reconciliation; rather they "announce[s] a demand not only

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Balance: When Transitional Justice Improves Human Rights and Democracy," *Human Rights Quarterly* 32, no. 4 (2010): 980-1007.

[33] Rosemary Nagy, "Transitional Justice as Global Project: critical reflections," *Third World Quarterly* 29, no. 2 (2008): 276.

[34] Ibid.

[35] Jon Elster, "Introduction," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006), 1.

for accountability and acknowledgement of harms done, but also for unflinching punishment."[36] Mechanisms that are based around retributive justice include International Criminal Tribunals, the International Criminal Court, hybridized courts and national or domestic trials. However, it is important to recognize that other mechanisms can include retributive elements. The *gacaca* courts in Rwanda are a primary example of this. Although there were restorative elements to the *gacaca* courts and retribution was not necessarily handled in strict Western legal terms, *gacaca* was still, first and foremost, a community-level court with a focus on distributing punishment.[37]

In contrast, restorative justice is much more victim-centric and focused on the rebuilding of social relationships. This approach is concerned with needs that are not necessarily met through conventional justice processes and expanding the circle of stakeholders to include community members.[38] Thus, restorative justice employs approaches that bring victim, perpetrator and the wider community together in order to restore social harmony. Restorative justice conceptualizes crime as a "violation of people and interpersonal rights."[39] Consequently, these violations create obligations, the central obligation being to put right the wrong.[40] While forgiveness and reconciliation are not necessarily inherent to restorative justice, these processes often make space for reconciliation to begin. Truth commissions are a frequently-employed mechanism that are based around the principles of restorative justice.[41] Many traditional or customary practices, such as Canadian Aboriginal healing circles, are also based on the ideas of restorative justice.[42]

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[36] Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), 26.
[37] For an exploration of this tension, see: Erin Daly, "Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda," *N.Y.U Journal of International Law and Politics* 34 (2001-2003): 355-396.
[38] Howard Zehr, *The Little Book of Restorative Justice* (Pennsylvania: Good Books, 2002), 13.
[39] Ibid., 19.
[40] Ibid.
[41] For a thorough discussion of truth commissions, see Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2011).
[42] For an excellent account of restorative justice in the Canadian Aboriginal context, please

Finally, reparative justice seeks to repair injustices by "return[ing] the victim to the position he or she would have been in had the violations not occurred."[43] More generally, "reparations are generally framed as repair for past damage."[44] The idea behind reparations stems from the compensatory theory of justice, which theorizes that "injuries can and must be compensated."[45] Reparations can be either material or symbolic and often a combination of both is required in order for reparations to truly make progress towards addressing the wrongs of the past. Material reparations can include monetary compensation, restitution, or rehabilitation. However, although monetary payments "symbolically substitute for the loss of time, freedom, dignity, privacy, and equality," in reality, "money remains incommensurable with what was lost."[46] This is why symbolic reparations are also necessary. Symbolic reparations can range from the official acknowledgement of the wrongs that were done and apology to commemoration and memorialization efforts. Reparations often accompany processes of restorative justice and the two paradigms of justice are often used in tandem.[47]

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see Rupert Ross, *Returning to the Teachings: Exploring aboriginal justice* (Toronto: Penguin Canada, 1996).

[43] Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas," *Hastings International and Comparative Law Review* 27 (2003-2004): 158.

[44] Ibid., 160.

[45] Minow, *Between Vengeance and Forgiveness,* 104.

[46] Ibid., 102-103.

[47] See also Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006).

4. Legal Pluralism

Legal pluralism is "generally defined as a situation in which two or more legal systems coexist in the same social field."[48] Similarly, legal pluralism can be understood to exist "where different sources of authority (traditional, religious, or statutory) considered legitimate by social actors coexist, and regulate and solve disputes on similar matters."[49] Understanding this phenomenon is crucial to understanding the post-conflict legal responses that occurred in Rwanda, as the multiplicity of mechanisms used constituted an example of legal pluralism. In order to evaluate and analyze any one single response to the genocide in Rwanda, it is also imperative to examine how the different mechanisms interacted with each other as well as their historical roots in the country. In the case of Rwanda, the ICTR, national courts and *gacaca* courts were, for a period of ten years, all in operation simultaneously. Thus, when evaluating local engagement with one mechanism, it also crucial to consider the impact of the legally plural environment.

As Merry points out, almost every society is legally plural, regardless of whether it has a colonial past.[50] This is due to the fact that "every functioning subgroup in a society has its own legal system which is necessarily different in some respects from those of other subgroups."[51] Subgroups in society include family and community, for example. A broad definition of "legal system" would include systems of courts and judges linked to the state as well as nonlegal forms of normative ordering.[52]

Initially, Waldorf highlights, "the notion of legal pluralism was used to describe the interaction between informal 'indigenous' practices and formal colonial (and post-colonial)

[48] Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 870.
[49] Barbara McCallin, *Restitution and Legal Pluralism in Contexts of Displacement* (International Center for Transitional Justice, 2012), 8.
[50] Merry, "Legal Pluralism," 869.
[51] Ibid., 870.
[52] Ibid.

law."[53] Merry identifies this analysis of the intersections of indigenous and European law as "classical legal pluralism."[54] This is in contrast to what she categorizes as "new legal pluralism," which applies the same concept to non-colonized societies.[55] Thus, it is evident that legal pluralism is embedded in relations of unequal power, whether it be colonizer and colonized or another dominant and subordinate group. Initially, this also equated to the dominance of one system over the other. However, in the 1970s and 1980s, anthropologists began to question this hierarchical model and argued instead that plural systems are often semiautonomous with interactions between the systems being bidirectional.[56] The idea of legal systems interacting in a bidirectional manner called into question the notions of superiority often associated with the Western-style legal system and put different legal systems on an even playing field where they could each assert influence over the other. Whether adopting the view of classical or new legal pluralism, "all legal pluralists to some degree question or displace the centrality of the state as the source of legitimate law and normative order."[57]

The presence of legal pluralism in Rwanda is inevitably a product of colonialism. Given that *gacaca* is often labeled as a "customary" mechanism or a form of customary law, it is useful to consider the impact that colonialism had on custom and customary law. Colonialism and the importation of a formal legal system often came hand in hand. "The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion."[58]

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[53] Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79, no. 1 (2006): 10-11.
[54] Merry, "Legal Pluralism," 872.
[55] Ibid.
[56] Paul Schiff Berman, "The New Legal Pluralism," *Annual Review of Law and Social Science* 5 (2009): 228.
[57] 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 R. Quinn (Montreal: McGill-Queen's University Press, 2009): 89.
[58] Martin Chanock, *Law, Custom and Social Order* (Cambridge: Cambridge University Press, 1985), 4.

In these contexts, pre-colonial law recognized by colonial rulers was labeled customary law.[59] This so-called customary law was predominantly oral and derived authority from outside of the colonial state. It has been argued that the notion of unchanging custom and customary law were a myth of the colonial era, as in many places "customary law was not simply an adapted or transformed version of indigenous law, but a new form created within the context of the colonial state." [60] Thus, it can also be argued that customary law itself was a product of the colonial encounter. As Roberts points out, we know very little about prevailing governmental and legal arrangements in Africa prior to the colonial period.[61]

Despite the introduction of formal legal systems and the rule of law, judicial systems in colonies were generally bipolar.[62] These bipolar judicial systems usually consisted of courts that utilized chiefs and headmen to dispense justice according to customary law, as well as formal courts that were designed for use by non-natives. According to Mamdani, "this dual system of justice was at the heart of indirect rule, and some variation of it came to be in every African colony."[63] Such was the case in Rwanda, where "Belgian power constructed 'customary law and 'Native Authorities,' alongside civic law and civic authorities."[64] Although Belgian colonial law did not formally recognize *gacaca*, it was nonetheless encouraged by the colonial administrators and kept its role as a conflict resolution tool at the local level.[65] The Belgians maintained a policy of indirect rule in Rwanda, allowing indigenous institutions to maintain their functions. In

[59] Merry, "Legal Pluralism," 875.
[60] Ibid.
[61] Simon Roberts, "Some Notes on 'African Customary Law'," *Journal of African Law* 28, no. 1/2 (1984): 2.
[62] See Mahmood Mamdani, *Citizen and Subject* (Princeton: Princeton University Press, 1996).
[63] Ibid., 113.
[64] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, Princeton University Press, 2001), 34.
[65] See Lars Waldorf, "'Like Jews Waiting for Jesus': Posthumous Justice in Post-Genocide Rwana," in *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, ed. Rosalind Shaw and Lars Waldorf, with Pierre Hazan (Stanford: Stanford University Press, 2010), 186; Bert Ingalaere, "The Gacaca Courts in Rwanda," in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experience*, ed. Luc Huyse, and Mark Salter (Stockholm: International IDEA, 2008), 34.

the judicial system this manifested in the introduction of written law and a formalized, "Western" court system imposed over traditional institutions.[66] However, these traditional institutions were hierarchically inferior to the new legal system and serious cases were to be handled by the Western-style courts.

After independence in 1962, *gacaca* became more closely associated with the state. It was used by the local authorities as a "'semi-official and neotraditional' institution… to resolve minor conflicts outside the formal justice system."[67] *Gacaca* evolved into an institution that served as a court of "first resort," enabling citizens to settle disputes at the local level rather than resorting to the formal court system. It was not the case that Rwandans were barred from using the colonial court system, instead *gacaca* provided a convenient and local option for the settling of disputes. "Gacaca represented both the justice of proximity and a handy mechanism to relieve the pressure on the ordinary court system."[68] If necessary, however, cases could be forwarded to the formal court system at the provincial level (*court de canton*).[69] However, despite the addition of some formal elements and its relationship to the formal legal system, *gacaca* remained focused on reconciliation and many of its decisions did not actually conform to written state law.[70] Although these changes were not as drastic as those that occurred when *gacaca* was officially adopted by the government to deal with the aftermath of the genocide, it is evident that legal pluralism in Rwanda had an impact on the evolution of *gacaca*. The presence of legal pluralism also affected the formal legal system; by providing an alternate forum for dispute resolution the function of the Western-style courts was also altered.

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[66] Ingalaere, "The Gacaca Courts in Rwanda," 34.
[67] Waldorf, "'Like Jews Waiting for Jesus'," 186.
[68] Ingalaere, "The Gacaca Courts in Rwanda," 34.
[69] Ibid. According to Waldorf, *gacaca* decisions could also be appealed to the canton courts; however, this happened rarely and when it did, the courts usually took note of the *gacaca* decision. Waldorf, "'Like Jews Waiting for Jesus'," 187.
[70] Ingalaere, "The Gacaca Courts in Rwanda," 34.

The colonial legacy and the establishment of a formal legal system in Rwanda alongside *gacaca* is only one form of legal pluralism at work in the country. Post-genocide, the implementation of three different transitional justice mechanisms (the ICTR, domestic trials and *gacaca* courts) also constituted a unique form of legal pluralism that combined three distinct legal mechanisms working on the basis of different legal norms. According to Clark, legal pluralism in transitional justice usually involves the combination of different mechanisms, such as an international criminal tribunal and a truth commission or community-based practice, [71] and this was certainly the case in Rwanda. In Clark's opinion, the purpose of adopting this legally plural, or "hybrid," approach to justice is to facilitate holism. According to Clark, "a holistic approach to transitional justice contends that multiple political, social and legal institutions, operating concurrently in a system that maximizes the capabilities of each one, can contribute more effectively than a single institution to the reconstruction of the entire society."[72] In Rwanda, the utilization of three different legal mechanisms certainly contributed to the pursuit of justice in a way that one mechanism alone could not have. Using the ICTR to prosecute the planners of the genocide and the domestic and *gacaca* courts to prosecute lower-level genocide suspects allowed for the prosecution of a greater number of suspects than could have been achieved with just one mechanism.

However, although the post-genocide legal responses in Rwanda certainly constituted an example of legal pluralism at work, whether or not they created a holistic approach is a matter of contention. While the legally plural approach was effective at achieving mass prosecutions, as mentioned above, whether or not it contributed more effectively to the reconstruction of the society is questionable. In fact, the strong emphasis on retributive justice may have detracted

[71] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2010), 48.
[72] Ibid.

from achieving other goals of transitional justice (such as truth-telling, reparation and reconciliation) that aid in the reconstruction of society. Adam Lang argues that legal pluralism has the potential to act as a source of ethnic tension and potentially promote ethnic conflict if certain systems are used as a political instrument.[73] It has been argued that the Tutsi-led government in Rwanda has used the transitional justice mechanisms as a political instrument by preventing any legal mechanism from prosecuting the RPF for crimes committed during the genocide. The refusal to prosecute RPF crimes has politicized the trials at all levels by enforcing a narrative that casts Hutus as perpetrators and Tutsis as survivors. This has, in many ways, worked contrary to the government's stated policy of reconciliation, which forbids the mention of ethnicity and aims to promote Rwandan unity. Although, in theory, utilizing three distinct legal mechanisms has the potential to provide justice for a broader segment of society, in reality the concurrent operation of these mechanisms may be alienating and serve as a barrier to local engagement.

The relationship between the transitional justice mechanisms employed in Rwanda was a complex one. The Rwandan government's attitude towards the ICTR initially appeared to pose one of the biggest obstacles to the transitional justice mechanisms working together. Although the Rwandan government initially proposed the establishment of the ICTR and participated fully in the deliberations regarding its Statute, ultimately it chose to vote against Resolution 955.[74] The Rwandan government has publicly criticized the ICTR and suspended state cooperation with the Tribunal, with the main point of contention between the two parties being regarding RPF

[73] Adam Lang, "What role can non-state justice systems play in fostering the rule of law and national reconciliation in post-conflict environments?" (LL.M diss., University of Essex, 2006), 17.
[74] For a discussion of the position of the Rwandan government, see Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *The American Journal of International Law* 90, no. 3 (July 1996): 504-508.

crimes.[75] However, since the replacement of Prosecutor Carla Del Ponte, who had pushed for trials of RPF members, in 2003 by Hassan Bubacar Jallow, the relationship between the ICTR and the Rwandan government has improved significantly.

The most important relationship between the Rwandan transitional justice mechanisms was that of the ICTR and the Rwandan domestic courts, as the ICTR's completion strategy mandated that cases involving "smaller fish" would be transferred to national jurisdictions for investigation and trial.[76] In an effort to ensure that the Rwandan courts were competent to try these cases, "the Rwandan government abolished the death penalty, made judicial reforms, created new prison and detention facilities for transferred suspects, and enacted a new law governing transfers."[77] However, interestingly, it appears that the ICTR has not exerted a profound effect on the operation of the *gacaca* courts. There was a much closer relationship between the domestic courts and the *gacaca* courts, as they shared the same confession and plea bargaining scheme as well as being responsible for prosecuting generally the same pool of suspects. Although eventually the genocide suspects detained by the Rwandan government were categorized into levels of offenders, with Category 1 suspects being tried by the national courts and the lower levels being tried at the *gacaca* courts, this pool of suspects was all initially intended for trial by the national courts. This is in sharp contrast to the ICTR, which only intended to prosecute the highest-level perpetrators and planners of the genocide.

It is often difficult to discern the effects of each transitional justice mechanism on the other; however, it is undeniable that the layered system of justice in Rwanda had a profound effect on the way that Rwandan citizens interacted with the transitional justice process. The

[75] Lars Waldorf, "'A Mere Pretense of Justice': Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal," *Fordham International Law Journal* 33, no. 4 (2011): 1230.
[76] Ibid., 1238.
[77] Ibid., 1239.

presence of legal pluralism in the Rwandan transitional justice context consisted of the ICTR, domestic courts and the *gacaca* courts all operating simultaneously. While these mechanisms, working in conjunction, allowed the Rwandan government to ensure mass prosecution of genocide suspects, whether or not the presence of legal pluralism promoted local engagement with and ownership of the transitional justice process is less certain.

5. Local Engagement and Ownership

5.1 What is Local Engagement and Ownership?

The relationship of local populations with transitional justice mechanisms has increasingly attracted attention and analysis in transitional justice literature. It has come to be understood that the success of any given mechanism is highly dependent on local perceptions of and involvement in the process. The 2004 U.N. Secretary-General's Report outlines that "effective and sustainable approaches [to transitional justice] begin with a thorough analysis of national needs and capacities, mobilizing to the extent possible expertise resident in the country."[78] Additionally, the Report acknowledges that "the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out."[79] The value of local consultation and engagement in providing insight into the nature of the conflict and the needs of the victims and greater community is invaluable when designing and implementing transitional justice mechanisms. Consequently, there has been a realization within the field that externally imposed and prepackaged transitional justice solutions are not adequate responses to the complex and unique realities of different conflicts. Rather, a more transparent, consultative and inclusive process is required in order to respond adequately to the particularities of each situation.

There is no singular definition of what local engagement and ownership entails; however, the basic premise involves local communities playing an active role throughout the different stages of the transitional justice process. This idea can also be conceptualized through Paul Gready's framework of distanced and embedded justice. Gready defines distanced justice as lacking local participation, impoverishing and undermining local legal systems, being alien to

[78] United Nations Security Council, "Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies," 6.
[79] Ibid., 7.

domestic legal communities and, consequently, making little contribution to democratic development and peace.[80] In contrast, embedded justice "involves local participation, develops local legal systems, achieves high local visibility, and, as a result, contributes to societal education, democratic development, and peace."[81] Thus, Gready's conception of embedded justice is closely linked to local ownership and engagement because it is "at least in part locally defined, claimed and owned, and as a result resonates locally."[82] It is important, however, to acknowledge that even mechanisms that are examples of distanced justice can promote local engagement, although ownership may be harder to accomplish.

Simon Chesterman illustrates that the language of local ownership emerged from "development" literature, and outlines how its meaning evolved as it was adopted into the context of post-conflict reconstruction and statebuilding.[83] According to Chesterman, "in its most positive sense, it reflects a desire on the part of external actors to avoid undermining pre-existing local processes that may also be the most effective response to local political questions."[84] Conversely, "ownership may also be invoked defensively, asserted in order to avoid the appearance of paternalism or neo-colonialism."[85] Chesterman also outlines six "senses" of ownership, responsiveness, consultation, participation, accountability, control and sovereignty, to illustrate the range of possible meanings associated with the term.[86]

Patricia Lundy questions whether "state-based efforts can be regarded as local, home-grown or even bottom-up, or whether these terms apply only to initiatives that operate outside

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[80] Paul Gready, "Reconceptualising transitional justice: embedded and distanced justice," *Conflict, Security & Development* 5, no. 1 (April 2005): 8-9.
[81] Ibid., 9.
[82] Ibid.
[83] Simon Chesterman, "Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations," *Journal of Intervention and Statebuilding* 1, no. 1 (March 2007): 7-9.
[84] Ibid., 9.
[85] Ibid.
[86] Ibid., 10.

the structures of the state and are rooted in 'the community'."[87] This is another important question to consider when defining what constitutes local engagement and ownership, especially given that concepts such as bottom-up or grassroots justice often figure strongly in these debates and conversations.[88] Lundy defines local ownership, at a basic level, as "locals having a say in formulating processes and initiatives that reflect the culture and values of the jurisdiction in question."[89] Despite this, however, she maintains that local or home-grown justice "means far more than a consulting or participatory role *given* to local actors on behalf of donors or external parties. Local people must have the final, decision-making power over a project's authorship, design, implementation and outcome."[90]

While Lundy proposes a more expansive conception of local ownership and engagement, the scope of the concepts examined in this study will be much more narrow. In the case of Rwanda, the transitional justice process has been primarily top down rather than bottom up. Thus, local ownership and engagement must be evaluated within this framework, which includes conceding the limitations that are attached to state or international-driven processes.

Lundy characterizes bottom-up transitional justice as being defined by a participatory approach, with the desired goal being "to cultivate agency and empower the least powerful in society from below."[91] Using this definition, it is easy to understand how local engagement and ownership are easily linked with a bottom-up approach to transitional justice. A participatory approach requires that the local population be engaged with the process and, further, having a central and empowering role in the process of transitional justice in turn is likely to promote

[87] Patricia Lundy, "Exploring Home-Grown Transitional Justice," 323.
[88] See, for example, Kieran McEvoy and Lorna McGregor, eds. *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008); Laura Arriaza and Naomi Roht-Arriaza, "Social Reconstruction as a Local Process," *International Journal of Transitional Justice* 2, no. 2 (2008): 157-172.
[89] Lundy, "Exploring Home-Grown Transitional Justice," 329.
[90] Ibid.
[91] Ibid., 323.

ownership of the mechanism. In contrast, top-down transitional justice models are often viewed as "Western-based impositions that are remote and have limited relevance to the needs and interests of local communities."[92] Although this assessment may not be applicable to all top-down mechanisms, the impetus for the transitional justice process coming from the international community or the national government generally means that the local population has less input in designing and implementing the mechanism and thus feels less of a sense of ownership of it. While local engagement, in the form of participation and support for the mechanism, may still be achievable, local ownership is decidedly more difficult to encourage with a top-down mechanism.[93]

In Rwanda, local engagement was decidedly more focused on encouraging local communities to participate in and identify with top down transitional justice mechanisms rather than encouraging them to create and implement their own initiatives. Although there is a wide spectrum of forms that local ownership and engagement can take, a consensus has emerged within the transitional justice literature, nevertheless, privileging these concepts as critical to the success of any transitional justice project. The transitional justice literature does not uniformly outline a definition of what local ownership and local engagement entail. Rather, the terms are often used interchangeably and to denote different ideas. For the purposes of this study, however, based on the literature and my own perceptions of the terms, I outline the difference between the two concepts. Local engagement consists of the local population interacting in a meaningful way with the transitional justice mechanism. This can take many forms, including deliberate attendance, active participation or even awareness of and support for the institution.

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[92] Ibid., 325.

[93] For another discussion of transitional justice from below versus from above, see Kieran McEvoy and Lorna McGregor, "Transitional Justice From Below: An Agenda for Research, Policy and Praxis," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, eds. Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008), 1-13.

Local ownership, on the other hand, involves community members asserting a measure of control over the mechanism. If the mechanism is implemented from the bottom up, this could include involvement in discussions about the form it should take, active participation in the implementation phase and continued involvement in modifying existing practices and creating new ones. Similarly, if the mechanism is imposed from the top down, local ownership would involve community members contributing ideas that help shape the form that the mechanism takes in the local community and taking control over the daily operations of the mechanism.

5.2 The Role of Local Engagement and Ownership in TJ

Having established that local engagement is crucial for the success of any transitional justice project, it is important to examine why this is the case. One primary reason for promoting local engagement in transitional justice is to ensure the sustainability of the positive outcomes of these mechanisms. The 2004 Secretary-General's Report states:

> The most important role we can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country's plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations. In doing so, we must learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards.[94]

This illustrates the recognition that local engagement is a necessary component in ensuring a long-term sustainable approach for transitional justice. As Wendy Lambourne points out, "[d]emocratisation of the transitional justice process, which results in local ownership and capacity building, is more likely to contribute to sustainable peacebuilding."[95]

[94] "Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies," 7.
[95] Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice* 3 (2009): 47.

Patricia Lundy and Mark McGovern adopt a similar stance, arguing that "the tendency to exclude local communities as active participants in transitional justice measures is a primary flaw, raising fundamental questions of legitimacy, local ownership, and participation."[96] Supporting the role of the local for sustainability, they write that "[i]nstitutionalizing and sustaining peace, it is increasingly being suggested, may require placing issues of ownership and participation at the centre of long-term post-conflict justice."[97] Finally, they argue convincingly that "[s]ustainability is the key to the long-term success of any post-conflict justice programme. Those conceived and imposed from the top down that do not have local ownership and genuine participation, are far less likely to have legitimacy, be effective, and therefore sustainable after the sponsors leave."[98]

Paul van Zyl similarly regards local ownership and consultation as essential to ensuring that TJ institutions will be effective and will lead to sustainable results. Conversely, he argues that effectiveness will be reduced if popular support is not established or if the institutions are viewed as an external imposition.[99] Consequently, it is important that transitional justice mechanisms draw on and respond to national conceptions of justice.[100] Although he acknowledges that local ownership is not a sufficient condition for the success of any transitional justice mechanism, he also points out that "the uncritical transplantation of models from one context to another will simply not work."[101] Thus, "it is vital that transitional justice strategies

[96] Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," *Journal of Law and Society* 35, no. 2 (June 2008): 266.
[97] Ibid., 279.
[98] Ibid., 291.
[99] Paul van Zyl, "Promoting Transitional Justice in Post-Conflict Societies," in *Security Governance in Post-Conflict Peacebuilding*, ed. Alan Bryden and Heiner Hänggi (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005), 223.
[100] Ibid.
[101] Ibid., 224.

emerge from an extensive process of local consultation and that they are based on local conditions."[102]

Lundy and McGovern also view local participation and engagement as a way to discourage the uniform application of transitional justice across contexts, pointing out that "the values and ideas informing justice may need to be articulated within and by each community, based on specific realities and needs, for both conceptual and, indeed, practical reasons."[103] In this way, local engagement can make transitional justice seem less distant and more firmly rooted in the communities that it is addressing, making it easier for the local population to identify with and trust these processes. As Kieran McEvoy points out, there has been a tendency within the field to view transitional justice as state-centric and top down.[104] However, these state-centric schemes often fail because they oversimplify and "fail to take sufficient account of local customs and practical knowledge and to engage properly with community and civil society structures."[105] It is evident that the state-centric model of transitional justice, with its emphasis on legalism, may not be sufficient to respond to the needs of the populations most affected by the conflict. Rather, these populations themselves are much better able to identify adequate solutions, as well as to account for norms, customs and practical realities that may aid or hinder the transitional justice process. As David Crocker puts it: "A nation's civil society is often well suited to decide on and give priority to the ends of transitional justice as well as to design, implement, monitor, and improve various means to achieve them."[106]

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[102] Ibid., 223.
[103] Lundy and McGovern, "Whose Justice?," 274.
[104] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (December 2007): 421.
[105] Ibid., 424.
[106] David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 109.

In addition to capitalizing on the unique knowledge and expertise that the local community possesses, engaging the local population also ensures that their expectations are taken into account and, conversely, ensures that they have realistic expectations of the transitional justice process as well. Wendy Lambourne presents a transformative theory of justice in which she argues that "it is critical to take into account the needs, expectations and experiences of conflict participants – perpetrators, victims, survivors and other members of society directly affected by the violence, who are intimately involved in the peacebuilding process."[107] Further, Lambourne states that "to be sustainable, this transformative process must be based on recognition of the particular cultural and conflict context and the effective participation of civil society."[108]

Kieran McEvoy and Anna Eriksson argue that "community participation in decision-making processes regarding the rebuilding of a society adds transparency, accountability, legitimacy, and, importantly, minimizes the risk of renewed conflict."[109] However, it is also important to note that local ownership and engagement is not necessarily always a good thing. For example, there is an accompanying risk that "the notion of community becomes idealized, which may in turn obscure the reification of exclusionary or authoritarian practices."[110] There are also concerns that the rhetoric of local ownership and engagement may be used to consolidate government power, reinforce unequal power relations and silence more vulnerable members of society.[111] This is not to say that promoting local engagement should be abandoned. It is, however, important to recognize that power dynamics are also at play at the local level and

[107] Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," 29.
[108] Ibid., 35.
[109] Kieran McEvoy and Anna Eriksson, "Restorative justice in transition: Ownership, leadership and 'bottom-up' human rights," in *Handbook of Restorative Justice*, ed. Dennis Sullivan and Larry Tifft (London: Routledge, 2006), 323.
[110] Ibid., 324.
[111] Lundy and McGovern, "Whose Justice?," 272.

that the community can also act as a site of "exclusionary practices or unequal power relationships."[112] Awareness of this fact can aid in promoting local engagement in a way that does not marginalize certain segments of the society.

5.3 Promoting Local Engagement and Ownership in TJ

Promoting local engagement with the transitional justice process can be done in a number of different ways. The strongest form of local ownership occurs when transitional justice mechanisms emerge at the community level and are fully controlled and implemented by local community members. Arriaza and Roht-Arriaza describe these initiatives as being "local almost by definition, as they rely heavily on specific cultural traditions and mass community involvement. They generally occur without central government or international intervention and are initiated by local religious or community actors."[113] These bottom up processes are important because national-level initiatives often treat countries as an undifferentiated whole and fail to address the differing experiences of conflict of people living in more remote areas of the country.[114]

Local ownership and engagement is not exclusive to bottom up initiatives. Local engagement can also be promoted when top down or national-level transitional justice mechanisms are being utilized. As mentioned previously, engaging the local populations in these processes is important if they are to resonate with communities and achieve their goals. Promoting local engagement is an important way for top down transitional justice mechanisms to bridge the gap that often exists between them and the community. Involving local populations in

[112] McEvoy and McGregor, "Transitional Justice From Below," 9.
[113] Arriaza and Roht-Arriaza, "Social Reconstruction as a Local Process," 164.
[114] Ibid., 153.

these transitional justice mechanisms is a way to counter the aforementioned tendency of "state-centric" processes to oversimplify.[115]

A primary method of promoting local ownership and engagement is consultation before the implementation of a transitional justice mechanism. However, for a fully participatory process, local people should take part in every stage of the process, not just at the implementation stage.[116] For Lambourne, this means that conflict participants "become subjects and not just objects in the design and implementation of transitional justice mechanisms."[117] Accounting for local experiences and expectations, as well as utilizing local expertise, ensures that transitional justice mechanisms will be much more relevant to local communities and affirms the importance of justice needing to be seen to be done. Promoting local engagement at all levels of any transitional justice process is important to ensure the transparency and legitimacy of the process.

[115] McEvoy, "Beyond Legalism," 424.
[116] Lundy and McGovern, "Whose Justice?," 266.
[117] Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," 47.

6. Categorizing Gacaca

In transitional justice, local ownership is often associated with mechanisms or processes that arise from the community level and that are considered to be traditional, customary or informal. Although not all community level transitional justice mechanisms fit these labels, it is important to understand what these categories mean and when they can be applied. The *gacaca* courts, as they are being utilized to deal with the genocide, provide a good example of the ambiguities that accompany terms such as traditional or informal. Although something akin to *gacaca* was in many ways a traditional practice in Rwandan society, its cooption by the government for the purposes of aiding the legal system in dealing with the overwhelming number of people awaiting trial for genocide-related crimes fundamentally altered many integral aspects of *gacaca*, making it difficult to accurately evaluate the process in the ways that were used previously. Traditional is no longer an accurate way to view *gacaca* due to the alterations that have been made to the process by the government. Viewing *gacaca* as an informal mechanism is not sufficient either, as the government has mandated its use and codified its rules. Thus, it is important to explore what these categories truly mean in order to understand how these labels do or do not apply to *gacaca* in its current form.

6.1 The Informal/Formal Distinction

The labels of formal and informal are often used as a convenient categorization tool for transitional justice mechanisms. However, these labels are imprecise and are not able to accurately convey the complexities of mechanisms such as *gacaca*. In this dichotomy, mechanisms are generally considered to be formal "by virtue of their connection to the governing body (or an international body) and because of the codified practices that assure both procedural

fairness and standards of accountability, based upon a collection of cultural norms."[118] Phil Clark offers another, very similar, definition, highlighting that in formal methods of justice "post-conflict institutions arrive at justice via pre-determined (usually legal) statutes and procedures. Due process during criminal hearings constitutes a key component of most formal models."[119] By contrast, informal mechanisms often do not adhere to the same rigid standards, are usually not instituted by or even connected to the state and are generally not codified in any concrete sense.[120]

Utilizing the distinction between formal and informal outlined by these definitions, it is relatively easy to identify examples of formal mechanisms in transitional contexts. Trials are perhaps the most widely-recognized and a frequently-used "formal" mechanism in transitional justice. Trials, in the context of transitional justice, have taken place in many different forms. National trials, used to prosecute a citizen of a state within that state itself, are one example. National trials were undertaken on a massive scale in Rwanda after the 1994 genocide. Since the Rwandan genocide was characterized by mass participation, national trials were used in this case to prosecute the "smaller fish" or those who participated in the genocide but were not necessarily involved in its planning. Trials have also occurred based on the principle of universal jurisdiction, which allows for a country to prosecute a citizen of a different state for crimes committed elsewhere. Trials of this nature have also been undertaken with regards to the

[118] Joanna Quinn, "Problematizing the Formal/Informal Distinction in Customary Justice: Mechanisms of Acknowledgement in Uganda," *Uganda Living Law Journal* 7, no. 2 (2009): 2.
[119] Phil Clark, "Hybridity, Holism and 'Traditional' Justice: The Case of the *Gacaca* Courts in Post-Genocide Rwanda," *The George Washington International Law Review* 39, no. 4 (2007): 773.
[120] For another perspective on informal justice and an exploration of the differences between formal and informal justice, see Andrew Woolford and R.S. Ratner, *Informal Reckonings: Conflict Resolution in Mediation, Restorative Justice and Reparations* (New York: Routledge-Cavendish, 2008).

Rwandan genocide, with Rwandan nationals being tried in countries such as Canada and Belgium.[121]

International tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR) have also been utilized. The ICTR was created by the United Nations Security Council under a Chapter VII resolution for the purpose of "prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide or other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."[122] In practice, the ICTR indicted and tried only higher-level perpetrators, or the "big fish," who were responsible for organizing and implementing the genocide.[123] Other notable types of trials utilized in the transitional justice context include hybridized tribunals, such as the Special Court for Sierra Leone, and the International Criminal Court, the first standing international court with the authority to adjudicate on genocide, crimes against humanity and war crimes.

Trials, however, are not the only "formal" transitional justice mechanism. Truth commissions are another widely used example of a "formal" mechanism, the most well-known example of this being South Africa's Truth and Reconciliation Commission. Reparations awarded by the state in the aftermath of mass atrocity, such as the issuing of formal apologies or financial compensation, are another "formal" mechanism employed in transitional justice. The

[121] For a more thorough discussion of universal jurisdiction as it relates to the Rwandan genocide see L. Reydams, "Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice," *European Journal of Crime, Criminal Law and Criminal Justice* 18 (1996): 18-47.
[122] SC Res. 955, 8 November 1994: 2.
[123] For a succinct and thorough overview of the different "formal" legal responses to the Rwandan genocide, see Alison des Forges and Timothy Longman, "Legal responses to genocide in Rwanda," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 49-68.

granting of amnesty, as well as vetting or lustration of government officers are also examples of "formal" mechanisms that can be used in transitional justice.

"Informal" mechanisms are not as intuitively easy to associate with transitional justice and are more foreign to the Western world. "Informal" mechanisms are often "traditional" practices of different communities, although in many cases these practices have been adapted to meet the needs of the post-conflict context. This can occur when the government modifies an existing customary practice in order to make it usable in the post-conflict context or when communities take it upon themselves to adapt a customary practice as a way of dealing with the aftermath of a conflict. Using a traditional practice in the context of transitional justice provides a mechanism that members of the community are already familiar and comfortable with. If utilized with care, traditional practices have the potential to aid in achieving some of the goals of transitional justice. For example, in Sierra Leone renaming and cleansing ceremonies for abducted girls have been undertaken to reintegrate them back into the community.[124] Traditional, "informal" mechanisms have also been utilized by many of the numerous ethnic groups in Uganda, including by the Acholi who "carry out ceremonies of *mato oput* (drinking the bitter herb) and *nyono tong gweno* (a welcome ceremony in which an egg is stepped on over an *opobo* twig) in welcoming ex-combatant child soldiers home after they have been decommissioned."[125] The *gacaca* courts in Rwanda, as they were used prior to the genocide, would also be considered an "informal" mechanism. In its pre-genocide form, *gacaca* itself was a traditional, community-based dispute resolution forum adjudicated by elders.[126]

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[124] Martien Schotsmans, "'Blow Your Mind and Cool Your Heart': Can Tradition-Based Justice Fill the Transitional Justice Gap in Sierra Leone?," in *Critical Perspectives in Transitional Justice*, ed. Nicola Palmer, Phil Clark, and Danielle Granville (Cambridge: Intersentia, 2012), 281.
[125] Joanna Quinn, "Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice," *Human Rights Review* 8, no. 4 (2006): 398.
[126] For a brief discussion of *gacaca* as an informal mechanism, see Urusaro Alice Karekezi, Alphonse Nshimiyimana, and Beth Mutamba, "Localizing justice: gacaca courts in post-genocide Rwanda," in *My Neighbor,*

However, "informal" mechanisms do not necessarily have to be based on traditional practices. Often, mechanisms are classified as "informal" because they have arisen from the community level, rather than because of their connection to tradition. The conception and implementation of transitional justice processes at the local level would be considered "informal" because of the absence of a connection to a governing or international body. A good example of this is the local memorialization efforts that have taken place in Guatemala.[127] The national-level initiatives that had taken place in the country did not accurately capture the experience of the conflict for people living in smaller villages or towns; however, these local-level processes were better suited to address the dynamic nature of the conflict and resonated strongly with the citizens at the community level.[128] Similarly, Northern Ireland also employed a bottom-up mechanism that would be considered "informal" by implementing the Ardoyne Commemoration Project (ACP). The Project, which took place in the Ardoyne area of North Belfast, involved a group of community members who decided to produce a book to capture testimony from relatives, friends and eyewitnesses of the area's violence in order to provide recognition of those who had been killed.[129] The ACP was informal in that it was not connected to the government and, in fact, was in part a reaction to the government-sanctioned Bloomfield Report that had created a 'hierarchy of victimhood' by privileging some accounts over others.[130] While "informal" is easily associated with traditional practices, it is also important to acknowledge that bottom-up or community-led processes would also fall under this category.

My Enemy: Justice and Community in the Aftermath of Mass Atrocity, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 73.

[127] Laura J. Arriaza and Naomi Roht-Arriaza, "Weaving a Braid of Histories: Local Post-Armed Conflict Initiatives in Guatemala," in *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, ed. Rosalind Shaw and Lars Waldorf, with Pierre Hazan (Stanford: Stanford University Press, 2010), 205-227; Arriaza and Roht-Arriaza, "Social Reconstruction as a Local Process."

[128] Arriaza and Roht-Arriaza, "Weaving a Braid of Histories," 206.

[129] Lundy and McGovern, "Whose Justice?," 285.

[130] Ibid.

6.2 A False Dichotomy?

Although the categorization of "formal" and "informal" mechanisms in transitional justice is a convenient tool in many ways, it also poses a problematic distinction. The definitions used to distinguish "formal" from "informal" are problematic in and of themselves. The definitions outlined previously dictate that "formal" mechanisms imply both codification and a connection to a governing body, while "informal" mechanisms are associated with the absence of either aspect. In practice, however, this theoretical model is insufficient to account for the realities of transitional justice. This distinction precludes many transitional justice practices that have characteristics associated with both formal and informal mechanisms simultaneously, such as community truth-telling initiatives. This was the case in Guatemala, where the Human Rights Office of the Catholic Archdiocese published the first extensive report of the violations that had occurred during the armed conflict.[131] The report "documented atrocities on the basis of over 6,000 testimonies collected in parishes across the country during the course of three years."[132] Although this truth commission was not connected to the state, it took the form of a transitional justice mechanism that is often considered to be "formal," raising the question of whether a mechanism itself can be categorized or whether formality is contingent on who is implementing the initiative.

The *gacaca* courts face a similar dilemma. Initially, *gacaca* functioned as an *ad hoc* institution based on unwritten law and called together whenever necessary to adjudicate disputes between or within families. However, as outlined by Quinn, "it is often the case that customary mechanisms are recognized and adopted by the state apparatus, thereby becoming

[131] Rachel Sieder, "War, Peace, and Memory Politics in Central America," in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen Gonzaléz-Enríquez, and Paloma Aguilar (Oxford: Oxford University Press, 2001), 176.
[132] Ibid.

'formalized'."[133] Such was the case in Rwanda, as the government adopted *gacaca* as a means to deal with the overwhelming number of citizens that had been detained and were awaiting trial in the national courts. The *Gacaca* Law, adopted in 2001, explicitly codified the rules and structure of the *inkiko gacaca*.[134] Thus, although the premise of *gacaca* is based on an "informal" mechanism, cooption and codification by the government has imbued *gacaca* with many features of a "formal" mechanism as well. *Gacaca* occupies a liminal space between formal and informal as it maintains some of the characteristics of each. This highlights the inadequacy of these rigid categories to capture the realities of how a mechanism such as *gacaca* operates in practice.

It may be more practical, as Luc Huyse points out, to view the two models as positioned at the extremes of a continuum.[135] At one end, he places "formal" mechanisms; describing them as strategies that are "initiated, organized and controlled by (national or international) state institutions. Its procedures are formal and rational-legalistic."[136] At the opposite end of the spectrum, he places "informal" mechanisms, or "policies that are community-initiated and community-organized. They are predominantly… ritualistic-communal."[137] Locating these models of justice as the poles of a continuum has the benefit of creating a space between the two extremes where other mechanisms can be situated. This softens the rigidity of the "formal" and "informal" characterizations and creates more room for mechanisms that do not easily fit into one or the other since, as Huyse acknowledges, "in real-world situations many transitional justice

[133] Quinn, "Problematizing the Formal/Informal Distinction in Customary Justice," 2.
[134] *Inkiko gacaca* means *gacaca* "courts" and is the formal term used to identify *gacaca* as it was used post-genocide. From this point on, *gacaca* will be used to connote the institution as it was utilized by the government to address the aftermath of the genocide. Any reference to *gacaca* in its previous form will be qualified as such.
[135] Luc Huyse, "Introduction: tradition-based approaches in peacemaking, transitional justice and reconciliation policies," in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experience*, ed. Luc Huyse and Mark Salter (Stockholm: International IDEA, 2008), 5.
[136] Ibid.
[137] Ibid.

policies will combine, albeit to different degrees, ingredients of both extremes."[138] Using this spectrum, it would be much easier to demonstrate where *gacaca* fits in the world of transitional justice.

However, even though utilizing a continuum of this sort mitigates some of the problems associated with the dichotomous formal/informal distinction, the continuum is still not able to fully capture the complexities of *gacaca.* Although *gacaca* would conceivably fall somewhere in the middle on this spectrum, categorization in this way cannot accurately express the nuances that have accompanied *gacaca*'s evolution from its initial form to its adoption by the government.

6.3 Traditional Practices

Gacaca is frequently referred to as a traditional or indigenous mechanism; however, this categorization is also inadequate to account for the evolution of the institution and the way in which it was utilized to deal with the genocide. Given the recent emphasis on traditional practices,[139] it is tempting to view *gacaca* through this lens in order to affirm the commitment of transitional justice to organic and culturally appropriate mechanisms; however, characterizing *gacaca* as a traditional mechanism is a misinterpretation that precludes understanding of the politics and power dynamics that have shaped its current form.

[138] Ibid., 6.

[139] See, for example, Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008); Quinn, "Social Reconstruction in Uganda"; Quinn, "Problematizing the Formal/Informal Distinction in Customary Justice"; Lars Waldorf, "Mass Justice for Mass Atrocity"; Erin K. Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda," *International Journal of Transitional Justice* 1, no.1 (January 2007): 91-114. Similarly, on the topic of locality, see Alexander Betts, "Should Approaches to Post-Conflict Justice and Reconciliation Be Determined Globally, Nationally or Locally?," *European Journal of Development Research* 17, no. 4 (2005): 735-752; Paul Gready, "Reconceptualising Transitional Justice"; Kieran McEvoy, "Beyond Legalism"; Rosalind Shaw and Lars Waldorf, eds., with Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010).

Defining what is "traditional" is a difficult task.[140] As Zartman notes, it is a term that has "occasioned vast discussions and inspired great ambiguity."[141] In fact, Osaghae questions "what is meant by 'traditional' in Africa, where colonialism and other external influences have transformed social formations in such fundamental ways that there is very little that may be considered authentically indigenous and traditional?"[142] However, by Zartman's definition, "conflict management practices are considered traditional if they have been practiced for an extended period and have evolved within African societies rather than being the product of external importation."[143] He also highlights that traditional practices were often focused on "calling the offender to order, preserving the community and hierarchy, and restoring the harmony of society."[144] Similarly, Osaghae states that "'traditional' may… be defined as simply the legacy of the past, including the changes and transformations that this past may have gone through."[145] He also emphasizes that these traditional systems are usually localized and particularistic with an emphasis placed on value consensus and social cohesion.[146]

Just as the *gacaca* process underwent a series of alterations and modifications, traditional practices in other post-conflict African countries have also "been greatly altered in form and substance by the impact of colonization, modernization and civil war."[147] These factors all exert influence on traditional institutions, changing and shaping them so that they are no longer, in the strict sense of the word, traditional. This process, however, is fundamentally at odds with the

[140] For an in depth discussion of the theory of tradition, see H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000), specifically Chapter 1: "A Theory of Tradition? The Changing Presence of the Past".
[141] I. William Zartman, "Introduction: African Traditional Conflict 'Medicine'," in *Traditional Cures for Modern Conflicts: African Conflict "Medicine,"* ed. I. William Zartman (Boulder: Lynne Rienner Publishers, 2000), 7.
[142] Eghosa E. Osaghae, "Applying Traditional Methods to Modern Conflict: Possibilities and Limits," in *Traditional Cures for Modern Conflicts: African Conflict "Medicine,"* ed. I. William Zartman (Boulder: Lynne Rienner Publishers, 2000), 203.
[143] Zartman, "Introduction," 7.
[144] Ibid.
[145] Osaghae, "Applying Traditional Methods to Modern Conflict," 204.
[146] Ibid., 210-211.
[147] Huyse, "Introduction," 6-7.

"Eurocentric connotations" associated with the term traditional, which "tends to suggest the existence of profoundly internalized normative structures."[148] It also refers to patterns that are "seemingly embedded in static political, economic and social circumstances."[149] These definitions lead to the question of how justified the label of "traditional" is if the mechanism is susceptible to almost continuous change.[150]

Adopting a less rigid definition of "traditional" allows for the retention of a link with the past while also accounting for the dynamic nature of mechanisms such as *gacaca*. As Kerr and Mobekk acknowledge, "all traditional laws and mechanisms are constantly changing, and were also doing so during pre-colonial times."[151] Similarly, Zartman states that "traditional does not mean unaltered or archaic."[152] In the context of transitional justice, it is important to highlight the fact that traditions are not static in order to fully understand the relationships of the community with these mechanisms and how they have evolved over time.[153] However, even utilizing a definition of tradition that allows for gradual change over time, it remains a stretch to place Rwanda's *gacaca* system in this category.

The utilization of *gacaca* in the post-genocide context represents a radical departure from its "traditional" form and usage rather than a gradual evolution of the institution. External importation played a major role in the reinterpretation of *gacaca*, resulting in many of its core elements being changed. As a consequence, the resulting institution bore little resemblance to its

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[148] Joe A.D. Alie, "Reconciliation and traditional injustice: tradition-based practices of the Kpaa Mende in Sierra Leone," in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experience*, ed. Luc Huyse and Mark Salter (Stockholm: International IDEA, 2008), 133.
[149] Huyse, "Introduction," 7.
[150] Ibid.
[151] Kerr and Mobekk, *Peace & Justice*, 153.
[152] Zartman, "Introduction," 7.
[153] For example, Osaghae states that "the process of social change is in large part a process of changing traditions and customs, a process of refinement that involves preservation of some traditions and transformation or discarding of others." Osaghae, "Applying Traditional Methods to Modern Conflict," 204. See also Eric Hobsbawm, "Introduction: Inventing Traditions," in *The Invention of Tradition*, ed. Eric Hobsbawm and Terrence Ranger (Cambridge: Cambridge University Press, 1983), 1-14.

namesake. Categorizing the *gacaca* process in its contemporary form as a "traditional" mechanism obscures the realities of the new institution, implying a strong link to the past that has, in reality, been severely weakened by its reimagination and implementation in the post-genocide context.

The difference between "traditions [that] have continued without interruption over time, but have gradually been adapted" and institutions such as the *gacaca* courts is acknowledged by Quinn.[154] Quinn identifies *gacaca,* and other institutions of the same nature, as "a newly-constituted practice that has been constructed in the manner of a collection of traditional practices which had ceased to exist for a period of years, and that now carry the same, traditional name."[155] In Rwanda, this was certainly the case as the government transformed "a largely moribund local dispute resolution mechanism into a highly formal system for meting out (largely retributive) criminal justice."[156] It may be more fitting to call these institutions that are modeled on older traditions but changed to fit the contemporary context "neo-traditional," thereby highlighting their connection to the past but also acknowledging the (sometimes significant) changes that have been made.[157]

Although the structure of *gacaca* will be discussed in depth in a subsequent section of this study, it is important to highlight some characteristics of *gacaca* that make it so fundamentally different from its "traditional" form. Firstly, "the new system's predominantly retributive character deviates fundamentally from the idea upon which traditional Gacaca is

[154] Joanna Quinn, "Mad Science?: Possibilities for and Examples of Synthetic (Neo-)Traditional Practices of Justice and Acknowledgement," a paper presented at the Annual Convention of the International Studies Association, San Diego, 2 April 2012, 14.
[155] Ibid.
[156] Lars Waldorf, "Mass Justice for Mass Atrocity," 26.
[157] See, for example, Paul Christoph Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford: Oxford University Press, 2012), 3; Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001), 192.

based."[158] The emphasis on retribution is in contrast with traditional *gacaca*'s primary focus on "redress of damages, with sanctions being aimed at reintegration and reconciliation."[159] Secondly, the contemporary form of *gacaca* is established by and based upon positive law. This is a departure from the traditional institution, which was convened on an *ad hoc* basis and was not beholden to positive law. Traditionally, the objective was not simply to apply law consistently but rather to restore harmony and ensure the reintegration of the "offender."[160] Finally, the magnitude of crimes dealt with in the two variations of *gacaca* also differs greatly. "Traditional" *gacaca* was used for "family and interfamily disputes over property, inheritance, personal injury and marital relations" and was not used for "cattle theft, murder or other serious crimes."[161] However, in its contemporary form, *gacaca* is utilized to deal with the most serious of crimes, including murder and rape relating to the genocide. It is extremely important to identify these fundamental differences between the two institutions in order to understand the ways in which *gacaca* was modified to meet the context in which it was employed. Terminology, such as "traditional" and "informal," can serve to obscure the true nature of the process, thus it is necessary to interrogate the meanings of these terms and evaluate whether they can accurately convey the complexities of *gacaca*.

[158] Bornkamm, *Rwanda's Gacaca Courts*, 31.
[159] Ibid.
[160] Peter E. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice* (New York: Writers Club Press, 2003), 68.
[161] Waldorf, "Mass Justice for Mass Atrocity," 186.

7. Case Study: Rwanda

7.1 Evolution of Gacaca

As mentioned earlier in this study, *gacaca* as used prior to the genocide was different in many significant ways from *gacaca* as it was used after the genocide. This is not to say that *gacaca* was ever a static institution. In fact, as Clark highlights, even prior to 1994 *gacaca* was constantly evolving; however, the genocide represented a radical leap in this previously gradual evolution.[162] Prior to Belgian colonization, *gacaca* did not exist as a permanent judicial institution and was based on unwritten law. *Gacaca* at this time was an *ad-hoc* conflict resolution mechanism that involved people sitting on the grass to settle disputes in the presence of community members. It was utilized to moderate disputes concerning land use rights, cattle ownership, marriage, inheritance rights and petty theft.[163] The meetings were run by *inyangamugayo* (community elders, literally "those who detest disgrace"[164]) who were responsible for mediating and adjudicating resolutions to the dispute. These gatherings were meant to restore order and harmony.[165] "The primary aim of the settlement [achieved through *gacaca*] was the restoration of social harmony, and to a lesser extent the establishment of the truth about what had happened, the punishment of the perpetrator, or event compensation through a gift."[166]

During the colonial period, *gacaca* continued to function as a customary conflict resolution mechanism at the local level, although the mechanism became more

[162] Phil Clark, *The Gacaca Courts,*50.
[163] Martha Mutisi, "*Gacaca* Courts in Rwanda: An Endogenous Approach to Postconflict Justice and Reconciliation," *Africa Peace and Conflict Journal* 2, no. 1 (June 2009): 19.
[164] Lars Waldorf, "'Like Jews Waiting for Jesus'," 186.
[165] Bert Ingelaere, "The Gacaca Courts in Rwanda," 33.
[166] Ibid. Although the notion of *gacaca* in its traditional form being used as a means of restoring social harmony creates a romanticized picture of the institution, it was still susceptible to power dynamics. It has been noted in much of the literature that older men dominated *gacaca* and women were not allowed to speak.

institutionalized.[167] Post-independence, the institution became more formal with many traditional functions taken over by local government officials.[168] According to Waldorf, by the late 1980s "gacaca transformed into a 'semi-official and neo-traditional' institution used by local authorities to resolve minor conflicts outside the formal judicial system."[169]

After the genocide, the United Nations warned that "*gacaca* [was] not competent to hear crimes against humanity, but it could be utilized for purposes of testifying in connection with reconciliation."[170] However, the government of Rwanda chose not to heed this warning. In 1999, a commission established by then President Pasteur Bizimungu proposed modernizing and formalizing the *gacaca* system to deal with the large numbers of people that had been imprisoned and were awaiting trial, often in horrible conditions and for extended periods of time. In January 2001, the *Gacaca* Law was passed, formally establishing the *gacaca* jurisdictions to aid in prosecuting those charged with crimes related to the genocide.[171] The *Gacaca* Law uses the categories of offenders established by the 1996 Organic Law and gives *gacaca* jurisdiction over suspects in categories two and three.[172] The objective of the *gacaca* courts was to prosecute and try the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994.[173] According to Ingelaere, *gacaca* had five goals, which were to: "establish the truth about what happened; accelerate the legal proceedings

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[167] Clark, *The Gacaca Courts*, 53.
[168] Gerald Gahima, *Transitional Justice in Rwanda: Accountability for atrocity* (London: Routledge, 2013), 160.
[169] Lars Waldorf, "Mass Justice for Mass Atrocity," 49.
[170] United Nations Economic and Social Council, "Report on the situation of human rights in Rwanda, submitted to the Special Representative, Mr. Michael Moussalli, pursuant to resolution 1998/69," E/CN.4/1999/33 (1999): 14, § 51.
[171] Officially, Rwandan Organic Law No. 40/2000 of January 30, 2001.
[172] Organic Law No. 08/96 of August 30, 1996 divided genocide suspects into four categories based on the severity of their crimes. When the *Gacaca* Law was modified in 2004, categories two and three were merged together to create a synthesized category two.
[173] Ingelaere, "The Gacaca Courts in Rwanda," 38. It is interesting to note that although the actual text of the law establishing the *gacaca* courts allows for the inclusion of war crimes, in practice the government has gone to great lengths to exclude war crimes from being prosecuted at *gacaca*. For a discussion of this, see Allison Corey and Sandra F. Joireman, "Retributive Justice: The *Gacaca* Courts in Rwanda," *African Affairs* 103 (2004): 86-88.

for those accused of genocide crimes; eradicate the culture of impunity; reconcile Rwandans and reinforce their unity; and use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom."[174]

The *inkiko gacaca* (*gacaca* "courts") consisted of approximately 11,000 courts and nearly 260,000 lay judges.[175] The judges, also called *inyangamugayo*, were elected by the population and were not required to have any legal training or formal education. The only requirement was that they had to be 'persons of integrity.'[176] The implementation of *gacaca* unfolded in multiple phases. Election of *gacaca* judges took place in October 2001 and training of the judges occurred in April and May 2002.[177] The first *gacaca* courts were launched in 2002 in a pilot phase that took place in one sector in each of Rwanda's provinces. Based on feedback from these proceedings, revisions to the *gacaca* process were made and a second pilot phase was launched in one sector in each of the country's districts.[178] *Gacaca* was inaugurated nation-wide in 2005, beginning with an information-collecting phase that lasted from January 2005 to July 2006. During this phase, information was collected through both confessions and accusations. Crimes were then categorized based on severity by the judges. The trial phase began in July 2006 and the *gacaca* courts officially ended their work, after many delays, on December 31, 2011.[179]

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[174] Ingelaere, "The Gacaca Courts in Rwanda," 38.
[175] Waldorf, "'Like Jews Waiting for Jesus'," 187.
[176] Ingelaere, "The Gacaca Courts in Rwanda," 41.
[177] Timothy Longman, "Justice at the grassroots? Gacaca trials in Rwanda," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 212.
[178] Ibid.
[179] Hirondelle News Agency, "Gacaca to Wind Up by Year-End Despite 22 Cases Outstanding," http://www.hirondellenews.org/ictr-rwanda/411-rwanda-gacaca/25744-en-en-101111-rwanda-gacaca-gacaca-to-wind-up-by-year-end-despite-22-cases-outstanding1479514795 (accessed April 7, 2013).

7.2 In Pursuit of Justice

As noted above, however, the *gacaca* courts were not the only transitional justice mechanism employed in post-genocide Rwanda. Both the International Criminal Tribunal for Rwanda (ICTR) and domestic trials were utilized in the hopes of achieving a fuller conception of justice by prosecuting all levels of criminality that had been committed during the genocide. Although *gacaca* is the main focus of this study, in order to analyze how legal pluralism affected engagement with *gacaca,* it is also important to understand the other transitional justice mechanisms that were used and how the local population interacted with them.

The United Nations Security Council established the ICTR on 8 November 1994 with the adoption of Resolution 955. Initially, the request to establish an international tribunal came from the government of Rwanda itself.[180] However, despite the Rwandan government's initial enthusiasm for an international tribunal to carry out prosecutions, the Rwandan government ended up voting against Resolution 955, citing dissatisfaction with the resolution and the Statute of the Tribunal on the basis of its limited temporal jurisdiction, disparity in sentences caused by ruling out capital punishment and because they wanted to see the Tribunal located in Rwanda proper.[181] Nevertheless, Resolution 955 was adopted and the ICTR was created. The tribunal was given the power "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."[182] The tribunal issued its first indictment on 12 December 1995 and the

[180] See United Nations Security Council, "Letter dated 28 September 1994 from the permanent representative of Rwanda to the United Nations addressed to the President of the Security Council," S/1994/1115, (1994): 4; and United Nations Security Council. 3453rd Meeting. S/PV.3453 (1994): 14.
[181] S/PV.3453: 5-16. In this document, the Rwandan Ambassador outlines seven reasons why the Government cannot support the Resolution and Statute. For the purpose of brevity, I have picked out what I believe to be the three most important and widely cited reasons.
[182] SC Res. 955, 8 November 1994: 3.

first trial began in January 1997. At the time of writing, the work of the ICTR was ongoing, although the Tribunal was slated to close on 31 December 2014 and its responsibilities transferred to the International Residual Mechanism for Criminal Tribunals, which began functioning on 1 July 2012.

In many ways, the ICTR constituted a major success for the international community. The tribunal contributed greatly to producing legal jurisprudence with regards to genocide and crimes against humanity.[183] However, the ICTR struggled to make a positive impact on Rwanda and, consequently, local engagement with the tribunal was almost non-existent. The ICTR was located in Arusha, Tanzania, which was one of the Rwandan government's points of contention with the tribunal. The physical disconnect between the court and the local population was an important contributor to the pervasive lack of awareness and understanding of the court's activities in Rwanda. However, the physical distance was not the only factor contributing to Rwandan's lack of awareness about the ICTR. The government-operated radio station provided limited coverage of the proceedings, there were no television broadcasts outside of Kigali and very few Rwandans understand the legal procedures or proceedings.[184] In 2000, the ICTR established an outreach program, which included opening a public information centre in Kigali in September 2000.[185] The ICTR predominantly approached outreach through the transparency model, which focused on "demystifying the Tribunal's work and making it more comprehensible

[183] See Erik Mose, "Main Achievements of the ICTR," *Journal of International Criminal Justice* 3 (2005): 920-943; Hassan Bubacar Jallow, "The Contribution of the United Nations International Criminal Tribunal for Rwanda to the Development of International Criminal Law," in *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, eds. Phil Clark, and Zachary D. Kaufman (New York: Columbia University Press, 2009), 261-279.
[184] Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," *International Organization* 55, no. 3 (September 2001): 670.
[185] International Criminal Tribunal for Rwanda, "ICTR Information Centre Opens in Kigali," http://www.unictr.org/tabid/155/Default.aspx?id=374 (accessed November 18, 2012).

to the Rwandan citizenry"[186] rather than using the engagement model of outreach, which presupposes the basic knowledge of the Tribunal that comes through transparency and "proceeds to facilitate extensive and frequent Tribunal dialogue and interaction."[187] The Tribunal failed to promote true engagement through its outreach efforts and therefore maintained a level of distance from the Rwandan population that hindered its potential to make any positive impact on national reconciliation. Gready uses the ICTR as an example of "distanced justice," as opposed to "embedded justice" which has an element of local ownership and high local visibility.[188]

Given the great expense and long time periods associated with prosecutions at the ICTR, it was necessary for the Rwandan government to undertake domestic prosecutions as well. While the ICTR undertook prosecution of the planners and organizers of the genocide (also known as the "big fish"), the Rwandan prison system was still overflowing with lower-level genocide suspects. Post-genocide, almost 130,000 people were arrested and imprisoned, often outside of any established legal procedures and held in horrific conditions for long periods of time.[189] Despite the fact that the Rwandan legal system had been destroyed by the genocide, the government decided to proceed with national trials. The adoption of the 1996 Organic Law, defining four different categories of offenders and establishing a Guilty Plea and Confession Program, served as the basis for domestic trials to begin. Trials under this law began in December 1996 and by the end of 2001, the cases of approximately 6,500 genocide suspects had been heard.[190]

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[186] Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice* 3 (2005): 954.
[187] Ibid.
[188] Paul Gready, "Reconceptualising transitional justice," 9.
[189] Ibid., 10.
[190] Ibid.

Despite the fact that the domestic trials were located in Rwanda and therefore did not have to contend with the challenge of physical distance from the population it was serving, the impact of the trials on the Rwandan population was similar to that of the ICTR. Similar to the ICTR, "the majority of Rwanda's rural population has little understanding of and feels little connection to the formal justice system."[191] Although it seemed that the location of the trials would promote local engagement, the formalities and procedures associated with legal trials were still largely alien to much of the Rwandan population.[192] Additionally, although the trials were not conducted abroad, their location in provincial capitals still rendered them geographically remote from much of the country's population.

The lack of local engagement with domestic trials can also be attributed to the lack of public confidence in the justice system. The lack of public confidence stemmed from a number of factors including Hutu perceptions of the justice system as a tool of the government, the arbitrariness of the mass arrests that occurred after the genocide and the horrendous conditions in which genocide suspects were detained.[193] Not only did the lack of public confidence preclude engagement with the trials, it also meant that much of the population was not supportive of the work being carried out by the courts and refused to cooperate in identifying perpetrators.[194]

7.3 Gacaca, Local Engagement and Local Ownership

Given the enormous number of genocide suspects awaiting prosecution and the slow pace of the conventional legal system, it was logical for the Rwandan government to implement an alternative mechanism such as *gacaca*. *Gacaca* has faced many criticisms, particularly from

[191] Peter Uvin and Charles Mironko, "Western and Local Approaches to Justice in Rwanda," *Global Governance* 9, no. 2 (2003): 225.
[192] Ibid.
[193] Gahima, *Transitional Justice in Rwanda*, 133.
[194] Ibid.

human rights and legal commentators, most of which are based on due process concerns.[195] These, however, have not been the only concerns about *gacaca*. Questions have been raised regarding *gacaca*'s appropriateness for dealing with female victims of sexual violence,[196] the failure to prosecute crimes committed by the RPF and the use of *gacaca* as a tool of government power.[197]

With these criticisms in mind, it is important to remember that *gacaca* was not intended to be a straightforward legal mechanism. Rather, *gacaca* is a "dynamic socio-legal institution."[198] Further, *gacaca* possesses an "internal hybridity"[199] that allows it to pursue multiple objectives of transitional justice simultaneously. Thus, while retributive justice is certainly a part of *gacaca*, it also has a component that is focused on restorative justice. Likewise, retributive justice is not pursued through *gacaca* in an orthodox manner. Popular ownership and participation is an important component of *gacaca* and one that is not present in more traditional, retributive justice-focused institutions such as the ICTR and national trials.

As Clark puts it, "the driving ethos of *gacaca* is one of popular ownership and participation."[200] Consequently, it is essential to evaluate whether *gacaca* has been successful at promoting local ownership and engagement. While the spirit of *gacaca* emphasizes a central role for the community, the literature analyzing local responses to and engagement with *gacaca* provides mixed answers as to whether this has truly been the case or not.

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[195] See, for example, Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (New York: Human Rights Watch, 2011); Amnesty International, *Gacaca: A Question of Justice* (2002).
[196] Waldorf, "Mass Justice for Mass Atrocity"; Sarah L. Wells, "Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda," *Southern California Review of Law and Women's Studies* 14, no. 2 (2005): 167-196.
[197] Lundy and McGovern, "Whose Justice?," 272; Susan Thomson, "The Darker Side of Transitional Justice: The Power Dynamics Behind Rwanda's *Gacaca* Courts," *Africa* 81, no. 3 (August 2011): 373-390.
[198] Clark, *The Gacaca Courts,* 27.
[199] Ibid., 48.
[200] Ibid., 89.

It appears on the surface that *gacaca* has been successful when it comes to promoting local engagement, especially given that the *gacaca* proceedings directly rely upon community participation. Taking a lesson from the ICTR's lack of outreach to the Rwandan population, the Rwandan government implemented a public sensitization campaign prior to the first *gacaca* trials. The nationwide education campaign aimed to explain the new law to the population[201] and culminated in the election of judges on 4 October 2011.[202] According to Thomson, "sensitization campaigns target rural populations to encourage people to participate out of self-interest and in the interest of national unity and reconciliation."[203] In contrast to the lack of awareness that surrounded the ICTR, "virtually all Rwandese have heard and know something about *gacaca*."[204] However, criticisms of the sensitization campaign allege that they were "too short, top-down and focused on rallying support behind, rather to provide information about, *gacaca*."[205] Public education and sensitization was necessary as mass participation was crucial to the success of *gacaca*; however, the nature of the education campaigns calls into question whether mass participation can be equated to meaningful engagement with the *gacaca* process or whether it can only be viewed as acquiescence to the will of the government.

It is crucial to recognize that although participation can be a form of engagement, this is not necessarily always the case; oftentimes participation is simply attendance. A high percentage of the adult Rwandan population has been engaged in the *gacaca* process, including attending hearings and providing evidence.[206] However, many scholars report that participation in *gacaca* is often mandatory and enforced by the government, which may detract from true engagement

[201] Ibid., 64.
[202] Karekezi, Nshimiyimana, and Mutamba, "Localizing justice," 72.
[203] Susan Thomson, "The Darker Side of Transitional Justice," 380.
[204] Amnesty International, *Gacaca: A Question of Justice*, 22.
[205] Ibid.
[206] Clark, *The Gacaca Courts*, 132.

with the process. For example, Ingelaere writes, "failure to participate in the Gacaca means either being fined or refusal of service delivery when contacting the local administration. In that sense the Gacaca is, paradoxically, a form of unpopular participatory justice, with large crowds of uninterested people physically present but psychologically absent or unsupportive of the activities."[207]

Although during the first pilot phase of *gacaca* participation was optional, problems with minimal attendance quickly led the government to make participation mandatory.[208] According to Waldorf, "*gacaca* sessions in numerous locations had to be cancelled because they did not meet the quorum of 100 adults for the pretrial phase."[209] The government induced compliance by using the 2004 *Gacaca* Law to require all Rwandans to participate in the courts.[210] Still, "low participation rates have forced the state to employ coercion, thus publicly exposing *gacaca*'s unpopularity and the contradictions in the state's ideology of 'national unity and reconciliation'."[211] Further reinforcing the idea that participation cannot necessarily be equated with engagement is the fact that very few people spoke or provided testimony at *gacaca*. In fact, "most of the evidence about serious crimes [came] from confessed prisoners, not the local population."[212]

Coercion not only influenced the citizens' decision to attend *gacaca*, coercion was also used to dictate what would be said at the meetings. Thomson and Nagy state that local

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[207] Ingelaere, "The Gacaca Courts in Rwanda," 49.
[208] Timothy Longman, "Trying Times for Rwanda: Reevaluating *Gacaca* Courts in Post-Genocide Reconciliation," *Harvard International Review* 32, no. 2 (Summer 2010): 51.
[209] Waldorf, "Mass Justice for Mass Atrocity," 64.
[210] Organic Law No. 16/2004 of June 19, 2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, art. 29. ("Every citizen has a duty to participate in the *Gacaca* court's activities.") According to Waldorf, "it appears that failing to participate incurs the same penalty as refusing to testify: three to six months' imprisonment (for a first offense)." Waldorf, "Mass Justice for Mass Atrocity," 62, footnote 394.
[211] Waldorf, "Mass Justice for Mass Atrocity," 67.
[212] Ibid., 70.

authorities instructed participants to act a certain way, particularly when visitors from Kigali were present.[213] "These local officials hold weekly sensitization meetings and instruct members of the populace to speak only on prescribed topics."[214] Further, "those who do not obey are subject to a variety of formal sanctions, including fines, imprisonment and, occasionally, the threat of physical harm."[215] This also raises questions as to whether Rwandans were truly engaging with the *gacaca* process or whether those who did choose to speak were merely following the script set out for them by the government. Maintaining the government-imposed narrative of Hutu violence against Tutsi and the vision of a unified Rwanda seems to be the priority as "participants are forced to tell a specific version of the truth, one that is often outside their actual lived experiences of violence before, during and after the genocide."[216] Clark sums up these concerns, writing "the sustained rhetoric of openness and public participation that much of the government employs when discussing gacaca may seem incongruous, even disingenuous, alongside the RPF's attempts to shore up political control over the country and to stymie public debate."[217]

Similarly, it is difficult to imagine how local ownership could exist with regards to *gacaca* when the process was extremely top-down and controlled by the government. The population had little to no input in the conception and implementation of *gacaca* aside from the designated roles accorded to them in the process such as voting for judges and serving as members of the assembly. However, Clark contends that popular involvement at all levels of the institution allowed the population to shape *gacaca* according to the needs of particular

[213] Susan Thomson and Rosemary Nagy, "Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's *Gacaca* Courts," *International Journal of Transitional Justice* 5, no. 1 (2011): 23.
[214] Ibid.
[215] Ibid.
[216] Ibid., 26.
[217] Clark, *The Gacaca Courts*, 22.

communities, which meant that *gacaca* in towns and villages far from Kigali often diverged from the original intentions of the makers of the institution.[218] It is also important to note that "the philosophy of modern gacaca draws on the ethos of the traditional version by recognizing the importance of the community's ownership over, and direct involvement in, the process."[219] The government also encouraged popular participation in *gacaca* by emphasizing the population's ownership over the practice.[220]

Despite the rhetoric that surrounded local ownership of *gacaca*, the reality appeared to differ significantly. It appears evident that the government greatly overstateed the degree to which the community controlled and could freely participate in *gacaca*.[221] The government rarely discussed extensive involvement of state actors in *gacaca*, which included sometimes intervening in hearings when they appeared to diverge from the statutes of the *Gacaca* Law.[222] This greatly undermines the notion of *gacaca* as being directed and "owned" by the local population. Mutisi claims that "most Rwandans 'own' the gacaca process as they participate in the election of the judges."[223] However, it is questionable whether this one action can constitute local ownership. Rather, even though Rwandans did participate in electing judges, it is hard to believe that this can be equated with ownership of the process when the government still has a strong presence in controlling the day-to-day operations of *gacaca*.

In fact, much of the literature indicates that, contrary to demonstrating engagement with and ownership of the *gacaca* process, much of the population demonstrated subtle forms of resistance to *gacaca*. Small actions such as remaining silent when expected to speak or being

[218] Ibid., 84.
[219] Ibid., 134.
[220] Ibid.
[221] Ibid., 146.
[222] Ibid.
[223] Mutisi, "*Gacaca* Courts in Rwanda," 25.

too busy to attend *gacaca* even when local officials are persistent provide insight as to the true relationship that Rwandan citizens had with *gacaca*.[224] Thomson and Nagy also found that "the practice of *ceceka* (Kinyarwanda for 'keep silent') is highly prevalent as an 'implicit pact' among Hutu not to testify against one another."[225] Although on the surface it seems that Rwandans have engaged with the *gacaca* process and the rhetoric of the government supports this perception, analyzing the nature of Rwandan citizens' relationship with *gacaca* actually seems to reveal quite the opposite. Contrary to what might be expected, the literature indicates that the level of local engagement with and ownership of *gacaca* was actually quite low.

[224] Thomson and Nagy, "Law, Power and Justice," 25.
[225] Ibid.

8. Conclusion

It has been written that the Rwandan government has pursued a policy of justice at all costs. Despite the significant challenges that the government faced in prosecuting the overwhelming number of genocide suspects, it pushed forward with prosecutions even implementing *gacaca*, an unconventional and innovative system, to aid with the process. However, although the government felt that retributive justice for the masses was the best approach in the aftermath of the genocide, it is less clear whether this was the best approach for Rwanda's citizens. Although *gacaca* aimed to provide a mix of restorative and retributive justice, the modifications made to the process made it much more focused on retribution.

The pursuit of justice had many unfortunate effects on Rwandan society. For one, the location of the ICTR in Tanzania, far away from the Rwandan population, meant that most citizens were largely unaware of the Tribunal's proceedings, did not have a strong understanding of the workings of the Tribunal and did not have the opportunity to experience justice being done firsthand. As well, the mass arrest of genocide suspects by the Rwandan government meant that a large number of citizens remained in prison, removed from their communities, for years at a time. In the wake of the genocide, this meant that many productive members of the society were removed from the largely agricultural communities, leaving their families to fend for themselves. The mass detention of genocide suspects also slowed the process of reconciliation between community members that would eventually have to live together again. When national trials did begin, they were also remote from Rwanda's largely rural population.

In contrast with the failings of the ICTR and national trials to impact the local population, *gacaca* seemed to offer an alternative that would operate at the local level and thus engage the population in the process of post-conflict peacebuilding and reconciliation. However, as outlined

in the last chapter, there was a distinct lack of true engagement or ownership associated with *gacaca*. This seems perplexing given that *gacaca* provided an opportunity for the population to play a role in shaping justice in their communities and to take an active role in rebuilding their communities. Additionally, since the ICTR and domestic trials were distanced from the Rwandan population, it was logical to assume that Rwandans would be eager to engage with *gacaca*, the mechanism that was specifically designed to ensure their participation in the process.

Although much of the literature on transitional justice in Rwanda talks about the simultaneous operation of three different mechanisms and literature focusing on *gacaca* often highlights the lack of engagement of communities with the process, there is almost no literature that has synthesized these two themes. Examining how the presence of different transitional justice mechanisms affects local engagement with the transitional justice process is a useful endeavour for scholars in the field, as a consensus has emerged that it is almost always necessary to utilize more than one mechanism in order to achieve the goals of transitional justice.

8.1 Definitional Clarity and Measurement

One of the greatest problems when it comes to assessing local ownership and local engagement in transitional justice is the lack of definitional clarity that exists in the literature. Although many articles have been written discussing the importance of this phenomenon, the terminology used to describe very similar ideas varies significantly. Often words and phrases like local, bottom up, customary, traditional, homegrown and "from below" are used by different scholars to describe processes that are extremely similar. This muddled terminology presents a serious impediment to future research in this area.

While the problem of definitional clarity certainly exists more broadly in the field of transitional justice,[226] clarifying the distinction between local ownership, engagement and the other concepts that involve transitional justice at the local level will only strengthen research going forward in the field. Given the increased emphasis on the local level that has emerged in the field, this is an important undertaking that will contribute to the accuracy and applicability of new research. It will be extremely difficult to continue research in this area and to determine the impact that local engagement and ownership truly has on the transitional justice process without a clearer definition of what these concepts entail.

Alongside the need to clearly define these concepts is the problem of measuring them. Given that engagement and ownership are inherently personal processes, there is an accompanying problem of determining how to accurately assess whether they are present in transitional contexts and, if so, to what degree. In the case of *gacaca*, many scholars claim that although many community members attend *gacaca*, they are not truly engaged with the process. Engagement, however, is a difficult phenomenon to measure. Making the definition of this concept more precise would certainly aid its measurement in transitional contexts, however the problem of measurement is one that the field as a whole has grappled with. Improvement will need to continue to be made in this area in order to improve the quality of research being produced in the field.

8.2 Now That Gacaca is Finished…

With *gacaca* having only just finished its work at the end of 2011, continued research on the effects of local ownership of and engagement with the *gacaca* process is crucially important. Continuing to monitor and analyze communities in Rwanda after the end of *gacaca* will provide

[226] In fact, debates still exist as to what the term "transitional justice" itself truly means. See, for example, Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice* 3 (2009): 5-27.

important insight into whether community-level transitional justice mechanisms were effective in this context, as well as whether local attitudes towards *gacaca* have helped or hindered reconciliation and community restoration. This research will also shed light on whether local engagement with the transitional justice process is in fact necessary for these mechanisms to achieve their goals or if there has been an unnecessary emphasis placed on how local populations interact with these institutions.

Similarly, from the perspective of legal pluralism, it will be of interest to monitor what form *gacaca* takes as its codified use for dealing with the genocide comes to an end. This study has illustrated the evolution of *gacaca* from its pre-colonial form to its adoption by the Rwandan government for use post-genocide and the end of the more formalized *gacaca* system will inevitably herald another evolution in its form. It will be interesting for future scholars to examine whether the codification of *gacaca* significantly impacts the form that it will take in the future and how the local population interacts with the institution in the years to come.

8.3 Holism in Transitional Justice?

Rwanda presents an interesting case to examine local engagement and ownership because of the layered approach to justice that was adopted. As mentioned earlier, there has been a realization in the field of transitional justice that it is nearly impossible for one mechanism alone to achieve the many goals of transitional justice. As a consequence, it is rare that only one mechanism will be utilized in any transitional context. This is often called a "holistic" approach to transitional justice, which, according to Clark, "provides that multiple political, social, and legal institutions, operating concurrently in a system maximizing the capabilities of each, can contribute more effectively to the reconstruction of the entire society than a single institution."[227] The legally plural approach to transitional justice adopted in Rwanda certainly constitutes an example of

[227] Clark, "Hybridity, Holism, and 'Traditional' Justice," 765.

holism; however, it is questionable whether it contributed more effectively to the reconstruction of the entire society. Indeed, the legally plural approach was more effective in ensuring the greatest amount of prosecutions than a single institution would have been. However, the specific combination of institutions that were implemented in Rwanda may not have been the ideal choice in terms of achieving some of the other goals of transitional justice, such as truth, reparations and reconciliation.

It is only by examining the transitional justice process at the local level that we can begin to understand how the process has impacted those that it sets out to help. A holistic approach to transitional justice may not necessarily be the best approach if the local population does not identify and engage with it. Although Rwanda pursued justice at three different levels, it appears that the population did not engage with the transitional justice process at the local level. It is important that some type of transitional justice mechanism is employed to deal with the legacy of mass atrocity such as Rwanda's genocide; however, if the local population does not see that justice is being done, feel that their needs are being met and engage with the process in order to make it their own, the implementation of these mechanisms may all be for naught. On the surface it appears that Rwanda took an extremely proactive approach to post-conflict justice but just under the surface, it seems that Rwanda's citizens were largely alienated from this process. In order to ensure that transitional justice is proving effective for those who need it most, considerations of local populations should be at the forefront of the transitional justice agenda and research on the impact of local engagement with the transitional justice process needs to be undertaken in a more robust manner.

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