Transitional Injustice:
Rwanda, Overcoming Violence and the Dark Side of Post-Conflict Societies

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ABSTRACT

Diverse in many respects, one unifying element of research on transitional justice concerns the fact that the predicted outcomes of these processes are normatively appealing; specifically, 1) promoting truth and reconciliation, 2) preventing the resumption of conflict and/or 3) increasing democratization. This perspective assumes that justice efforts are implemented with these goals in mind. This need not be the case. We argue that it is possible to use transitional justice without maintaining an interest in truth, peace or democracy but rather 1) promoting denial and forgetting, 2) perpetuating conflict and 3) legitimating state repression. To make this argument, we conduct a detailed examination of Rwandan politics following the violence of 1994.

Over the last ten years, a popular, political and scholarly interest in what is commonly referred to as "transitional justice" has essentially exploded – becoming one of the more important topics in comparative politics and international relations. Defined as those efforts undertaken after political violence and/or authoritarian rule has ended in order to deal with what has taken place (in some manner), relevant activities include truth commissions, trials, reparations, amnesty and lustration. By and large, this body of work has been broadly concerned with what is and what should be done to deal with a troubled past.

The newest and latest wave of scholarship on this topic has moved beyond identification and justification to explicitly examining what impact transitional justice has had on diverse outcomes: e.g., the structure of the post-conflict/transition government,[1] the functioning of the legal system,[2] foreign direct investment,[3] mass public opinion,[4] the attitudes of victims,[5] subsequent state-imposed human rights violations[6] as well as general political violence[7]. While diverse in many respects, one unifying element of this research concerns the fact that all of the outcomes predicted correspond to liberal democratic norms. Specifically, the outcomes considered assume that the transitional justice process in question is directly intended and implemented to: 1) promote truth and reconciliation (both psychological and political), 2) prevent the resumption of armed conflict and/or 3) increase political legitimation of the post-

[1] Monika Nalepa, Procedural Fairness and Demand for Transitional Justice: Evidence from East Central Europe (2007) (unpublished manuscript, on file with author).
[2] Ruti G Teitel, Transitional Justice. (2002).
[3] Benjamin Appel Cyanne E. Loyle, Investing in the Truth: Economic Incentives for Post-Conflict Justice, (2010) (unpublished manuscript, on file with author).
[4] James L. Gibson, Overcoming Apartheid: Can Truth Reconcile a Divided Nation? (2004).
[5] David Backer, *Evaluating Transitional Justice in South Africa from a Victim's Perspective*, J. of the Intn'l Institute, 12(2) (2005).
[6] Erik Wiebelhaus-Brahm, Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy (2009)
[7] Kimberly Thiedon, *Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru*, J. of Conflict Resolution, 50(2): 433-457 (2006)

conflict regime as well as democratization itself. Cumulatively, these outcomes create something that we refer to as a "Favorable Justice Package" (hereafter FJP).

The reasons for the orientation identified above are clear. Ideas of retributive justice are considered necessary precursors to desired/desirable outcomes.[8] Indeed, by the mid-1990s, a broad international consensus developed regarding the link between justice and reconciliation with the end of conflict and support for democratic transitions.[9] Some argue that it is only through justice that governments can modify as well as improve social, economic and political life.[10] These ideas are not limited to the academy but they have influenced social movements, NGOs, national governments and INGOs – the world over.[11]

Of course, this perspective assumes that all justice efforts are implemented with the goal of truth, reconciliation, peace and liberal democratic change in mind. Whether or not the process is successful, these foundational motivations are assumed. This need not, however, be the case. In fact, within this paper, we argue that it is possible for governments to use truth commissions, trials, reparations, amnesty and lustration without maintaining an interest in the FJP, promoting what we refer to as an "Unfavorable Justice Package" (hereafter UJP). The less normatively appealing objectives involved here include: 1) promoting denial and forgetting, 2) perpetuating conflict and 3) legitimating authoritarianism as well as state repression. Development of the UJP is particularly problematic for those interested in transitional justice because it reveals how

[8] Teitel, *supra* note 2.
[9] International Human Rights Law Institute (IHRLI) "The Chicago Principles on Post-Conflict Justice" (2008)
[10] Teitel, *supra* note 2.
[11] Alex Boraine, Transitional Justice as an Emerging Field, presented at *Repairing the Past: Reparations and Transitions to Democracy* Symposium (2004)

the widely assumed objectives commonly associated with these activities can be used for a completely different purpose, often with international acquiescence and/or support.

Within the article below, we briefly outline the history of transitional justice as well as the basic principles of the "Favorable Justice Package," identifying how it developed both in practice and in the current literature. Next, several possible subversions of this program are identified; that is, ways in which the basic logic and relevant mechanisms of operation could be used for purposes that not only halt advancement to truth and reconciliation, peace, the rule of law and democracy but which actually move things in the opposite direction. The third section of the paper illustrates how subversion of the FJP occurs, leading to the UJP. To make this argument, we rely upon a detailed examination of Rwandan politics following the violence of 1994. Our case selection is crucial for Rwanda has been viewed by many as an example of how transitional justice *should* take place, including features such as community participation, culture-specific practices and local ownership of the process.[12] As we show, Rwanda illustrates a host of different ways that the conventional conception of transitional justice has been used in order to create and sustain a largely autocratic and repressive government. We then address the implications of our argument and the Rwandan case for theory, research and public policy more generally conceived.

Conceptualizing Transitional Justice: Practice and Scholarship

While reckoning with a violent and/or authoritarian past is not a new concept in either law or politics, the post-World War II trials at Nuremberg and Tokyo are largely understood to be the

[12] For example, the "Governance for the Future" report put out by the UNDP (2006) highlighted Rwanda for its "innovative methods in search of justice" and argued that the Gacaca process could be used as a model for other developing nations (130).

beginning of transitional justice in the contemporary period.[13] Indeed, these legal proceedings were precipitated by a broad discussion regarding the rule-of-law, truth, the prevention of conflict, individual accountability and a shifting legal focus from the national to the international. Accordingly, the international-led and implemented trials were undertaken with the understanding that holding perpetrators of human rights violations and war crimes accountable for their actions would contribute to a broader respect for rights as well as reduce the chance of a resurgence of the violence seen during the Holocaust and World War II. Following the trials, emerged the concept of a morally binding obligation to hold violators accountable and the responsibility of both international[14] and domestic communities to do so.[15]

Years later, the trials at Nuremberg and Tokyo were followed by transitional justice processes throughout Latin America and later in the former Soviet block. In 1994, the creation of the South African *Truth and Reconciliation Commission* (TRC) marked the tipping point for the popularity of transitional justice in the international legal context.[16] On most dimensions, the TRC was clearly not another Nuremberg or Tokyo. Different from earlier legal proceedings, this was a domestically-led attempt to hold one's former government and society responsible for violent activities of the past.[17] The TRC was followed by the international legal tribunals for the Former Yugoslavia and Rwanda as well as hybrid courts in East Timor and Sierra Leone to name just a few efforts.

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[13] Gary J. Bass. Stay the Hand of Vengeance: The Politics of War Crimes Tribunals, (2002).
[14] In addition to an obligation to prosecute, there has been an emergence of a current understanding of an obligation to protect those at risk of violence as codified by the Responsibility to Protect at the World Summit in September 2005.
[15] Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime* In *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. 1 - General Considerations*. (Neil Kritz ed. 1995)
[16] Ellen Lutz and Kathryn Sikkink. *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, Chicago J. of Intn'l Law 2(1):1-34 (2001)
[17] Gibson, *supra* note 4.

The increased application of transitional justice sparked the emergence of a field of practice dedicated to the successful implementation of similar institutions to those noted above. Diverse international organizations attempted to assist in this endeavor. For example, in June 2007, Amnesty International produced a report on how to implement a truth commission. The United States Institute of Peace currently runs a transitional justice research section as part of its Rule of Law mandate. These more specific efforts were supplemented in 2008 when the Chicago Council on Global Affairs released the Chicago Principles on Post-Conflict Justice which were meant to serve as a set of guiding principles for transitional justice implementation. And finally, the practice of transitional justice was formally institutionalized with the creation of the International Center for Transitional Justice in 2001 whose mission is to assist in the global promotion of accountability and justice through assisting in local capacity building and institutional creation of transitional justice.

Along with the practice of international and domestic transitional justice has come a burgeoning field of academic scholarship dedicated to understanding justice in a transition or post-conflict period.[18] This work attempts to shed light on the selection,[19] implementation[20] and outcomes[21] of transitional justice around the world. Originally this work was concerned with the moral

[18] See Paige Arthur, *How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice*, *Human Rights Quarterly* 31: 321-367 (2009) for a review of the history of the transitional justice literature
[19] Carsten Stahn. *The Geometry of Transitional Justice: Choices of Institutional Design*. Leiden J. of Intn'l Law 18: 425-466. (2005)
[20] Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen. *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, Human Rights Quarterly (31): 163-220. (2009) .
[21] Oskar Thoms, James Ron and Roland Paris, *Does Transitional Justice Work? Perspectives from Empirical Social Science*, Report of the Canadian Department of Foreign Affairs (2008)

imperative of implementing justice in the post-conflict period.[22] Later, however, this work shifted focus to a more institution specific analysis of justice.

While commonly viewed positively, this area of research is not without controversy. Indeed, the field of transitional justice scholarship should be viewed as a highly contested arena. Bell, for example, challenges the very notion of a scholarly field of transitional justice at all.[23] She argues that the concepts of transitional justice really belongs among international legal scholarship and any attempts to broaden this field are simply diluting the waters. Others disagree, trying to incorporate as many distinct bodies of work as possible.[24]

There is also debate surrounding the core premises of transitional justice. While generally supportive of the approach to post-conflict/regime transitions outlined above, there are some debates about when as well as what to implement and by whom. For example, there is a large debate in both the policy and scholarly communities regarding the timing of justice implementation.[25] Because transitional justice is implemented in periods of substantial political change, post-conflict institutional responses can be strong signaling mechanisms to both exiting and incoming elites regarding the future of a given country. Due to this uncertainty, countries in transition often choose to ignore the abuses of the past in favor of a peaceful transition,

[22] Samuel Huntington, Political Order in Changing Societies (1968) and Guillermo O'Donnel and Philippe C. Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies, (1986)
[23] Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, Int'l J. of Transitional Justice. 3: 5-27. (2009)
[24] Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, J. of Law and Society, 34(4): 411-40. (2007)
[25] David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society* in Truth v. Justice: The Morality of Truth Commissions. (Rotberg and Thompson ed. 2000)

implementing amnesty or granting exile.[26] While the early call for transitional justice pushed for immediate prosecution, Snyder and Vinjamuri argue instead for a "logic of pragmatism" that highlights the complex inter-dynamics of post-conflict parties as well as the role of spoilers.[27] An additional debate in the literature explores the tradeoff between information gathering processes such as truth commissions and those processes which preference legalism, such as trials.[28] Legal trials offer incentives to those accused to withhold information that may be socially useful, while truth processes often don't allow for criminal prosecutions or more sever forms of punishment (e.g. prison terms).[29]

In addition to questions of timing and the type of institution there has been increasing discussion in the literature about the "who" of transitional justice on both the delivery as well as recipient sides. For example, some research stresses the importance of locally driven processes that respect cultural legacies of justice, such as the increased attention on Mato Oput in Uganda. Included in this debate are the division between national and international processes and an increasing move towards hybrid institutions (such as the courts in Cambodia and Sierra Leone). Gendered responses and the focus on women's participation in transitional justice have challenged a male-centered justice paradigm as well.[30] And finally the new survey work of Kulkarni and Backer suggest that increased attention should be paid to the specific needs of victims and their interactions with transitional justice processes.

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[26] Jack Snyder and Leslie Vinjamuri, *Trials and Errors: Principles and Pragmatism in Strategies of International Justice*. Int'l Security 28:5-44 (2003/04). This is commonly referred to as the "peace versus justice" debate.
[27] *Id.*
[28] Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions, (2001).
[29] For an overview of these debates see Rotberg and Thompson (2000).
[30] Nahla Valji, Gender Justice as Transitional Justice: Exploring Rwanda's Experience, Paper presented at the annual meeting of the ISA's 50th ANNUAL CONVENTION "EXPLORING THE PAST, ANTICIPATING THE FUTURE"(2009).

The developments and differences identified above are significant but not crucial to the current research effort. While there is debate over form and structure, those supporting transitional justice do so with the normative assumption that these processes will lead to the favorable justice package. While the literature outlines a variety of reasons why these goals might not be met, we have currently failed to theorize the deliberate sabotaging of the package on the part of the state for different ends. What is important for us is that although there are disagreements about the form, content and timing of diverse approaches to the topic, *there is still a commitment to the overall project of transitional justice for its "favorable" ends* (i.e., what it can bring). Why is this the case? We turn to this below.

All Good Things Go Together: Understanding the Favorable Justice Package (FJP)

We maintain that scholars, social movements, NGOs and governments around the world are in favor of transitional justice because they proceed on the normative assumption that the relevant processes are put in place in order to advance the liberal democratic goals of the domestic and international communities.[31] In short, post-conflict/transition institutional responses have become infused with normative assumptions regarding the promotion of truth, peace/non-violence and democracy. For example, Amnesty International argues that a lasting peace and the rule of law is contingent on "truth, justice and reparation".[32] This message has been enforced overtime through the political and human rights discourse leading to the FJP celebrated today. Below, we outline the goals of the Favorable Justice Package as developed in the literature as well as by practitioners of transitional justice.

[31] Arthur, *supra* note 18.
[32] Amnesty International, Rwanda Abolishes Death Penalty, 2 August 2007.

Although distinct institutional forms are unique in many respects, conventional wisdom maintains that the general goals of each transitional justice process are the same. These goals can be broadly classified in three complementary concepts: (1) to promote truth and reconciliation, (2) to prevent the resumption of armed conflict and (3) to increase political legitimization of the post-conflict regime as well as democracy. Each is discussed briefly.

Truth and Reconciliation

One of the main objectives ascribed to the FJP is the promotion of truth and reconciliation.[33] These goals are accomplished through the development of a historical record that overcomes denial of the events, provides psychological healing and dignity to the victims as well as creates a path for national acknowledgement and recovery.[34]

As generally conceived, post-conflict/transitional justice institutions are supposed to establish an "accurate" record of a country's past regarding the wrongdoing of the previous regime (i.e., a definitive accounting of exactly who did what to whom, when, where and occasionally why). This record is necessary in order to create a common understanding around which different parts of the population could rally.[35] Such coherence is believed to be essential for the building of democracy and civil society.[36]

[33] See Jon Elster, Closing the Books: Transitional Justice in Historical Perspective (2004), Hayner 2001 *supra* note 28, Neil J. Kritz Transitional Justice: How Emerging Democracies Reckon with Former Regimes (1995), Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (1998) O'Donnel and Schmitter, *supra* note 22, and Zalaquett, Jose, *Truth, Justice and Reconciliation: Lessons for the International Community*, In Comparative Peace Processes in Latin America (Cynthia J. Arnson ed. 1999)
[34] See Browyn Leebaw, *The Irreconcilable Goals of Transitional Justice*, Human Rights Quarterly 30 (95-118) (2008) for both a review and a critique of truth goals.
[35] For work on the construction of conflict frames see Loyle (2010).
[36] Hayner 2001, *supra* note 28.

In addition to data collection, truth-telling and psychological healing, FJPs are believed to provide national reconciliation (a community's ability to both understand and integrate into a new political entity[37]) through deliberation and public acknowledgement of past violations. This task is the most difficult to attain and arguably the most important FJP goal. Transitional justice facilitates these objectives by marking an official break with the past which allows for a greater social healing that is not possible if issues, actions and actors of the past are left unaddressed. Similar to psychological healing, the presence of an institution (e.g., truth commission or amnesty hearing) to acknowledge wrongdoings allows people to overcome their differences and get on with their lives as non-revenge seeking, deliberative citizens.[38]

Ending and Preventing Future Conflict

Although the goals of providing truth and reconciliation are important, the transitional justice literature argues that post-conflict/transition responses are also essential in securing an end to large-scale political violence.[39] This is largely achieved through the same measures identified above with regard to creating records, psychological healing and establishing reconciliation. In this context, however, the outcome is not the creation of a new series of relationships and behavior patterns between citizens and political officials; rather, it is the cessation of a series of old relationships and behavior patterns. Specifically, two types of conflict are discussed.

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[37] Gibson, *supra* note 4.
[38] Amy Gutmann and Dennis Thompson, *The Moral Foundations of Truth Commissions* In Truth v. Justice: The Morality of Truth Commissions (Rothberg and Thompson ed. 2000)
[39] See Elster *supra* note 33, Human Rights Watch, "None So Blind as Those that will Not See" (2009) http://www.hrw.org/en/news/2009/11/26/rwanda-none-so-blind-those-will-not-see, Tove Grete Lie, Helga Malmin Binningsbo and Scott Gates, Post-Conflict Justice and Sustainable Peace (2007) (unpublished manuscript, on file with author) and Thiedon *supra* note 7.

A primary concern for transitional justice institutions is the reduction of violence within a particular territorial domain and the prevention of violence in the future within the same locale. This makes sense. Conventional wisdom and current literature argues that a failure to adequately deal with the past will lead to retribution killings, mob justice and a future resumption of conflict.[40] Transitional justice is therefore seen as essential for addressing individual grievances, holding individuals accountable and strengthening the rule of law in a post-conflict, transitional context.

The restoration of domestic order is not only good for the nation-state of interest but it is good for those nations surrounding it as well. Specifically, transitional justice advocates argue that domestic mechanisms of accountability are crucial for establishing a global understanding of human rights.[41] The logic here is straightforward: if a violent political leader in one country watches another violent political leader be held accountable and punished for her/his violations, then the current leader (either of the same or a different country) will be less likely to engage in the same activity, committing the same "crimes."[42]

Increased Political Legitimization and Democracy

In addition to promoting truth and reconciliation as well as ending conflict, Favorable Justice Packages are believed to have a legitimizing as well as democratizing effect for those regimes that use them. As conceived, transitional justice efforts outline the institutional reforms

[40] Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, Law and Social Inquiry 51-78. (1995)
[41] See Amnesty International 2007 *supra* note 32, and Lutz and Sikkink *supra* note 16.
[42] New work by Monkia Nalepa and E. Powell, The International Criminal Court – spoiler or promoter of democratization? International Transitional Justice and Peaceful Democratic Transitions, *Paper presented at the annual meeting of the International Studies Association (2010)* suggests that ICC indictments could actually increase conflict by decreasing a leaders willingness to peacefully transition from office.

necessary to legitimate a new regime and demonstrate a normative shift away from the abuses of former political leaders. By both highlighting previous abuses and holding perpetrators accountable, post-conflict institutional responses attempt to break away from these earlier activities/actors. Beyond simply emphasizing this break, the argument asserts that these efforts place responsibility with past institutions and perpetrators, which are presumably different from the ones engaging in post-conflict reform. Consequently, these institutions force a new conception of the nation that is not defined "by reference to its ancientness, but (rather) in its affirmation of the uniqueness of the present".[43]

Not only do post-conflict institutional responses legitimate a new regime, but they have become part of democracy-building as well. For instance, Gutmann and Thompson argue that there is a deliberative democratic component to truth commissions and other transitional justice mechanisms that teach citizens principles necessary for the development of a new democracy and strengthening of civil society which are vital for the new democracy to function (i.e., respect for the rule-of-law and political participation).[44] Similarly, the Inter-American Commission on Human Rights argues that the *information-gathering* component of transitional justice is essential in the democracy-building process. Indeed, the Commission found that "(t)he right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems".[45] Involvement in the one facilitates the development of the other.

[43] Richard A. Wilson, The Politics of Truth and Reconciliation in South Africa (2001) at 16.
[44] Gutmann and Thompson *supra* note 38.
[45] Amnesty International 2007, *supra* note 32 at 5-6.

Subverting Justice:
Understanding the Unfavorable Justice Package

While much work has been done in the transitional justice literature to outline and explore the favorable parts of the justice package (explicitly and implicitly), comparatively little attention has been paid to the ways in which justice processes can be used for alternative political objectives.[46] In essence, the problem with the existing framework is that it assumes good intentions on all sides. This is an important assumption because, as we argue, there is nothing inherently good about justice packages and the institutions, behaviors or laws associated with them. In fact, the opposite could be said to be true, which we demonstrate below.

Although research on the topic has been limited, we do acknowledge that some of the most recent literature has begun to critically evaluate the political motivations for justice implementation. For example, in her work on the former Yugoslavia Subotic argues that in Serbia and Croatia transitional justice was complied with in order to further domestic political agendas as well as respond to international pressure from the ICTY often at the expense of domestic transitional justice goals.[47] Similarly, Nalepa's work on lustration in the Eastern European Countries argues that the decision to implement or not implement lustration processes in these countries is largely tied to the degree of culpability of the entering opposition party and in this way is largely a political calculation.[48] While useful in challenging existing research, we take these insights one step further and argue that sometimes the utilization and manipulation of

[46] A critical work on transitional justice, in general, exists. See Paris, Roland, At War's End: Building Peace After Civil Conflict (2004); David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?* Int'l Studies Review (6): 355-380 (2004), PaulVan Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission,* J. of Int'l Affairs. 52(2) (1999)
[47] Jelena Subotic. 2009. Hijacking Justice: Dealing with the Past in the Balkans (2009)
[48] Monika Nalepa, Skeletons in the Closet: Transitional Justice in Post-Communist Europe (2010)

transitional justice processes is done with the direct intention of undermining justice efforts and consolidating political power.

With this in mind, we explore the ways in which the Unfavorable Justice Package (UJP) is used to subvert the commonly prescribed normative goods identified above. In this way the very same institutions, laws and behaviors that are implemented to promote the FJP can lead to very different outcomes. Instead of supporting truth, peace and democracy, the objectives of the UJP are to (1) promote denial and forgetting, (2) perpetuate conflict and (3) legitimize authoritarianism as well as state repression. Below, we outline the ways in which the same practices can be used to promote these generally *unfavorable* political ends.

Promoting Denial and Forgetting

At its extreme, there is an assumption in the transitional justice literature that relevant mechanisms seek to find the real "truth" of what happened and present this to the post-conflict/transition society. While institutional responses work to present a comprehensive as well as unified historical narrative, the degree to which these mechanisms present "truth" (all the relevant facts of the matter) is often contested. Additionally, exactly *whose* truth is presented in the final reports and policy prescriptions of the relevant institutions as well as how truth-production is undertaken frequently becomes a controversial issue.[49] The promotion of denial and forgetting, therefore, becomes one of the central components of the Unfavorable Justice Package. How is this done? Essentially, this is achieved by restricting the narrative of the

[49] See Johan Pottier, Reimagining Rwanda; Conflict, Survival and Disinformation in the Late Twentieth Century (2002) and Kirk Simpson, *Voices silenced, voices rediscovered: victims of violence and the reclamation of language in transitional societies*, Int'l J. of Law in Context. 3(3): 89-103 (2007).

transitional justice process, such as the designated mandate for the relevant institution, the content of the final report or by restricting access to the process for a specific group.

These concerns provide us with an important way to evaluate the magnitude of subversion of a post-conflict/transitional justice effort. For example, one could gauge the promotion/subversion of truth-telling by the degree to which distinct actors are incorporated into a process, given an opportunity to participate, draft, review and edit relevant materials/decisions as well as veto any aspect of the process that they do not believe to be valid. In short, the existence of the institution itself is less informative than popular incorporation and interaction with it.

In addition to a contested truth and restricted narrative, participation in the justice process could be restricted through the process mandate, i.e., the temporal scope or violations included under the jurisdiction of the process. For example, the National Commission for the Disappeared in Argentina (1983) focused only on the crime of disappearances. By limiting the focus of the information-gathering process to a particular type of crime, the process de facto restricted the definition of victim to only those who had suffered that particular crime and offered redress in the form of additional information only to those victims. Subversion of the FJP and development of the UJP through *denial and forgetting* can thus take place through restricting participation and intentionally limiting the "truth" narrative (e.g., restricting justice mandates).

Resumption, Continuation and Perpetuating Violent Conflict

Our next point concerns behavior associated with conflict. With reference to this factor, it is possible that instead of using transitional justice processes to end cycles of large-scale

conflagration and contestation, processes could be associated with or explicitly used to increase the level of subsequent violence within a society. Specifically, there are two ways that this could be done.

First, post-conflict/transition efforts can contribute specifically to violence surrounding the justice institutions themselves. For example, the targeting of witnesses and the retribution killing of perpetrators are both noted outcomes across different efforts. There are also cases of government-sponsored violence against judges and commissioners, such as in Chad when some commissioners of the Commission of Inquiry into the Crimes and Misappropriations went into hiding after receiving threats on their lives allegedly from government forces.[50] Increased crime and domestic violence surrounding justice practices would thus be evidence of a UJP. Of course, one might wonder why existing authorities might seek to contribute to increasing violence. Primarily this could lead to increasing suspicion or lack of confidence in the transitional justice effort itself. Alternatively, this could be done in order to eliminate someone or a group of individuals from the transitional process that is believed to be dangerous to a specific political interest. It is also possible that the violence itself would lead to increased calls for political order which could legitimize the government – especially if the violence did not exceed specific parameters.

Second, post-conflict/transition processes can spark a resumption of conflict in general and a deterioration of the political transition on the domestic level. Contention over the creation and implementation of a justice process can cause the newly established government to create

[50] Priscilla B. Hayner, *Fifteen Truth Commissions- 1974 to 1994: A Comparative Study*, Human Rights Quarterly 16(4) 4, 597-655 (1994).

security organizations and/or practices that could at once protect the existing status quo as well as eliminate potential rivals. This contention could provoke prior parties to the conflict to re-take up arms and/or fail to comply with the terms of a previously established peace agreement.[51]

While Favorable Justice Packages (FJPs) are characterized by an end or reduction of large-scale violence, UJPs can thus be used by relevant authorities as a cover for the continuance of post-conflict/transition violence either through the direct targeting of those involved in the justice process or though more indiscriminate levels of state repression directed at political opposition.

Legitimizing Authoritarianism and Repression

The third and last element of the Unfavorable Justice Package concerns the attempt to break with the past. While it may be desired by observers, advocates, activists and funders that transitional justice leads to a strong, liberal democracy, this is not always the case nor is it structured to be this way. Indeed, existing work on post-conflict/transition processes merely argues that these efforts seek to separate the current regime from the past.[52] This separation and consolidation of the current regime does not presuppose the democratic intentions of that new regime. The extent to which a transitional justice process legitimates democracy is dependent on the degree to which the new regime is democratic already as well as the ability of the process to strengthen the rule of law and participation in the post-conflict society. Two elements are discussed below.

First, the UJP is characterized by the legitimization and consolidation of an autocratic or authoritarian state. In this case, instead of working towards the development of democratic,

[51] See Snyder and Vinjamuri *supra* note 26 for examples of this type of conflict.
[52] Wilson *supra* note 43.

liberal ideals, transitional justice under the UJP consolidates authoritarianism. The separation of a new regime from the past is important for this type of government because under the guise of justice such behavior can deflect domestic and international attention away from authoritarianism and activities such as repression that are frequently associated with the political consolidation of this type of government. For example, there have been a number of prominent transitional justice cases in which the mechanism of justice was "hijacked" for specific non-democratic objectives.[53]

Of course, it is not always clear exactly how processes are used. However, the degree to which a justice process legitimates a *democracy* by advancing its component parts (e.g., free, fair and frequent elections, diverse and representative political parties, autonomous and effective separate powers as well as a constrained and responsive executive) could be used as a valuable metric for understanding the general intent of the actors involved and type of process being used.

Second, the degree to which a transitional justice mechanism supports (i.e., contributes to) democracy is also dependent on the extent to which the process strengthens the rule of law. Under the UJP, failed justice processes can serve to weaken citizen's faith in law by highlighting corruption and demonstrating social biases in favor of one particular group. Gutmann and Thompson's assertion that truth commissions are deliberative democratic mechanisms assumes that all groups in society have equal access to and desire participation in these institutions.[54] The failure of a post-conflict/transition process to favorably include all groups across society can lead to the alienation of particular groups, but can also lead to an increasing social distrust of the rule-

[53] E.g. Subotic *supra* note 47 details the Serbian and Croatian misuse of the ICTY for non-democratic purposes
[54] Gutmann and Thompson supra note 38.

of-law that these institutions purport. A particular group could also choose not to participate in the process either out of fear, distrust or disinterest. Instead of learning lessons of democracy, citizens can learn lessons of divisionism and autocracy. These are not the types of lessons discussed in the Favorable Justice Package; indeed, they point in the opposite direction.

In order to determine the democratic intentions of a justice package, therefore we must avoid the tautological reasoning that currently exists. Breaking from a past autocratic regime does not insure that the new regime will be (more) democratic. Rather, we should take care to measure the intentions of the regime through institutional as well as behavioral indicators of democracy.

The mechanisms discussed above are illustrated across Favorable as well as Unfavorable Justice Packages in the table below.

(Insert Table 1 about here)

Transitional Injustice in Rwanda

To illustrate what an Unfavorable Justice Package is and how it functions, we examine post-Genocide/Civil War Rwanda after 1994. Now, this is not to say that all justice efforts in Rwanda can be viewed as UJPs. Indeed, there have been significant advancements in the development of law and justice following the violence of 1994 within this country. We also do not make the claim that justice in Rwanda is not necessary. Following the Civil War and Genocide as well as the period after 1994 when further rebel violence took place, there is a clear need for all relevant parties to be identified and dealt with legally, politically and socially for both Rwanda as well as the international community to heal and develop. Rather, the purpose of this study is to

demonstrate how political goals can be advanced under the guise of a Favorable Justice Package which are essentially antithetical to the goals currently ascribed to transitional justice. This is done to caution against the undisputed acceptance, by the academic and policy communities, of all procedures associated with this approach to post-conflict/transition societies and to reveal an approach for how such subversions could be identified in the future.

A Brief History of the Conflict

Political tension in Rwanda has been an intermittent condition since the advent of independence in the 1960s.[55] After the departure of Belgian colonial rule and political domination of the minority Tutsi ethnic group, the majority Hutu government engaged in a series of pogroms against the Tutsi. This violence sparked a flow of refugees north into neighboring Uganda where they remained until internal discord within this country took place in the late 1980s.[56] In October 1990, an organized, militarized group of primarily Rwandan Tutsi based in Uganda, the Rwandan Patriotic Front (RPF), invaded Rwanda from the north. This invasion sparked a two-year civil war, ended through a UN intervention, which resulted in the signing of the 1992 ceasefire, the Arusha Accords. The resulting power-sharing agreement between the RPF and Rwandan government contributed to the further rise of extremist factions within the government as well as the Rwandan army.[57]

On April 6, 1994, an airplane carrying the Rwandan President, Juvenal Habyarimana, was shot down over the Kigali airport while returning from a regional summit in Dar-es-Salaam. The

[55] See Gérard Prunier. The Rwanda crisis: History of a Genocide (1995) and Filip Reyntjens, *Rwanda, Ten Years On: From Genocide to Dictatorship*. African Affairs 103(411): 177–210 (2004).
[56] Mahmood Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda (2002).
[57] Prunier *supra* note 55.

assassination of the Hutu president sparked a wave of massacres against ordinary Tutsis and Hutu political moderates (i.e., all those who were not supportive of the violent campaign) that would grow to violence of genocidal proportions. The assassination was also followed by the renewal of the RPF invasion – one which advanced quickly, capturing nearly half the country in a matter of weeks. The result of these events was devastating. In a little over 100 days before the RPF won the war and genocide ended, more than 800,000 people were killed throughout Rwanda. Upward estimates exceed a million.[58]

The Rwandan Approach to Justice

After the violence of 1994 was terminated, justice (i.e., the accountability and prosecution of those responsible for crimes during the conflict) was a major priority for Rwandans in general but political authorities in particular. The transition government stated that "(t)here can be no reconciliation without justice".[59] The path selected toward this end was unique. With extensive consultation from international actors, the Rwandan government engaged in three different justice efforts: the *International Criminal Tribunal for Rwanda* (ICTR), national-level domestic courts and Gacaca – each appearing to resolve the weaknesses of the others. We discuss each of these institutions in turn before moving to discuss how their implementation is actually leading to an UJP instead of a FJP.

The International Criminal Tribunal for Rwanda (ICTR). Created by the UN Security Council in 1994 immediately following the end of mass violence and sponsored as well as supported by the

[58] Commission Pour Le Memorial Du Genocide Et Des Massacres Au Rwanda, *Rapport Preliminaire D'Identification Des Sites Du Genocide et Des Massacres D'Avril-Juillet 1994 Au Rwanda*, Ministere de L'Enseignement Superieur, De La Recherche Scientifique Et De La Culture, Kigali, Rwanda. (1996)
[59] Government of Rwanda (January 28, 2009) http://www.gov.rw/government/genocide.html.

international community, the ICTR was intended to handle the "prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994."[60] Accordingly, the goals of the ICTR are to "contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region" by punishing those accountable for violent activity.[61] As structured, the ICTR was created in order to address a number of problems that it was not believed that the Rwandan government was able to tackle at the time without international legal support.

First, there was the history of cyclical conflict and revenge in Rwanda (and neighboring Burundi) that had plagued the region for several decades.[62] Both the international community and the transitional government had an incentive to prevent the repeated outbreak of violence and mass migrations that had been historically ravaging the country (and the region). It was understood that an international criminal tribunal would go a long way to insuring that violence would not resume by demonstrating a commitment to justice over revenge and retribution. Second, the ICTR was created in order to facilitate the capture of the "big fish" – the planners and organizers of the Genocide who had already fled to other African countries such as Zaire and Kenya.[63] Rwanda's lack of extradition treaties and its relationships with these countries threatened the transitional government's ability to successfully capture and try suspects. Finally, the ICTR was implemented by the international community and supported by the Rwandan government in an effort to help solve the legitimacy crisis that arose between the minority and

[60] United Nations. "Statute of the International Criminal Tribunal for Rwanda." (1994)
[61] *Id.*
[62] See Prunier *supra* note 55 and Reyntjens 2004 *supra* note 55.
[63] Victor Peskin, International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation, (2008).

Anglophone Tutsi government as well as the Francophone Hutu and remaining Tutsi populations. Through the ICTR, the government demonstrated to both the international community and skeptics within Rwanda that the RPF-led transitional effort had a commitment to the rule of law and not patterns of revenge.

Although well intentioned, the ICTR had some limitations. For one, it was not structured to deal with nor was it capable of trying all the persons believed to be involved with the violence. The ICTR was only expected to deal with the persons "responsible for genocide" taken to mean the leaders and organizers not lower level participants. As the ICTR's mandate draws to a close, only 52 cases have been completed with 22 cases in progress and 2 individuals awaiting trial.[64] Seemingly in an effort to fill this void, new legislation and procedures were established in Rwanda.

National-Level Courts. Immediately following the conflict, the transitional government initiated a massive legal plan[65] of arrests and prosecutions for suspected perpetrators living in the country.[66] The establishment of courts and relevant proceedings (trials) relied on both new and pre-existing Rwanda Criminal law, functioning in accordance with the new Rwandan judiciary. Unlike the ICTR, individuals in the national court system were to be charged and tried according to Rwandan and not international law. This effort was extensive. By early 1995, over 6,500 suspected genocidaires were being held in Rwandan prisons, by 2005 that number was close to

[64] http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx. Accessed on November 22, 2010.
[65] Rwandan Organic Law 40/2000.
[66] United States Institute of Peace (USIP), Rwanda: Accountability for War Crimes and Genocide, Special Report No. 13. (1995)

72,000.[67] A major difference between the ICTR and the Rwanda national courts concerns the issue of the death penalty which was legal in Rwanda until 2007.

Unfortunately, like most of the other bureaucratic infrastructure in Rwanda following the Civil War and Genocide, the existing judiciary was not quite up for the job. From over 800 judges before 1992, at the end of 1994 there were only 40 jurists remaining in the entire county.[68] This led to the identification and training of a large number of legal personnel as well as the creation of a large number of courts. Both were undertaken with amazing speed. Indeed, the National Gacaca Jurisdiction currently reports that there are 841 judges, 210 prosecutors and 910 judicial support staff, a number which surpasses the previous figures of 1992.[69]

While effort was extended, however, the infrastructure was not at the level necessary to match the number of individuals being brought into the system. This did not prevent the arrest of suspected perpetrators but rather it led to a backlog in the courts and an overflow in the Rwandan prison system which forced the development of yet another institution. This we discuss below.

Gacaca. The third component of the Rwandan justice package is the most unique within the case. In 2002, the government began the implementation of a more local-level institution termed "Gacaca" (literally translated to mean "justice on the grass").[70] Loosely based on the traditional,

[67] *Id.* See also: http://news.bbc.co.uk/2/hi/africa/4726969.stm.
[68] *Id.* The Rwandan government states that these numbers were slightly higher. The National Service of Gacaca Jurisdiction reports that before 1994 there were 758 judges and 70 prosecutors in Rwanda and in November of 1994 there were 244 judges and only 12 prosecutors (http://www.inkiko-gacaca.gov.rw/En/Generaties.htm accessed March 25, 2010).
[69] http://www.inkiko-gacaca.gov.rw/En/Generaties.htm. Accessed on May 29, 2010.
[70] For an overview of the international community's role in the construction of Gacaca see Oomen (2005).

pre-colonial justice structure in Rwanda,[71] these courts were designed to prosecute small-scale genocide crimes such as harassment and destruction of property – these constitute the majority of crimes within the national prison system. Rather than take up time within the already over-taxed domestic court, the government decided to use locally elected judges who were quickly trained on law and court proceedings. Unlike the international court system with its adherence to international law and focus on accountability and punishment as well as the national court system with its emphasis on civil and customary law, Gacaca encourages the public confession of crimes, truth telling and community service/reduced punishments.[72]

Differentiating it from the other two processes, which were more concerned with establishing a record of what took place, punishing those involved and preventing future conflict, Gacaca has a slightly different purpose. This institution was intended to facilitate reconciliation through truth-telling and accountability for alleged participation. Specifically, it was intended to: 1) reconstruct the historical narrative, 2) speed up the justice process in Rwanda, 3) assist with the reconciliation of the country, 4) eradicate the culture of impunity and 5) prove to Rwandan society that it has the capacity to settle its own problems.[73]

How well it achieved these ends, is up to some debate. Some argue that Gacaca is uniquely designed for dealing with the specific justice and legacy issues emerging from the Rwanda genocide[74] whereas others question the legality of public testimony and the use of lay judges[75].

[71] Importantly, these traditional courts were never used for major crimes.
[72] Elizabeth Neuffer, The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda. (2002)
[73] http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm Accessed on March 25, 2010.
[74] See Phil Clark, *Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*. George Washington Int'l Law Review, 39(4) (2007) and Coel Kirkby, *Rwanda's Gacaca Courts: A Preliminary Critique.* J. of African Law. 50(2):94-117 (2006).

Subversion of Transitional Justice

On the surface, it appears that the efforts identified above support the normative aims of the "Favorable Justice Package." As one would expect, the Rwandan approach combines international, national and local processes with the stated goals of truth and reconciliation, peace as well as democracy. However, recent critiques of the justice process in Rwanda have called into question the ability of this transitional justice package to accomplish those goals. Indeed, instead of promoting truth, peace and democracy, it is being revealed that elements of the ICTR, national courts and Gacaca have been used to forward the promotion of denial and forgetting, renewed violence and the legitimization of an autocratic regime, promoting the "Unfavorable Justice Package." These claims are further discussed below.

Promoting Denial and Forgetting

As discussed earlier, the current literature and conventional wisdom suggests that transitional justice is used to promote truth and reconciliation. This goal is accomplished through developing a historical record that overcomes denial, provides psychological healing and promotes social reunification. In the Unfavorable Justice Package, however, subversion of these goals through the same institutional process involves limiting the space for truth-telling and controlling expression. In post-genocide/civil war/transition Rwanda, the space for truth has been constricted through the support of targeted remembering and state-sanctioned, scripted truths.[76] This prompts individuals to assess the content, scope and target of transitional justice institutions not simply their existence.

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[75] Anuradha Chakravarty, *Gacaca Courts in Rwanda: Explaining Divisions within the Human Rights Community*, Yale J. of Int'l Affairs*:* 132-145 (2006).
[76] Reyntjens 2004 *supra* note 55.

For example, targeted remembering in Rwanda has been supported through the construction of a dominant political narrative regarding Rwandan history, specifically the history of the Genocide.[77] To date, this narrative has been predominantly one of Hutu perpetration and Tutsi victimization. As such, the historical and political focus in as well as outside of Rwanda has been largely one concerned with the Genocide not the Civil War (which involved the RPF rebels and the then Rwandan government), reprisal killings by the RPF or state repression of the post-genocide/RPF government against diverse targets.[78]

Now, it is clear that counter narratives exist. For example, much of the current work on Rwandan perpetrators stresses the way in which fear surrounding the Civil War served as an important impetus for participation in the genocide.[79] This work implies that without the RPF invasion in 1990 and then again in 1994 the violence would have transpired differently and potentially with much less bloodshed. There was also substantial violence throughout the Civil War. During this time, homes were destroyed, people were killed in military crossfire and others were targeted specifically, accused of spying for the other side. Additionally, immediately following the Civil War and Genocide, human rights organizations drew attention to other forms of violence taking place in Rwanda. As but one instance of this, in 1999 Human Rights Watch published an account of the violence which highlighted RPF reprisal killings. Together this variation in type of violence and victims comprised the conflict in Rwanda which lasted from

[77] E.g. Pottier *supra* note 49.
[78] Christian Davenport and Alan Stam, *Rwandan Political Violence in Space and Time*, Working Paper and Dataset, www.genodynamics.com (2009) and Reyntjens 2004 *supra* note 55.
[79] Reva Adler, Cyanne Loyle and Judith Globerman, *A Calamity in the Neighborhood: Women's Participation in the Rwanda Genocide*, Genocide Studies and Prevention 2(3) (2008)

1990 through 1997.[80] The failure of the justice package to take these other forms of violence into account restricts understanding of the truth.

Directly relevant to the topic of this paper, the official version of what took place in Rwanda is explicitly linked to the justice package in Rwanda. Criminality in Rwanda has been restricted to a discussion of crimes of genocide avoiding further inquiry into the Civil War and potential RPF violations. The ICTR, for example, has frequently bent to the will of the Rwandan government on issues of mandate, docket order and the restriction of crimes to those of the past Hutu-dominated regime.[81] In many ways, the mandate of the ICTR has been exclusively restricted to the crime of genocide which effectively has eliminated a discussion of RPF atrocities during and immediately following the Civil War. The impossibility of this discussion being pursued was clearly evident when the first Chief Prosecutor of the ICTR, Carla Del Ponte, began an open investigation of RPF crimes in December 2000. When the investigation began, the Rwandan government banned international travel for crucial ICTR witnesses. The timing of this ban was in line with a number of witness violations and abuses allowing the Rwanda government to credibly claim that it was protecting its citizens until more reliable witness procedures could be put into place. But, this ban also served as a substantial reminder to the Office of the Prosecutor, that the ICTR would cease to function without Rwandan government support.

In his work on the ICTR and ICTY (International Criminal Tribunal for the Former Yugoslavia), Peskin argues that the development of national victimhood and international culpability is an essential reason for the inability of the ICTR to effectively compel Rwandan cooperation in the

[80] The newer report from the United Nations extends these activities further – both spatially and temporally.
[81] Victor Peskin, Victor, *Beyond Victor's Justice? The Challenge of Prosecuting the Winner at the International Criminal Tribunals for the Former Yugoslavia and Rwand*a, J. of Human Rights 4: 213-231. (2005)

process.[82] It is indisputable that the international community failed to aid Rwanda in its time of need. The inadequacy of the response from the UN Peacekeeping force (UNAMIR), the failure of the international community to implement effective sanctions as well as the failure of the media to quickly and accurately garner international public support, all contribute to an international guilt which has been timely and effectively harnessed by the RPF government, called by Reyntjens a "genocide credit".[83] Over the last 15 years, the RPF government has worked to propagate a rhetoric of victimhood which seeks to play upon this international guilt in support of Rwandan political aims – notably security and non-interference in both domestic as well as foreign policy.[84]

Similarly and more understandably, national courts and the domestic judicial setting within Rwanda have been subject to the influence of the current Rwandan government as they have become mired by laws concerning "genocidal ideology" and "divisionism." For example, the Media Law of 2002 legislates freedom of the press including freedom from censorship but the same legislation imposes criminal sanctions (with jail time of up to five years) for the propagation of genocidal ideology and "divisionism" – phrases falling under the jurisdiction of state discretion. The latter in particular refers to anything determined to sow the seeds of ethnic conflict such as accusing the existing government of having engaged in previous violent action or unjustifiably restraining political freedom. For example, genocidal ideology includes creating "confusion aiming at negating the Genocide which occurred", a phrase which could be used to suppress legitimate debate. As a result, this legislation causes a great deal of self-censorship within the press community.

[82] Peskin 2008 *supra* note 63.
[83] Filip Reyntjens, *Rwanda, L'Histoire Secrete (review)*, Africa Today 54(3): 141-144. (2008)
[84] Pottier *supra* note 49.

While genocidal ideology and divisionism are defined with regard to the media, these same restrictions apply to all Rwandan citizens. Wary of how such laws could be viewed, the current government argues that this level of restriction is an essential step to prevent the resumption of conflict in Rwandan society. But the term, "genocidal ideology[85]" has come to include most political challenges to the current administration. In a number of well-known cases (such as that involving Célestin Sindikubwabo of Nyabikenke cell), political opponents to the RPF government have consistently been accused of "crimes of genocide" and "divisionism." This rally against genocidal ideology has also been used to restrict the development of majority political parties who could represent the arguably underserved Hutu population. The application of this law is clearly taking place on a large scale. Between 2007-2008, 1,304 cases involving "genocidal ideology" were tried in the Rwandan courts.[86] While there is no way to accurately determine the nature of their alleged crimes, these accusations highlight one way in which justice through the national courts can be used to subvert the broader revelation of truth. In addition, these prosecutions create a climate of fear which spills over into other areas of the justice process.

[85] Genocidal ideology is currently defined as: "manifested in any behavior characterized by evidence aimed at depriving a person or a group of persons of common interest of humanity like in the following manner:

1. threatening, intimidations, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting to hatred;
2. marginalize, laugh at one's misfortune, defame, mock, boast, despise, degrade, create confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;
3. kill, planning to kill or attempting to kill someone following the genocide ideology" (Article 2, Rwandan Law No 18/2008).

[86] Human Rights Watch, Law and Reality: Progress in Judicial Reform in Rwanda, HRW Index No.: 1-56432-366-8 (2008)

One can view Gacaca in a comparable light, advancing a UJP over an FJP. By their mandate, the Gacaca courts focus only on crimes of genocide. As outlined above these courts were created to address the prison backlog of genocide perpetrators and to bring greater levels of information to victims of the genocide. This focus is based in part on the grave nature of the genocide crimes. It can be argued that the nature of these crimes presupposes their precedence. The Rwanda government suffers from limited resources and therefore it might not be possible to address all crimes from the Genocide/Civil War period. However, this exclusion has not gone unnoticed across the Rwandan population. Recent work by Loyle suggests that exclusion from the Gacaca process is causing animosity and political disenfranchisement among people who were victims of similar crimes but during different periods of violence (e.g. during the Civil War or during post-genocide violence).[87] These findings apply to people who were victims of civil war violence as well as those who were victims of rebel violence from 1995-1997. It is also worthy of note that of all the violence experienced in Rwanda, crimes of genocide are the only body of crimes to which the current government can in no way be implicated.

Perpetuating Conflict

Instead of ending conflict, adherence to the Unfavorable Justice Package is demonstrated by the perpetuation of conflict in a given country. In Rwanda, far from reducing violence, the justice package in Rwanda allows the current government to increase state repression and domestic as well as international conflict. Work of the national courts and the Gacaca process, and to a lesser extent that of the ICTR has been used to justify strong state control and the invasion of Zaire

[87] Cyanne E. Loyle, Justice on Every Hill: The Micro-Foundations of Rwanda's Gacaca Process, *Paper presented at the annual meeting of the American Political Science Association* (2010)

(now the Democratic Republic of Congo). In a sense, the implementation of justice institutions is allowing the current government to successfully mask these different forms of violence.

How was this accomplished? Through the creation of a genocide-focused conflict narrative within the ICTR, Rwandan national courts and the Gacaca process, discussed above, the Rwandan government developed a strong anti-genocide message shrouding the termination of genocide violence (the "never again" campaign). This narrative homogenizes the violence experienced in Rwanda and simply identifies it as a horrible period in Rwandan history, never again to be repeated. The narrative argues that the crisis, in large part, was ushered in by "bad" leadership. As the Rwandan people had failed to prevent this crisis in the past, it is now the responsibility of the current Rwandan government (and its implied "good" leadership) to make sure genocide does not happen in the future. This narrative sets the stage for allowing the current government to take liberties and to use a heavy hand in the consolidation of state power without accountability or restriction.[88]

The message being put forward is not one of non-violence, rather, it is a strong message against the resumption of a specific form of violence: *genocidal* violence against the Tutsi population. The perpetuation of other forms of conflict has been persistent in Rwanda since after the Genocide in large part to prevent this resumption; in this context, violence to prevent violence is not viewed as violence at all. In fact, the violence to prevent violence narrative is especially antithetical to the FJP because it can take place without discussion and/or outrage from both domestic as well as especially international actors.

[88] Loyle *supra* note 87.

Clearly state repression has been a persistent component of the post-1994 Rwandan state. Indeed, one of the reasons that the extradition of alleged genocide criminals back to Rwanda was halted in the immediate post-genocide period was the insistence by the transitional government on the use of the death penalty.[89] In the immediate aftermath of the genocide, a number of people were accused, tried and executed in a short period of time and without a legalized form of appeal. By 1998, 22 people convicted of genocide crimes had been tried and executed. The procedural fairness of a number of those trials was significantly in question.[90]

In recent years, the problem persists. For example, in July 2007, Human Rights Watch reported that the Rwandan National Police had shot and killed at least 20 detainees in 10 separate incidents in the six months between November 2006 and May 2007.[91] Currently, between 800,000 and 1 million people are accused of 'crimes of genocide' under the Gacaca courts. This is approximately one out of every five adults in Rwanda. While current conflict statistics on the Genocide suggest that the number of perpetrators could be at this level,[92] many have accused the RPF government of hiding behind current justice institutions in order to prosecute political dissidents and other challengers to the current regime.[93] Exactly how one tells the difference between the numerous actors is unclear and this is part of the problem. Within a Favorable Justice Package, we would be easily able to separate them into categories of alleged genocide perpetrators and political dissidents. Within an Unfavorable Justice Package, we would not and

[89] The death penalty in the Rwanda has been subsequently banned in order to facilitate the transfer of the remaining ICTR suspects. The reversal of the death penalty was a condition for this transfer.
[90] Amnesty International 2007 *supra* note 32.
[91] Human Rights Watch. There Will Be No Trial: Police Killing of Detainees and the Imposition of Collective Punishment, (2007).
[92] Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, J. of Genocide Research 6(1): 85-98 (2004)
[93] Amnesty International 2007 *supra* note 32.

indeed we would expect that the number of individuals being implicated would continue to increase as deemed necessary by existing political authorities.

Finally, in addition to justifying domestic violence in the form of state repression, the narrowly constructed justice focus is bolstered by the reality of a threat from outside. Following the Civil War, Genocide and the RPF victory in 1994, former members of the Rwandan army and militia members who participated in the Genocide fled across the border into Zaire. This group formed a rebel movement which launched periodic attacks into Rwanda through 2001. The Rwandan government has labeled this group as former genocidaries (i.e., those who perpetrated genocide) whose goal is the complete annihilation of the Tutsi in Rwanda.[94] Others have argued that this group represents a legitimate, militarized, political opposition to the current government.[95] This claim by the Rwandan government has justified the continued conflict in the Democratic Republic of Congo which has lead to the death of millions of people and the theft of large amounts of Congo's lootable resources.[96] The degree to which the rebels are an actual military threat to the current Rwandan government is under debate.[97] As a hallmark of the UJP, justice processes in Rwanda are serving to increase and sustain violence in the country instead of promoting a reduction of conflict and leading to regional peace.

Legitimating Authoritarianism

While the current literature stresses the democratizing effects of the Favorable Justice Package, Rwanda provides an example of the justice system working to consolidate an authoritarian

[94] For an extensive discussion of anti-RPF collaborations throughout Africa see Reyntjens 2004 *supra* note 55.
[95] United Nations. Final Report of the Group of Experts on the Democratic Republic of Congo. S/2009/603 (2009)
[96] Filip Reyntjens. The Great African War: Congo and Regional Geopolitics, 1996-2006 (2009)
[97] International Crisis Group. 2003. "Rwandan Hutu Rebels in the Congo; A New Approach to Disarmament and Reintegration". *ICG Africa Report No.63*, 23 May 2003.

regime and restrict political participation. This is the final component of the Unfavorable Justice Package. The current Rwandan government is by most accounts a far cry from a functioning democracy. While elections have been held, their validity has been questioned and the lack of a viable opposition party has essentially made the country a single-party state under the firm grip of one individual – Paul Kagame.[98] Far from promoting liberalization and democratization, therefore, the post-conflict institutional response in Rwanda has helped establish and strengthen an increasingly autocratic state.

Where do we see this? The ICTR, national courts in Rwanda and the Gacaca courts have all worked to legitimate the current Rwandan government, but the ability of these processes to legitimate a democratic government is contingent on the democratic potential of the state itself. Gacaca was presumably established to promote the rule of law in Rwanda and to strengthen support for the existing regime by demonstrating that commitment. By separating the current Rwandan government from past ones, on the surface Gacaca appears to be legitimating the democratic order as suggested in the literature. Careful inspection of the political climate in Rwanda, however, draws this claim into question.

In addition to legitimating a non-democratic regime, the exclusionary nature of the justice process, as outlined above, also hampers democratic participation in the processes themselves. Due to the focus on crimes of genocide, the justice package (specifically Gacaca) has moved towards an anti-Hutu criminalization of Rwandan society. Because of the nature of the Genocide and the targeting of Tutsi and Hutu political moderates, prosecuting crimes of genocide is a fairly

[98] See Christian Davenport, State Repression and the Domestic Democratic Peace (2007) and Reyntjens 2004 *supra* note 55.

one-sided affair. When Gacaca was initially announced, there were minor population movements within the Hutu peasant community as people, fearful of judicial persecution, fled the country. While massive levels of nation-wide persecution have not come to pass, the anti-Hutu message in Rwanda's domestic and international political narrative is still strong.[99]

Conclusion

We began this paper with an interest in examining the normatively appealing objectives currently underlying the existing transitional justice literature and policy community – truth, reconciliation, violence prevention and democracy; we referred to this as a "Favorable Justice Package" (FJP). Specifically, we wished to explore exactly how the processes involved in typical transitional justice efforts could be turned against the stated/assumed objectives of the larger enterprise. We used the Rwandan post-conflict experience to provide an example of the way in which a FJP can be subverted for other goals, revealing an "Unfavorable Justice Package" (UJP). Within the conclusion, we seek to identify some of the implications and limitations of our research. Specifically, there are two areas of interest: lessons concerning transitional (in)justice generally and Rwanda in particular.

What does our study tell us about transitional injustice? We have consistently argued that identifying as well as tracking the goals and subsequent effects of transitional justice packages could not be more important. At the same time, the uniform deference to the Favorable Justice Package (where an end to conflict, democracy, freedom and justice go together) must be seriously questioned. Indeed, the emergence of the Unfavorable Justice Package (where the

[99] Amnesty International, Rwanda-Gacaca: A Question of Justice, AFR 47/007/2002 (2002) and Alana Tiemessan, Alana, *After Arusha: Gacaca Justice in Post-Genocide Rwanda,* African Studies Quarterly 8(1) (2004)

perpetuation of conflict, autocracy and repression go together) is increasingly significant in light of growing international attention to and reliance on transitional justice measures as a part of post-conflict reconstruction. In the last decade alone, the World Bank, United Nations and the U.S. State Department have given considerable ideological and financial support to such efforts. While these processes may not always be a "success," it is important to mitigate the extent to which they are actually subverting the larger post-conflict/transition goals of the international community. Indeed, to do anything but investigate this topic is to possibly sanction the next wave of dictatorships and repressive governments under a guise of international justice.

In addition to drawing attention to the existing normative slant of the current transitional justice literature and policy, our research has identified three indicators of justice subversion that could be used to designate where this subversion is happening and hopefully how to identify as well as prevent it. Specifically, researchers and practitioners of transitional justice should focus on the level of *participation and inclusion* surrounding different processes. The ability of different groups to participate will have broader implications for the type of "truth" that is revealed as well as the potential democratic effects of the process. Attention should also be paid to the *level of violence* surrounding a justice process. Few post-conflict/transition societies are completely violence free, but the degree to which a particular justice process provokes violence, contention and state repression may shed light on underlying subversion. And finally, broader *characteristics of the new state* should be reviewed and monitored for democratic tendencies. Simply implementing a justice package does not and should not signal democratic intent. Rather, new governments should be monitored for their adherence to international human rights laws and other measures of democracy.

Identifying a subverted justice process is clearly not easy. It is also unlikely that individual processes are entirely "good" or "bad". Rather, the ability of scholar and policy communities to critically evaluate justice institutions will strengthen our ability to support the liberal democratic goals of post-conflict reconstruction. There must be extensive care put forward with the evaluation of specific cases and because of this the topic must be examined carefully and in detail. This is the direction that we feel future research, policy-making, advocacy/activism and funding must take.

What does our study tell us about Rwanda in particular? Our approach provides an interesting way to interpret historical and contemporary events in the country, as these events have seemingly followed exactly what a country transitioning from political violence should do. In this context, Rwanda has supported and implemented domestic as well as international efforts to collect information about what happened, communicate the findings to others, capture and punish those who were involved in previous violent action and, through these efforts, the government has argued that they will advance truth, reconciliation, prevent the resumption of violence and facilitate democratization.

Unfortunately, by couching *political* motivations in the obstruction of free and fair justice proceedings, the current Rwandan government is doing irreparable damage (both inside and outside of the country) to the development of the truth, societal reconciliation, rule-of-law and democracy; in essence doing "injustice in the course of delivering justice".[100] Indeed, through

[100] Barbara Oomer, *Donor-Driven Justice and Its Discontents: The Case of Rwanda*, Development and Change 36(5): 887-910 (2005)

restricting participation in justice processes, constructing a limited truth narrative and continuing high levels of political violence within and outside the country, the Rwandan post-conflict/transition response is doing little more than legitimating the current regime which has been moving toward greater authoritarianism and increased restrictiveness domestically as well as increased violence internationally. In order to acknowledge and criticize this subversion, the international community must recognize the ability of justice institutions to be used for other (less liberal democratic) aims. Greater attention must be paid to indicators of subversion such as decreased levels of participation and narrative inclusion, levels of violence and regime characteristics.

All this said, we acknowledge that reliance upon the Rwandan case faces something of an uphill battle. Many individuals feel as if they have some sense of what has taken place in the country and our argument appears to be at odds with much of this literature and discussion. We agree with this and merely use the case to reveal the fact that even in situations where it appears as if countries are moving in the "right" direction, upon deeper exploration it is clear that the "wrong" outcomes can emerge. Our research thus seeks to provide a healthy skepticism regarding the processes associated with transitional justice as well as a metric for how to evaluate the potential subversion of relevant processes. With this in mind, we move to consider other cases and invite others to do the same.

Tables

Table 1. Comparing Transitional Justice Packages		
	Favorable Justice Package (FJP)	*Unfavorable Justice Package (UJP)*
Level of Participation	High levels of Participation Participation across the population (with specific attention to victimized minority groups)	Limited or restricted Participation Systematically excluded groups
Level of Violence	Reduced levels of violence (both domestic and international)	Increased domestic and international conflict Increased state violence
Political Legitimacy	Legitimate the rule-of-law, democratic norms as well as institutions	Support authority, autocratic rule and state repression