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Favoring Retribution?

A Study on the Factors Influencing the Choice of the Transitional Justice Approach in the Aftermath of the Genocide in Rwanda 1994-1996

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List of Abbreviations

AI	Amnesty International
GDR	German Democratic Republic
HRW	Human Rights Watch
ICC	International Criminal Court
ICG	International Crisis Group
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MDR	Mouvement Démocratique Républicain
MRND	Mouvement Révolutionnaire National pour le Développement
NGOs	Non-governmental organizations
NURC	National Unity and Reconciliation Commission
OAU	Organization of African Unity
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
USIP	United States Institute of Peace

Abstract

This thesis inquires why Rwanda applied retributive justice in the aftermath of the 1994 genocide. Considering the devastation the country found itself in, as well as the prominence of restorative approaches in Africa, it seems astonishing that Rwanda enacted extensive prosecution as main policy to deal with the genocide. In order to account for that phenomenon, various factors are examined with regards to their influence on the choice of transitional justice approach in Rwanda. The theoretical foundation of the research is derived from the transitional justice framework and existent work on the possible correlation between factors present before, during and after a transition and type of transitional justice approach pursued. The paradigms of retributive and restorative justice are introduced as values of the dependent variable, which is type of transitional justice applied. After a thorough discussion of the theoretical framework, the thesis proceeds to an in-depth analysis of the Rwandan case study. Here, the particular values that the independent variables *nature of the previous regime*, *transition type*, *external actors* and *foreign policy considerations*, and *values and beliefs* held by decision-makers take on are explored. The choice of a retributive approach is finally explained as a result of the combination of the discussed variables.

In der vorliegenden Masterarbeit wird untersucht, weshalb Ruanda nach Ende des Völkermords im Jahre 1994 einen retributiven Weg der Vergangenheitsbewältigung einschlug. Dies ist insbesondere erstaunlich aufgrund der Schwierigkeiten, die sich dem zerstörten Land hierbei entgegen stellten, und vor dem Hintergrund, dass auf dem afrikanischen Kontinent bevorzugt restaurative Ansätze Anwendung finden. Zur Lösung der Problemstellung wird der Einfluss verschiedener Faktoren auf die Wahl eines bestimmten *Transitional Justice* Ansatzes, basierend auf Hypothesen aus der Literatur zu Demokratisierungsprozessen der 1980er und 1990er, untersucht. Die abhängige Variable basiert auf den Konzepten retributiver und restaurativer Justiz. Es erfolgt zunächst eine Darstellung der theoretischen Grundlagen, gefolgt von einer Analyse der Fallstudie Ruanda. Hierbei werden die unabhängigen Variablen im Falle Ruanda's untersucht. Diese sind die *Natur des vorherigen Regimes*, die *Art des Regimewechsels*, *externe Akteure* und *außenpolitische Abwägungen*, sowie *Werte und Überzeugungen* der Entscheidungsträger. Ruanda's Wahl eines retributiven Ansatzes ergibt sich aus der Kombination der diskutierten Faktoren.

Introduction

In the thirteen weeks after April 6, 1994, at least half a million people perished in the Rwandan genocide, perhaps as many as three quarters of the Tutsi population. At the same time, thousands of Hutu were slain because they opposed the killing campaign and the forces directing it.¹

The Rwandan genocide left the country shattered and the whole world in shock. It seems impossible to understand how thousands of people could have been slaughtered in open daylight, with the world watching but not interfering. Half a century after the Holocaust, the deadly power of an ideology of ethnic superiority and hatred had been once more demonstrated. One of the most shocking parts of the genocide, and at the same time one of the most challenging factors for the country's future, was the high complicity of the population in the killings, stretching through all levels of society.² The genocide was ended by the military victory of the Rwandan Patriotic Front (RPF), which subsequently formed a transitional government.³ Like many countries before, post-conflict Rwanda then faced the question of how to deal with its past. This question relates to transitional justice, a field which receives increasing attention from scientific researchers and practitioners. Its growing importance is manifested in the adoption of a report on transitional justice by the United Nations (UN) in 2004. Here, transitional justice is defined as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses."⁴

Within the international community, even though there exists a broad agreement on the necessity to react to norm violations such as war crimes, crimes against humanity or genocide, more divergence shows in the discussion of how such a reaction should look like.⁵ The practice of prosecuting perpetrators for crimes committed under a former regime which gained increasing prominence departing from the precedent set by the Nuremberg Trials was challenged by the Eastern European and Latin American transitions in the 1980s and 1990s, in which countries increasingly employed strategies such as lustration, truth commissions or the granting of amnesties to deal with their violent past. Subsequently, truth commissions and war crime tribunals emerged as the

¹ Des Forges 1999, *Introduction*.

² Cf. Jones 2010, 28.

³ Cf. Brown 2011, 179.

⁴ UN Security Council 2004, 5.

⁵ Cf. Roberts 2003, 120.

most prominent instruments within the field of transitional justice.⁶ One way to conceptualize the variety of transitional justice approaches at hand is by employing the theoretical framework of restorative and retributive justice. Whereas restorative justice can be said to be focusing on dialogue involving all stakeholders, with a goal of repairing the harm that was done, retributive justice is characterized by an emphasis on punishment by the state, which is justified in light of the rules that were broken.⁷ The main mechanism employed by Rwanda after the genocide was criminal prosecution.⁸ The country thus chose a highly retributive approach, and this despite the huge logistical challenges it faced in doing so. “Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights.”⁹ Considering that it is a “duty-based approach, strongly influenced by Kantian and Hegelian philosophy,”¹⁰ it seems curious at first glance that Rwanda would favor such a rather ‘Western’ concept over others. Especially since it is often claimed that African cultures share a common perception of community assuming primacy over individualistic values.¹¹ For instance, Desmond Tutu, famous for his role in the South African transition, which can be placed in roughly the same time period as Rwanda’s, refers to restorative justice as corresponding to African values:

Retributive justice is largely Western. The African understanding is far more restorative- not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of people.¹²

The question arises why Rwanda chose the mentioned particular way to deal with its past. Why was the country favoring retribution over other approaches? What were the factors that led Rwanda to adopt a more retributive transitional justice approach, as compared to a more restorative one?

Research Question

This thesis inquires why Rwanda applied retributive justice after the genocide. Corresponding to a proposal made by Elster (1998), which perfectly describes the issues that are dealt with in this thesis, the research is conducted on “political decisions made

⁶ Cf. Teitel 2003, 70; Roht-Arriaza 2006, 2-5.

⁷ Cf. Jones 2010, 34-35.

⁸ Cf. Drumbl 2000, 291.

⁹ Minow 1998, 12.

¹⁰ Mani 2002, 33.

¹¹ Cf. Mani 2002, 48; Villa-Vicencio 2009b, 65.

¹² Tutu in Minow 1998, 82.

in the immediate aftermath of the transition and directed towards individuals on the basis of what they did or what was done to them under the earlier regime.”¹³ Here, the concern is with factors that influenced those decisions in terms of political capacity and political will. Classifying transitional justice as either retributive or restorative puts the focal point of the analysis on retroactive justice.

In order to answer the research question, the historical background of the conflict and the genocide, going back until the time of colonization, has to be taken into account. However, the main analysis is restricted to the context of the transition. Transitional justice in any society is an ongoing process, however, for analytical purposes, a time period has to be demarcated here. Research is conducted on the time period immediately following the genocide, when initial decisions about transitional justice were made. This is framed as starting in 1994 because the end date of the genocide in July 1994 simultaneously marks the beginning of transitional justice becoming an issue in the country. The adoption of genocide legislation and the beginning of genocide trials in Rwandan national courts in 1996¹⁴ are considered as marking the end of the period in which initial responses to the violence were established.

In order to solve the research problem, questions that have to be addressed involve first of all the transitional justice options that were available to Rwanda, with a focus on those that were actually discussed, and including the ones brought forward by external actors. Further, the factors that had an influence on the final decision, and also the goals and priorities Rwanda set in this process are issues to be analyzed. It is to be expected that Rwanda’s choice of a retributive transitional justice approach was highly influenced by decision-makers’ political power and also political will.

Methodology and Research Design

The thesis conducts a qualitative in-depth analysis of a case study. The research is deductive, applying the transitional justice framework and its work on the possible correlation between factors present before, during and after transition and type of transitional justice approach pursued to make sense of the Rwandan case study. Further, the theoretical framework of retributive and restorative justice is used to classify the Rwandan transitional justice approach. The research is of analytical nature, since the

¹³ Elster 1998, 14.

¹⁴ Cf. Schabas 2008, 214-215.

objective is to draw conclusions from analyzing the link between the examined factors and the transitional justice approach taken.

The dependent variable concerns the type of response given to human rights abuses under a previous regime. It is thus the transitional justice approach employed in order to deal with suspected perpetrators of past atrocities. There exists a large variety of instruments in the field of transitional justice, accordingly also a number of dependent variables.¹⁵ However, to consider all possible options would make the analysis too complex. Therefore, the dependent variable this thesis focuses on is the type of justice applied. The value it can take on is either retributive or restorative justice. The same goes for the independent variables. Due to space limitations, the analysis has to focus on a limited number of influencing factors, the majority of which are derived from literature on transitions. The independent variables are then nature of the previous regime,¹⁶ transition type,¹⁷ external actors and foreign policy considerations,¹⁸ and values and beliefs.¹⁹ Nature of the previous regime can be further refined into the level of complicity, presence or absence of the options of exit and voice, the history of repression and the level of legitimacy of the previous regime. Likewise, transition type concerns the distribution of power, the emerging political landscape and different modes of conflict resolution. The hypotheses derived out of these variables' possible correlation with the dependent variable are tested. The research design is mainly derived from literature written about post-communist transitions. In order to test the hypotheses in the Rwandan case they are adapted to the context of a transition from violent internal conflict.

The International Criminal Tribunal for Rwanda (ICTR) is treated as an independent rather than a dependent variable, since this thesis focuses on transitional justice as decided upon and implemented by the Rwandan state. Even though it is taken into consideration that Rwanda initially asked for the ICTR to be established, the analysis treats it mainly in terms of the influence its mere existence had on transitional justice options available in Rwanda.

Moreover, the Gacaca Courts are not included in the analysis. This is justified in light of the fact that Gacaca was launched in its pilot phase in 2002 as a reaction to

¹⁵ For an assortment see for example Elster 1998, 17-27.

¹⁶ Cf. Huntington 1995, Moran 1994, Welsh 1996, Nedelsky 2004.

¹⁷ Cf. Huntington 1995, Welsh 1994.

¹⁸ Cf. Kaufman 2005.

¹⁹ Cf. Elster 1998.

shortcomings of the initial transitional justice approach, as stated on its official homepage in the following:

The slowness of procedures and the important delay in the trial of these cases represented a serious risk of hindering the efforts made for the reconciliation of the Rwandans. It became clear that it was necessary to modify the strategy and to look for another solution to the problem. His Excellency, the President of the Republic, called a reflexion and consultation meeting that has resulted under the inspiration of the traditionnal context of conflicts resolution in the establishment of the Gacaca Courts.²⁰

The objective of the analysis at hand is to account for the initial reaction of the Rwandan transitional government, and how factors present at that time influenced its decision. Alterations made later on as a form of lessons learned are not part of the research since taking them into account risks distorting the findings. This is because it cannot be clearly established to what part the adoption of the new approach of Gacaca was in fact influenced by the independent variables and not only a result of lessons learned from the transitional justice approach taken on until that point. Thus, there would be a risk that Rwandan transitional justice in the form of national prosecution as initially introduced after the genocide - the dependent variable - would to a certain extent also become an independent variable, as exerting influence on the adoption of Gacaca.

Many discussions about transitional justice take on a normative approach.²¹ Discussions about the topic tend to be heated, especially since many advocates of a particular position operate in the political arena, entangled in what Daly (2001) refers to as the “politics of selling justice ideals.”²² The possibility of bias stemming from political motives behind the arguments has to be taken into account. A qualified and informed look at the literature is very important to not get entangled in those normative arguments. However, the analysis tries to take into account that decision-makers themselves hold normative assumptions and partly act upon those. Since it is not possible to look into people’s heads, this thesis takes into consideration general perceptions held about benefits, or respectively drawbacks of transitional justice policies. This then does not involve any attempt to judge them normatively.

A last point to be mentioned in advance is that even though the thesis often refers to Rwandan transitional justice, because decisions made within that framework affected the whole Rwandan society, in fact it lay in the hands of the transitional government to

²⁰ National Service of Gacaca Jurisdiction 2011.

²¹ Cf. Elster 1998, 7-8.

²² Daly 2001, 32.

make those decisions and implement them. Therefore, it has to be born in mind that even if there is reference made to Rwanda choosing a particular mechanism, before the background of a highly divided society and a recently ended civil war, this is not meant to imply that the whole society was involved in the decision-making in a democratic manner.

Research Objectives

At the center of the analysis stands the question why a particular transitional justice approach was chosen in Rwanda. The aim of this thesis is hence not to assess the efficiency of Rwandan transitional justice, as there exists already sufficient literature on that topic. It is rather to find out what the *raison d'être* behind the choice was, along the line of what outcome the transitional justice instruments were expected to bring, and how the final choice was influenced by various factors.

This thesis also aims to add to the still thin conceptual framework of transitional justice. Most literature accounting for the variation in transitional justice outcomes is written on transitions in the 'third wave of democratization'.²³ Transitional justice is a theme that is attributed growing importance in today's globalizing, conflict-ridden world. This thesis tries to account for the Rwandan transitional justice approach by applying the existing literature to the case study. At the same time, this can contribute to the general work on transitional justice by de-contextualizing hypotheses derived from third wave transitions and seeing if the claims made by the literature can be verified in the Rwandan case.

Further, Rwanda serves as an academic valuable example, since the country had to come to terms with a past that involved internal conflict, civil war, and genocide, and in the present world situations in which transitional justice plays a role are increasingly of an inter-society conflict nature.

Structure

The thesis is divided into a theoretical and an empirical part. For the theoretical framework that the research is based on, first of all the field of transitional justice is explained. After defining the paradigm, an overview over its historical development is given. Further, the main dilemmas and constraints that decision-makers in the field face

²³ The term was coined by Huntington in his book "The third wave: democratization in the late twentieth century", in which he analyzes countries' transitions from authoritarian regimes to democracy 1974 – 1990, cf. Nedelsky 2004, 66.

are discussed. The next point provides the first part of the basis upon which the methodological framework for the analysis is constructed. Various works by theorists who have written on the possible influence of certain variables on the type of transitional justice approach chosen are discussed. Those are Huntington (1995), Welsh (1994, 1996), Nedelsky (2004), Moran (1994), Kaufman (2005), and Elster (1998). The independent variables that subsequently arise are nature of the previous regime, transition type, external actors and foreign policy considerations, and values and beliefs. The second part of the theoretical framework is provided by the concepts of retributive and restorative justice. First, the main principles underlying each are discussed. The next point connects the two justice paradigms to the transitional justice framework. For this objective, the concept of justice is explored in more detail, employing Mani's (2002) categorization of three dimensions of justice. Finally, the dependent variable and the specific values it can take on, namely retributive and restorative justice, are elaborated.

The empirical part starts with the background and history of the conflict in order to establish the context in which to place the transition. The section also enumerates factors from the past that had implications for the conduct of transitional justice in Rwanda. The next chapter first describes the different policy options that were discussed after the genocide and subsequently continues with the classification of the approach that was finally adopted according to the theoretical concepts introduced beforehand. Accordingly, it is established in how far the approach of post-genocide Rwanda, namely the decision to prosecute all perpetrators, was rather retributive. The next part finally analyzes the factors that contributed to the choice of this particular transitional justice approach in Rwanda. The first variable to be analyzed concerns the nature of the former regime. Next, the type of transition is explored. As a third variable, influential external actors and their role in the decision-making process are considered. Also, foreign policy considerations of Rwanda are taken into account. The fourth variable relates to decision-makers' values and beliefs. Here, constraints on the possible array of transitional justice options as well as the conclusions that were drawn out of those and the beliefs that decisions were based on are analyzed. The thesis concludes by recapturing the findings inferred from the analysis in an evaluation, and summing them up in an informed statement about Rwanda's choice of transitional justice approach.

State of the Art and Research Material

This thesis consults literature from the subject areas of justice, transitional justice, regime transitions, and sources relating directly to Rwanda. For the former, literature on justice is used to explore the concept of justice per se and the paradigms of retributive and restorative justice. Concerning the state of the art, a huge part of scholarly work is done on the integration of restorative justice in the traditionally rather retributive oriented legal systems of Western states. Whereas some scholars focus on defining restorative justice, while arguing for its superiority, others increasingly promote a reconciliation of the restorative and the retributive paradigm.²⁴ Most literature on transitions stems from the analysis of democratizing countries of the 1970s through the 1990s. However, increasingly research is done on transitions from violent conflict. Regarding the subject area of transitional justice, a growing epistemic community in the field is contributing to theoretical conceptions as well as its practical application. Since many of the organizations that are part of this epistemic community work on the ground, they expand the transitional justice literature in a manner that is informed by their practical experiences. A prominent and influential example is the International Center for Transitional Justice (ICTJ), founded in 2001. Since South Africa is one of the most prominent transitional justice examples, many important organizations can also be found on the African continent, for instance the African Transitional Justice Research Network or the Institute for Justice and Reconciliation. Stemming from its close connection to human rights issues, advocacy for transitional justice also comes from the side of organizations such as Amnesty International (AI) or Human Rights Watch (HRW). Again, theory and practice inform each other. For instance, HRW had a big influence on the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). Therefore, a lot of the literature on transitional justice takes on the form of reports and articles, often referring to a specific country case study. This also connects to the issue that a lot of influential works in the field are written by practitioners who were involved in transitions.²⁵ There are a few, more general books on the topic, mainly tracing its historical development.²⁶ More specifically relating to Rwanda, the genocide and the issue of transitional justice regarding the country is a topic well discussed in literature. Most literature deals either with the genocide, and the

²⁴ See for example Braithwaite 2002, Daly 2001, Marshall 1999, von Hirsch, v. Roberts, and Bottoms 2003, Zehr 1985.

²⁵ See for example Goldstone 1998, Villa-Vicencio 2009b, Zalaquett 1995.

²⁶ See for example Elster 2004, Kritz 1995, Sriram 2009, Teitel 2003.

failed reaction of the international community, or assesses the transitional justice process in terms of its results and efficiency.²⁷

In addition to the scientific literature providing the theoretical foundation for the analysis, literature about the background of the genocide is considered in order to explain the specific needs that transitional justice in Rwanda had to address. Secondary sources about transitional justice in Rwanda provide information on where to localize the Rwandan approach along the line between retributive and restorative justice. Further, secondary sources about the involvement of international actors, such as the UN, non-governmental organizations (NGOs), and individuals who took on a consulting role are used. Information about international treaties and conventions as well as practices that had been employed in other transitions help frame the international context in which the Rwandan transition has to be placed.

The research material consists of sources from the decision-making process that took place after the end of the genocide. In addition, the analysis takes into account documents that were published before that as a reaction to ongoing violence. Thus, the information about the transitional justice options that were put forward by different agents is drawn from primary sources such as requests of NGOs reporting about human rights abuses in Rwanda or recommendations that conferences on the issue of transitional justice in Rwanda put forward, including the end report of a conference involving Rwandan and international voices held in Kigali in 1995.

1 Theoretical Framework

The paradigm of transitional justice as well as the categories of retributive and restorative justice provide the theoretical foundation the research is based on. Whereas the independent variables and hypotheses to be tested are derived from literature about transitions, the categories of retributive and restorative justice are considered as the values that the dependent variable can take on.

1.1 Transitional Justice

As the practice of transitional justice has been gaining prominence over the last decades, the body of literature on the phenomenon has been growing. However, it is not possible to speak of a theory of transitional justice as such. Rather, the field is characterized by a

²⁷ See for example Clark and Kaufman 2008, Dallaire 2003, Des Forges 1999, Fujii 2009, Mamdani 2001, Prunier 1995, Gourevitch 1998.

diversity of approaches and a practice-orientation.²⁸ A huge part of the literature focuses on the various transitional justice instruments that exist, such as truth commissions,²⁹ reparations or war crime tribunals, and their efficiency in given situations. However, a lot has been written on the relationship between factors present at transition and particular transitional justice approach adopted, especially in the context of transitions in Southern and Eastern Europe and Latin America. This scientific research provides the conceptual framework, out of which hypotheses to be tested in the case study of Rwanda are derived.

1.1.1 Definition

There are various definitions of transitional justice and opinions on the role it should take on diverge.³⁰ Broadly, it can be understood as the “response to systematic or widespread violations of human rights.”³¹ Transitional justice does not necessarily constitute a special form of justice.³² Teitel (2003) defines it as a “conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”³³ Her definition however neglects non-judicial measures and furthermore restricts the practice of transitional justice to a defined period of transition.³⁴ The UN (2004) adopts a broader definition, stating that transitional justice is “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”³⁵ At the same time, the UN connects transitional justice closely to the rule of law.³⁶ Still another definition shows the increased attention given to post-conflict societies when it describes transitional justice as involving “states and societies shifting from a situation of conflict to one of peace and, in the process, using judicial and/or non-judicial mechanisms to address past human rights violations.”³⁷ While some definitions of transitional justice focus on the pursuit of justice from a legal perspective, others take on a more holistic

²⁸ Cf. Clark 2008, 193.

²⁹ A truth commission can be defined as “an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specific period of time”; Teitel 2003, 78.

³⁰ Cf. UN Security Council 2004, 5.

³¹ ICTJ 2008, 1.

³² Cf. ICTJ 2008, 1.

³³ Teitel 2003, 69.

³⁴ Cf. Roht-Arriaza 2006, 1.

³⁵ UN Security Council 2004, 5.

³⁶ Cf. UN Security Council 2004, 1.

³⁷ Kaufman 2005, 58.

approach, adding moral, social, political and economic dimensions. With conflicts being increasingly of an inter-society nature, reconciliation assumes a central role in transitional justice processes. Similar to transitional justice, the concept of reconciliation is also a very debated one. The way it is understood in the research at hand, reconciliation can be defined as “the rebuilding of fractured individual and communal relationships after conflict, with a view to encouraging meaningful interaction and cooperation between former antagonists.”³⁸

Another term used to describe mechanisms that can be employed after a regime change is ‘retroactive justice’.³⁹ Altogether, the term ‘transitional justice’ per se is a debated issue. Some argue that the subject field’s reference to ‘justice’ is misleading since the issues referred to connect to numerous areas. For instance, it is argued that they are increasingly related to security studies.⁴⁰ Another point for controversy derives from the other half of the term. As can be seen, one main theme that definitions on transitional justice vary according to is their respective understanding of ‘transition’, and thus the spectrum of situations in which transitional justice is employed. The term ‘transition’ was traditionally closely connected to the shift from one political system to another, and the main focus of transitional justice lay on transitions from authoritarian to democratic regimes. This rather narrow and normative view that developed out of experiences from transitions from authoritarianism in the 1980s and 1990s is increasingly challenged. Especially within the emerging epistemic community on transitional justice, definitions are broadened to include any mechanism employed to deal with the past in any situation. Thus, transitional justice is increasingly perceived to also take place in situations where the transition is not made to democracy, or there is no transition per se but still a need to come to terms with the past. In this regard, transitional justice also affects countries that are not newly emerging democracies, such as post-conflict societies, authoritarian countries captured in ongoing conflict, or mature democracies.⁴¹

Two of the main goals of transitional justice are to prevent recurrence and repair damage caused. Its diverse objectives revolve around establishing justice, truth, peace, democracy, reconciliation, forgiveness and healing.⁴² Transitional justice possesses both a backward and forward looking characteristic since it revolves around the issue of how

³⁸ Clark 2008, 194.

³⁹ Cf. Elster 1998, 7.

⁴⁰ Cf. Kaufman 2005, 77; Clark, Kaufman, and Nicolaïdis 2008, 390-391.

⁴¹ Cf. Bachmann 2011, 25; Crocker 2009, 45.

⁴² Cf. Clark and Kaufman 2008, 3; Zalaquett 1995, 5; ICTJ 2008, 1.

to address abuses committed under a past regime in a way that guides a society into a peaceful and stable future. The multitude of interests and needs present in such a situation make the enterprise of transitional justice a highly complex one. Tensions result out of the sometimes conflicting objectives. Complexity is added since transitional justice takes places in various dimensions, namely the individual, local, national, and international one, and because an increasing number of actors have a stake in its enterprise. Thus, next to the government of the state concerned, the international community and increasingly non-state actors like NGOs or business organizations try to have a say in policies enacted after a transition.⁴³

Given different countries' unique history, culture and circumstances, each one has to find its own way of dealing with its past. However, there is a certain repertory of transitional justice options emerging, war crime tribunals and truth commissions being among the most prominent mechanisms used. Moreover, lessons can be learnt because many of the challenges, which countries in transition face are similar.⁴⁴ In addition, one country's handling of its transition to a certain extent influences the options available to others by shaping international norms and expectations. For this reason, it is important to consider the historical background of the transitional justice movement.

1.1.2 History

According to Teitel (2003), transitional justice can be said to have undergone broadly three phases in its development. Those she divides roughly into the period after the second World War, the transitions of the third wave of democratization, and the end of the 20th century.

Issues of transitional justice affected countries before 1945. However, the Nuremberg and Tokyo Trials were the point at which transitional justice became both international and extraordinary.⁴⁵ The importance of the trials derives from the fact that for the first time leaders were held accountable for crimes committed against their national subjects by the 'international community', represented by the Allied powers. Instead of relying on national trials, international criminal law was applied beyond the state to individuals on the basis of bringing them to account for crimes against humanity.⁴⁶ Judgments on the fairness of the trials diverge and ever since they took place they faced the accusation of victor's justice. The argument is that they were

⁴³ Cf. Elster 2004, 79; UN Security Council 2004, 4.

⁴⁴ Cf. Smith 1995, xvi.

⁴⁵ Cf. Teitel 2003, 70-71.

⁴⁶ Cf. Ibid., 73; Neier 1998, 16-17, 22.

misused to justify the Allied powers' intervention, were one-sided because no-one from the side of the Allies was put on trial for war crimes and were unfair because judges were affiliated with the winning side.⁴⁷ Nevertheless, to provide trials at all was not a given at that time. Thus, leaving aside issues of fairness in the actual conduct of the trials, the decision to establish them in the first place, and therefore to rely on legal processes, is what had an important influence on any transitional justice conduct that followed. Further, in establishing international accountability for war time abuses committed by state officials the trials limited state sovereignty. In addition, the Nuremberg Trials acknowledged the murder of the Jews by the Nazis as genocide, a term which Lemkin defined in 1944 as acts with the intent to destroy a group. In this regard, the trials created a precedent out of which international human rights norms like the Genocide Convention eventually evolved.⁴⁸ Despite these important developments concerning international jurisdiction, it took as long as 1992 until with the ICTY another international tribunal was established.⁴⁹

After a period in which the attention of most of the world revolved around the power struggle between the USA and the Soviet Union, concerns about transitional justice were revived with the end of the Cold War. The so called third wave transitions from authoritarian rule to democracy challenged the liberal belief in the universalizing quality of certain norms, like for example the idea of the rule of law as an unquestionable tool of state modernization. Countries emerging from authoritarian rule insisted on the primacy of sovereignty so that the focus lay on nation building and the legitimacy of national jurisdiction. However, the Nuremberg and Tokyo Trials still remained important insofar as they served as a frame of reference for the rule of law built up in the newly democratized states and for the trials that were taking place on a national level.⁵⁰ At the same time, post-transition governments in Eastern Europe and Latin America emphasized the preservation of peace, which was believed to be achievable not only via criminal prosecution. Debates about the usefulness of different transitional justice mechanisms gained prominence, featuring the discussion about either applying prosecution or granting amnesty especially in Latin America. Transitional justice started to be seen as a tool that could be used to redefine national identity, and many nations adopted an amnesty policy in order to reconcile society.⁵¹

⁴⁷ Cf. Neier 1998, 15; Mani 2002, 92.

⁴⁸ Cf. Teitel 2003, 70, 73-74; Neier 1998, 18-19, 121-123.

⁴⁹ Cf. Neier 1998, 123

⁵⁰ Cf. Jones 2010, 38; Teitel 2003, 74, 76.

⁵¹ Cf. Teitel 2003, 76, 82.; Roht-Arriaza 2006, 2-3.

The complexity of transitional justice began to show as the new regimes dealt with human rights abuses committed under predecessor regimes in various ways. No longer was it external actors enforcing their vision of dealing with the past and punishment on the country in transition, as it had been the case after World War II, but those decisions were to a certain degree made within the society. The dilemmas resulting out of this required compromises to be made. A growing emphasis was put on establishing the truth about what happened under the authoritarian regime and goals of transitional justice now included issues such as reconciliation, forgiveness, and the healing of society. This also meant that the arsenal of transitional justice instruments grew, since approaches differing from the classical retributive one emerged.⁵² Truth commissions nowadays assume such a prominent role also because with them the discourse on transitional justice, which after the Nuremberg Trials more or less fell into oblivion, was revived.⁵³ With the emphasis that many countries in third wave transition put on restorative approaches, the two objectives truth and justice started to be portrayed as a dichotomy.⁵⁴

Finally, in today's globalizing world, the increasing number of conflicts makes the field and practice of transitional justice move from exception to norm.⁵⁵ This is exemplified by the establishment of a permanent International Criminal Court (ICC).⁵⁶ The ICC is also characteristic for a refocus on achieving justice through prosecution, a trend which mainly emerged because of efforts of the epistemic community in this field.⁵⁷ Transitional justice is now characterized by an interdependence of the national and international level and a great number and diversity of policy options that are available to countries.⁵⁸ New challenges arise as conflicts increasingly take place between societal groups and thus huge parts of the population are involved in criminal abuses, so that one of the main goals transitional justice has to achieve is reconciliation within a society. Whereas many governments established after Cold War transitions saw the key to success in distinguishing themselves clearly from the predecessor regime, in a country emerging out of an intra-society conflict, a concentration on highlighting the divisions might just reinforce a cycle of violence. At the same time, transitional justice leads to an increased politicization of the law. Conflicting objectives are inherent to

⁵² Cf. Teitel 2003, 77.

⁵³ Cf. Bachmann 2011, 22.

⁵⁴ Cf. Teitel 2003, 78-79.

⁵⁵ Ibid., 71.

⁵⁶ Ibid., 90.

⁵⁷ Cf. Bachmann 2011, 23; Roberts 2003, 121.

⁵⁸ Cf. Kaufman 2005, 58; Roht-Arriaza 2006, 9-1; Teitel 2003, 78.

transitional justice, and political decisions in such situations often lead to rule of law standards being compromised to a certain degree.⁵⁹

1.1.3 Dilemmas

Dilemmas of transitional justice concern those inherent in decisions made about the objectives of a certain policy, and those that arise from the post-conflict situation per se. Even though somewhat artificial dichotomies, the two main conceptual dilemmas that can be found in the transitional justice literature can be summarized as ‘truth versus justice’ and ‘peace versus justice’.⁶⁰ Those debates originated as a challenge to the perception of justice as the main objective of post-transition societies and prosecution as the main instrument to reach that goal. Thereby, the concept of justice is altered as new dimensions are added. A closer look on this is provided in chapter 1.2.3.

The peace versus justice dilemma is derived from the potential threat that an insistence on accountability can pose to peace building in fragile post-conflict societies. Whereas the peace versus justice debate concerns the immediate goals a policy prioritizes, truth versus justice can refer to two different beliefs of how to achieve the same goal, for instance reconciliation.⁶¹ It deals with the question of whether truth or justice should be prioritized in order to achieve long-term peace and stability. However, both dilemmas are oversimplified. Peace and justice are interrelated and with regards to truth and justice, the pursuit of one does not necessarily have to exclude the other.⁶² For instance, trials also aim at establishing the truth in form of a historical record, and truth commissions might be regarded as important supplementary instruments to trials.⁶³ On the other side, for a truth commission to function properly, an incentive has to be provided for the suspected perpetrators to tell their stories, and the possibility of subsequent criminal prosecution might be an impediment to that.

Different kinds of dilemmas arise from the specific constraints that especially post-conflict societies face, and which challenge the pursuit of transitional justice. Problems like a traumatized population, destroyed infrastructure, lack of resources or a high level of complicity in the population broaden the gap between aspiration and capability.⁶⁴ In case the country decides to enact criminal prosecution the question of whom to put on

⁵⁹ Cf. Kritz 1995, xxi; Teitel 2003, 90.

⁶⁰ Cf. Sriram 2009, 1; Clark 2008, 203; Roht-Arriaza 2006, 3.

⁶¹ Cf. Moghalu 2009, 76.

⁶² Cf. Villa-Vicencio 2009b, 66; Roht-Arriaza 2006, 8; Sriram 2009, 1, 4-5.

⁶³ Cf. Sriram 2009, 6; UN Security Council 2004, 9.

⁶⁴ Cf. Clark, Kaufman, and Nicolaïdis 2008, 382.

trial arises. Especially when a huge part of the population committed crimes under the former regime, a decision has to be made how far down the chain of command prosecution should proceed. Again, keeping the balance between addressing what happened in the past while at the same time guiding the country into a stable future plays a role. Practical issues have to be considered, since major difficulties can arise from putting a huge percentage of the population on trial, not only because of the time and resources this enterprise consumes, but also because people with experience and knowledge that served under the previous regime are needed to build up new institutions. Further, to establish a rule of law, it is regarded crucial to provide certain standards like a fair trial to everyone, including persons put on trial for gross human rights abuses. This might however lead to frustration and anger in the population, especially in countries where resources are limited and victims might be forced to live in poverty.⁶⁵ In Rwanda, a lack of understanding for the upholding of such standards, especially for the prohibition of death penalty, at the ICTR was one of the factors that led the government to vote against the Tribunal's establishment and added to the negative perception of the court within the population.⁶⁶ Another practical issue concerns the importance of local ownership, which possibly comes at the expense of impartiality. Especially in post-conflict regions, the charge of a perceived ethnic bias can risk the credibility of newly built institutions and might thus fuel new conflicts.⁶⁷ Another important dilemma underlying transitional justice is that of finding a proper balance between a 'whitewash' and a 'witch-hunt'. Transitional justice has a highly political dimension to it, which means that steps undertaken have to aim at achieving justice not only for the victims but also for the country as a whole, and for its future. Thus, the post-transition government faces the task to distinguish itself from the predecessor regime while at the same time avoiding the reinforcement of old divisions within the society.⁶⁸ It could be argued that the spectrum of options available reaches from two extremes, one being full and unconditional amnesty, the other being strict prosecution of perpetrators,⁶⁹ or even execution without trials. Each country has to decide where along that path to go, and this decision is influenced by a variety of factors, most of which are discussed in the next chapter. However, the following general considerations about the usefulness of prosecution as a transitional justice tool also

⁶⁵ Cf. Kritz 1995, xxiii-xxiv.

⁶⁶ Cf. Schabas 2008, 210.

⁶⁷ Cf. Zaum 2008, 372-374.

⁶⁸ Cf. Kritz 1995, xix-xx.

⁶⁹ Cf. Huyse 2000, 83.

matter because they provide the basis according to which decision-makers can estimate policy outcomes.

Although not the same, the peace versus justice debate relates to the prosecute or pardon question insofar as justice is predominantly perceived in terms of legal justice, which is then regarded as achievable through prosecution, whereas amnesty is justified on grounds of long-term stability and peace.⁷⁰ There are various arguments brought forward for as well as against prosecution as a transitional justice mechanism. One of the main dilemmas regarding this issue is the question if prosecution helps a society to move forward after a conflict in that it serves to distinguish the new government from the old regime, thus giving it credibility and legitimacy, or if criminal proceedings rather highlight divisions within society and prolong past conflicts. The latter argument was the dominant one in many transitions in Latin America, where blanket amnesty was seen as the best way to achieve reconciliation and to rebuild the nation.⁷¹ Proponents of prosecution regard it first of all as a tool to reinforce moral standards and to re-establish a just moral order. Another main argument in favor of criminal court proceedings is that they are seen as necessary to fight impunity by officially condemning crimes that were not punished under the previous regime. Thereby, it is argued, the new political system is strengthened.⁷² In addition to its deterrent quality, proponents of prosecution see it as a way to bring about justice by putting those responsible for atrocities on trial. Another quality of court proceedings is that they establish individual accountability, which is especially of great importance in countries where conflict was fueled by tensions among groups.⁷³ Further, it is argued that prosecution serves as an official acknowledgment of the victims' suffering in establishing a truthful account of what happened and giving them an opportunity to voice their experiences as witnesses.⁷⁴ However, opponents argue that the formalized protocol of the court room restricts the effects wished for and can even further traumatize witnesses and harden divisions.⁷⁵ They state that the court room setting restrains real communication between victim and perpetrator because the focus lies on confrontation.⁷⁶ It is further criticized that trials only establish objective and factual truth, which most of the times does not clarify the causes and consequences of the violence. In comparison, it is suggested that other, more victim-oriented

⁷⁰ Cf. Moghalu 2009, 74.

⁷¹ Cf. Minow 1998, 88; Mani 2002, 89.

⁷² Cf. Huyse 2000, 84-85.

⁷³ Cf. Kaufman 2005, 65-66; Des Forges 1999, *Justice and Responsibility*.

⁷⁴ Cf. Neier 1998, 222.

⁷⁵ Cf. Drumbl 2000, 293-294.

⁷⁶ Cf. Mani 2002, 100.

approaches give every person involved the opportunity to have his or her subjective experience and version of the story heard and thus offer an opportunity for polarization between groups to be overcome.⁷⁷ In addition, trials run the risk of being perceived as victor's justice, especially if prosecution is one-sided, thus crimes committed by officers of the new regime are not sanctioned.⁷⁸ Further, if trials fail in providing certain standards to the accused, as is often the case in post-conflict situations, which are characterized by a lack of resources and other constraints, they run danger of being perceived as measures of revenge. This can reinforce tensions and violence, especially if penalties include execution.⁷⁹ Another tension concerns the rule of law. Whereas some argue that prosecution and the punishment of abuses committed by the old regime is necessary to build up a rule of law and democratic state, the principles of *nulla poena sine lege* and *ex post facto* make it difficult to punish acts that were not constituting a crime under national law when they were committed.⁸⁰ One possible way to circumvent that problem stems from the emerging body of international law and norms, including for example the Universal Declaration of Human Rights, which aspires universality, and would thus make certain crimes punishable no matter the national legislation under which they were committed.⁸¹

Whatever the normative arguments, depending on the context, as explained above, post-transition governments face many constraints, which restrict the choice of transitional justice options available to them. Thus, a government may for example be willing but not able to strictly prosecute human rights abuses. Especially the literature analyzing post-communist transitions suggests some variables that constitute a possible influence upon those decisions.

1.1.4 Independent Variables and Hypotheses

The research problem this thesis tries to account for is why a particular transitional justice approach is chosen. The dependent variable is explored in more detail in section 1.2; there are however some points that need to be clarified in advance. At the center of the analysis stands what Huntington (1995) calls the torturer problem, which concerns the following questions:

⁷⁷ Cf. Villa-Vicencio 2009a, 43; Mani 2002, 100.

⁷⁸ Cf. Kritz 1995, xxi; Benomar 1995, 32-33; Huntington 1995, 68-69; Walgrave 2003, 65.

⁷⁹ Cf. Goldstone 1998, x-xi; Huyse 2000, 85; Kaufman 2005, 65-66; Villa-Vicencio 2009a, 44.

⁸⁰ Cf. Kritz 1995, xxii; Huntington 1995, 68.

⁸¹ Cf. Neier 1998, 16; Jones 2010, 40-41.

How should the democratic government respond to charges of gross violations of human rights [...] committed by the officials of the authoritarian regimes? Was the appropriate course to prosecute and punish or to forgive and forget?⁸²

Huntington thus distinguishes two clear-cut options: either prosecution, followed by punishment, or forgiveness, which for him includes forgetting the past. There are some points that have to be reflected upon concerning this torturer problem. First of all, many scholars and practitioners would argue that to forgive does not mean to forget. On the contrary, it might even be important to remember in order to honor the victims and be able to move on.⁸³ Secondly, as has been discussed before, prosecution is not the only transitional justice mechanism at display. If Huntington's approach is adapted to the existing variety of transitional justice instruments, the torturer problem can be reframed as follows. In a first step, a country has to decide if it wants to address the past or not. Concerning the latter option, some would argue that to do nothing about the past can also be a strategy.⁸⁴ If the country decides to address its past, the next question is how to deal with the suspected perpetrators, namely whether it wants to and can punish them.⁸⁵ Options reach from passing an unconditional amnesty, forgiving without forgetting - for example in the form of a truth commission that abstains from any form of follow up prosecution, over lustration to criminal prosecution.⁸⁶ Four independent variables and the hypotheses resulting out of them are considered in order to account for variation in the outcome of the torturer problem. Those are the nature of the previous regime, the type of transition, the role of external actors and foreign policy considerations, and the impact of decision-makers' values and beliefs.

Huntington's model is derived from the transitions from authoritarian rule to democracy of the 1980s and 1990s. Those revolutions in Latin America and Central and Eastern Europe, Asia and Africa are also referred to as the third wave of democratization. Huntington distinguishes between three different modes of transition. Mode here refers to the process of regime replacement and varies according to the distribution of power between former and incoming regime during and after transition. In the first mode, which he calls transformation, the transition is initiated from a part of the old regime, whereas in replacements the opposition gains strength and enforces the regime change. Finally, in transplacements the balance of power is roughly equal, so

⁸² Huntington 1995, 66-67.

⁸³ Cf. Clark 2008, 202.

⁸⁴ Cf. Kaufman 2005, 60.

⁸⁵ Cf. Ibid., 192; Elster 1998, 17.

⁸⁶ Cf. Huyse 2000, 83-84.

that both forces have to come to a negotiated compromise.⁸⁷ Huntington then uses this mode of exit of the authoritarian regime to explain variance in the outcome of the torturer problem across countries. He thus defines justice as a function of political power. Since in replacements, officials of the former regime are no longer in a position of power, those are most likely to result in prosecution and punishment. As additional variables he names the time aspect and the level of complicity of the population. Accordingly, he states that justice has to come quickly because the population regards punishment more legitimate when the wounds from the past are still fresh and because the more time passes, the higher the probability that agents from the previous regime regain some form of political power.⁸⁸ Huntington was one of the first scholars to research the variability in transition outcomes and approaches to deal with the past across countries. His hypothesis has been tested, criticized and modified by various other scholars.

Welsh slightly modifies Huntington's approach. She de-emphasizes the significance of type of transition and assigns a more important role to different modes of conflict resolution between the parties involved in a transition to democracy. For her, the concept of bargaining is crucial, independent of transition mode.⁸⁹ Moreover, she emphasizes the influence that the past has on the present and future. In this regard, the history of political repression plays an important role. Like Huntington, she also stresses the factor of time. Thus, it matters if memories of state terror are fresh or already fading at the time of transition. For example, she describes how the latter was the case in many Central and East European countries because there the mode of repression was changing over time, with physical violence having been the strongest at the time of communist takeover and being gradually replaced by more structural violence. In addition, Welsh puts the politics of the present at the center of attention, stating that efforts directed against officials of the former regime are less likely to be taken if those regain a position of power. Therefore, she takes into account the political landscape emerging after transition.⁹⁰

Nedelsky adopts a similar approach. Trying to account for divergence in the Czech and Slovakian responses to their common past, she offers the level of the former regime's legitimacy as an explaining variable.⁹¹ Drawing on a typology originally put

⁸⁷ Cf. Huntington 1995, 65-66; Welsh 1994, 379.

⁸⁸ Cf. Huntington 1995, 79-80; Nedelsky 2004, 68.

⁸⁹ Cf. Welsh 1994, 379.

⁹⁰ Cf. Welsh 1996, 413-414, 419-422.

⁹¹ Cf. Nedelsky 2004, 65-66.

forward by Kitschelt, Nedelsky focuses her analysis on two factors. First of all, she explores how the former regime sought societal compliance, namely either through repression or through cooptation. Secondly, she dissects the population's relationship to the regime into cooptation, internal exile and opposition.⁹² Nedelsky uses this typology to account for the former regime's legitimacy while bearing possible repression of opposition in mind. She argues that support within the society for a certain transitional justice approach varies according to the perception the population has of the previous regime, thus relating to the question if people found it unjust. Both Welsh and Nedelsky identify the need to place the transitions under scrutiny into a more historical framework.⁹³ Whereas Welsh assigns an important role to the history of political repression of opposition forces, Nedelsky goes further. For her, the nature of the former regime influences the population's experience with it and thus perception of it. In this regard, transitional justice becomes not an elite decision but is highly dependent on societal support.⁹⁴

Another scholar elaborating on Huntington's thesis is Moran. He tries to account for an apparent lack of a causal relationship between democratization process and outcome of the torturer problem in Eastern Europe. Huntington's hypothesis, Moran argues, is not confirmed since Bulgaria and Czechoslovakia, classified as transformation and transplacement countries, show more of a tendency to prosecute and punish than the German Democratic Republic (GDR), where a replacement took place. Moran suggests that an explanation has to be found in the differences between East European countries and proposes the variables of exit and voice as objects of analysis. He emphasizes the psychological characteristic of those variables, as opposed to the structural nature of the paradigm suggested by Huntington. He derives those variables from studying three countries, each responding to one of Huntington's transition types. Analyzing how the GDR, Bulgaria and Czechoslovakia went about solving the torturer problem, Moran finds that instead of transition type, the outcome was determined by how opposition forces could become active against the regime. Here, the two variables of exit and voice indicate whether opposition forces were given the opportunity to leave the country or had some freedom to utter their discontent while staying in the country.⁹⁵ Moran suggests that if one or both of those options existed under the former regime, it is

⁹² Ibid., 100

⁹³ Ibid., 72, 108.

⁹⁴ Ibid., 107, 108.

⁹⁵ Cf. Moran 1994, 95, 97.

more likely that the outcome of the torturer problem is to forgive and forget.⁹⁶ His argument is that if the opposition is severely repressed under the former regime, and the option to leave the country is also denied, anger adds up and it is more likely for prosecution to be asked for after transition. This demonstrates the psychological dimension that Moran sees involved. In his opinion, people who stood by and did nothing to stop the crimes, “frustrated neutrals”⁹⁷ as he calls them, would insist on prosecution of officials of the previous regime in order to clear their own conscience. Thus, it seems that the option of prosecution and punishment here primarily serves the society to reaffirm shared values and principles that were abused in the past, the punishment of those guilty of criminal abuses thus becomes solely a means to an end. Moran compares the situation with a pressure cooker, which explodes and results in vengeance if none of the relief options, neither exit nor voice, are existent. He explicitly stresses the psychological and emotional dimension involved in decisions about transitional justice.⁹⁸

Another variable to be considered is provided by Kaufman. He raises the question of the role that foreign policy considerations play in the conduct of transitional justice.⁹⁹ Analyzing the influence the USA had on transitional justice in Iraq and the role that the ICC might play in the future, Kaufman emphasizes how some transitional justice goals and processes are related to domestic, regional and global order and stability.¹⁰⁰ This raises two issues. First of all, attention is brought to why and how external actors get involved in another country’s transitional justice conduct and thus exercise their influence on it.¹⁰¹ This adds another dimension to Huntington’s paradigm of justice as a function of political power, since in a globalizing world increasingly international actors influence the distribution of power in post-conflict societies. Secondly, it can be inferred that the way in which the country in transition itself employs transitional justice is influenced by foreign policy considerations. Since one priority after violent conflict is to lead the society into a stable future, an enterprise which in today’s interdependent world cannot be reached in isolation, international norms and regional issues shape a country’s transitional justice approach just as much as domestic considerations.¹⁰²

⁹⁶ Ibid., 101.

⁹⁷ Ibid., 108.

⁹⁸ Ibid.

⁹⁹ Cf. Kaufman 2005, 58.

¹⁰⁰ Ibid., 77.

¹⁰¹ Ibid., 61-62.

¹⁰² Cf. Sriram 2009, 7.

Finally, a last variable can be conceived from Elster's work. Among others, he considers the specific constraints arising from the context of a transition, as well as the role that actors' values and beliefs play in the adoption of a particular policy. Here, the conclusions that decision-makers draw out of the situation in which they act become just as important as the constraints themselves in their impact on the choice of transitional justice instrument. Since actors' choices are highly influenced by beliefs they hold about the likelihood of a certain outcome of a policy, the points enumerated in the section about dilemmas of transitional justice can also provide some explanation for why a certain policy was chosen.¹⁰³ Elster further also refers to level of complicity as an important variable for explaining a country's response to past atrocities. According to him, there exists a causal relationship that can be illustrated as a curve. A high level of complicity of the population with the old regime correlates with a low interest in retribution. On the other end of the spectrum two options emerge. Elster distinguishes between those cases where a low level of complicity correlates with the wish for retribution and those where the independent variable takes on the same value, the desire for retribution however remains low. The latter, he argues, are people who focus on reconciliation and reconstruction, and see those objectives more likely to be fulfilled leaving the past behind. In this regard, the impact of people's values and beliefs is demonstrated. Up until a medium level of complicity, the demand for retribution then increases. He further stresses the role of alliances, which are likely to be formed among those who want to forget the past, either to move forward or because they are guilty themselves.¹⁰⁴

Four sets of independent variables can be inferred from the scholarly work explored above. Accordingly, the *nature of the previous regime* can be established as a first variable. It results out of Moran's work on exit and voice, Huntington's and Elster's level of complicity, Welsh's history of repression and Nedelsky's level of legitimacy. The second variable is the *transition type*, based on the mode of transition according to the distribution of power as suggested by Huntington and the emerging political landscape and different modes of conflict resolution as suggested by Welsh. A third variable is derived from Kaufman and concerns the role that *external actors* as well as *foreign policy considerations* play. Finally, the work by Elster provides a fourth variable, namely the *values and beliefs* held by actors that decide about transitional justice. The hypotheses arising out of this framework, which are spelled out in more

¹⁰³ Cf. Elster 1998, 29, 41-43.

¹⁰⁴ Ibid., 45-47.

detail when applied to the Rwandan case study, have to be seen as linked in the sense of a multi-causal model. This means that none of them can explain the dependent variable in isolation. Here it is important to distinguish between necessary and sufficient conditions that have to be fulfilled for the dependent variable to take on the value of retributive justice. For example, while a certain transition type on its own might be a necessary condition for retributive justice to be applied, it might not suffice in explaining why no other option was chosen. It is the combination of all of the independent variables taking on a certain value that in the end explains the particular transitional justice approach adopted by Rwanda.

The scholarly works upon which the conceptual framework is based originated within the specific circumstances of so called third wave transitions. Whereas the latter refer to a process of democratization, the Rwandan transition was from a situation of violent conflict to one of peace.¹⁰⁵ Moreover, Huntington frames the torturer problem as directly referring to how to deal with the *officials* of a former regime, whereas in a post-violent conflict situation like the one in Rwanda, decisions about transitional justice concern how to deal with a number of perpetrators from all societal levels, possibly constituting a major part of the population.¹⁰⁶ Further, the crimes in Rwanda were acts of genocide.¹⁰⁷ Thus, violence was not only an instrument to spread terror in order to repress dissident. The primary intent was to exterminate the whole population group of the Tutsi. Another major difference between third wave transitions and the case of Rwanda is that in the latter there was no gradual replacement of an authoritarian regime involving bargaining and power struggle between the military and political elites. The specific context of the Rwandan situation, which will be explained in more detail below, is that the conflict was ended by the military victory of one side. Indeed, an opening up of the political space, and a subsequent emergence of a variety of political parties and actors, as well as an exiled opposition movement characterized the context that Rwanda has to be placed into in the early 1990s.¹⁰⁸ It would however be misleading to analyze this as a particular form of distribution of power and mode of transition in the sense used by Huntington. The distribution of power preceding the Rwandan genocide rather relates to the factors leading to the massacres, insofar as the government propagated ethnical hate to cling on to political power in the country, than it is part of the

¹⁰⁵ Cf. Moghalu 2009, 75.

¹⁰⁶ Cf. Roht-Arriaza 2006, 6.

¹⁰⁷ Cf. Jones 2010, 138-139.

¹⁰⁸ Cf. ICTR 2000, 3-4.

transitional context, in which the victorious RPF replaced the ruling party and ended the genocide. Despite those differences, inference drawn from the scholarly works on third wave transitions can still provide important insights on the question of the choice of particular transitional justice mechanism. The dilemmas and constraints faced by the country and transitional justice options available are comparable but exacerbated by the fact that Rwanda was emerging from a violent conflict.¹⁰⁹

1.2 Retributive and Restorative Justice

The concept of justice includes many aspects and dimensions. In a broad sense, it can be defined as “a response to a powerful moral intuition that [...] something must be done to right the wrong.”¹¹⁰ Even if there exists agreement that some response to a wrong is necessary, what constitutes this ‘something’ that must be done is a highly debated issue. The diversity of possible reactions to a crime is reflected in the multitude of theories of justice. Those differ in their conceptualization of justice and crime, and therefore also in the processes they apply, and the objectives they try to reach.¹¹¹ Out of the various theories on justice, the two paradigms of retributive and restorative justice are chosen to complement the conceptual foundation of this research. They provide the theoretical background upon which the dependent variable is based. Since the research revolves around the question of transitional justice approach chosen, the main focus lies on the different processes, or instruments, that the two paradigms put forward in order to achieve justice. This is however closely connected to two other issues. First of all, it is important to understand how crime is defined in the respective theories. Secondly, it needs to be considered how the paradigms differ in their understanding of justice and thus in the results they expect justice to bring about.

To begin with, there are some points that retributive and restorative theories of justice agree on. They both argue that wrongdoing needs to be censured and the offender needs to be held responsible one way or another in order to achieve justice.¹¹² Furthermore, they both are committed “to establishing/ re-establishing social equality between the wrongdoer and the sufferer of the wrong.”¹¹³ They however differ in their understanding of how to do that. Further, there are some scholars who argue that the two theories that are often portrayed as a dichotomy actually overlap, for example in

¹⁰⁹ Cf. Sriram 2009, 1.

¹¹⁰ Llewellyn and Howse 1998, 13.

¹¹¹ Cf. Jones 2010, 34-35.

¹¹² Cf. Walgrave 2003, 74.

¹¹³ Llewellyn and Howse 1998, 21.

that restoration would require retribution, and that therefore they should be reconciled. Daly (2001) even goes further by critically arguing that illustrating the two in a dichotomous relationship is not an innocent perspective but that such “dichotomies are also used to construct normative positions about justice”¹¹⁴ and that “the contrast is a highly misleading simplification, which is used to sell the superiority of restorative justice and its set of justice products.”¹¹⁵ Bearing in mind those problematic motives and the normative character that works written on the concepts might have,¹¹⁶ the two approaches are nevertheless first of all explained according to how they differ. This is justified since the primary aim here is not to explore the two paradigms in depth and see how they could overlap, but to use those two categories as a basis on which to describe the values of the dependent variable. Further, the analysis is not normative, and thus does not ascribe superiority to neither concept.

1.2.1 Retributive Justice

The retributive theory of justice is the dominating one in Western society. The paradigm is characterized by a top-down approach putting the state at the center and by a focus on guilt and punishment.

The retributive justice concept is based on the underlying perception that a crime constitutes a violation of a law and is therefore an offense against the state. The focus lies on the rule that was broken.¹¹⁷ Hence, justice is defined as a system of “right rules.”¹¹⁸ It is seen as the state’s responsibility to punish the offender.¹¹⁹ The retributive approach to justice is strongly influenced by the work of Kant and Hegel. Corresponding to Kant’s ‘categorical imperative’, the justification for punishment is found in the moral obligation to react to a wrongdoing. Society then has the right as well as the duty to punish the wrongdoer.¹²⁰ The retributive justice approach puts the state, represented at court by its proxies, at the center of the justice process, so that adversarial relations are established between state, victim, and offender.¹²¹ Accordingly, the state represents the community. Therefore, the process that is employed to bring

¹¹⁴ Daly 2001, 21.

¹¹⁵ Ibid., 8-9.

¹¹⁶ Cf. Daly 2001, 12.

¹¹⁷ Cf. Jones 2010, 35; Zehr 1985, 4, 12.

¹¹⁸ Zehr 1985, 13.

¹¹⁹ Cf. Zehr 1985, 4.

¹²⁰ Cf. Mani 2002, 33-34; Minow 1998, 12.

¹²¹ Cf. Daly 2001, 8.

about justice is structured in a hierarchical and top-down manner.¹²² The legal definition of crime as an offense against the state excludes victims.¹²³ In the retributive paradigm's understanding, accountability means that the offender owes a debt to society, and this debt is paid by offenders being punished for the crime they committed. Retributive justice as applied in the courtroom has a confrontational setting. The offender focuses on telling his story in a way that s/he thinks will result in the lowest sentence because of the *a priori* character of the process. The latter refers to the provision, known even before the process starts, that in case of guilt there is going to be some form of punishment enacted.¹²⁴ Interaction between victim and offender is kept at a minimum level.¹²⁵

Retributive justice is based on the 'just desert' principle.¹²⁶ The term 'desert' is derived from the word 'to deserve'. The principle indicates that the punishment must fit the crime. In addition to the adherence to proportionality, this implies at the same time that punishment has to be in reaction to the crime that was committed, and cannot be primarily based on other justifications, such as for example deterrence.¹²⁷ Determining the right form of punishment is regarded as one of the main tasks in the retributive process.¹²⁸ Retributive justice can then be perceived as backward looking since it focuses on establishing guilt and punishing, the justification of which is found within the committed crime, which inevitably took place in the past.¹²⁹

At the same time, retributive justice is closely linked to rule of law principles. As mentioned, it is the dominant paradigm in Western societies, and thereby closely connected to democratic ideals, such as government by laws.¹³⁰ As such, pursuing prosecution is regarded as an important ingredient in the process of establishing a democratic order. The other way around, a functioning rule of law system is needed in order to pursue prosecution and conduct trials.¹³¹

In summary, the ontology underlying the retributive justice approach is to comprehend justice in purely legal terms. A crime is seen solely in consideration of the

¹²² Cf. Zehr 1985, 13; Walgrave 2003, 67.

¹²³ Cf. Walgrave 2003, 4.

¹²⁴ Cf. Ibid., 2; Villa-Vicencio 2009a, 37-38.

¹²⁵ Cf. Daly 2001, 12.

¹²⁶ Cf. Jones 2010, 35-36.

¹²⁷ Cf. Oxford Dictionaries 2011; Mani 2002, 33-34.

¹²⁸ Cf. Walgrave 2003, 70-71.

¹²⁹ Cf. Mani 2002, 33-34; Zehr 1985, 13.

¹³⁰ Cf. Minow 1998, 25.

¹³¹ Cf. Mani 2002, 95, 124.

law that was violated.¹³² As will be explained in the next point, restorative justice suggests additional dimensions.

1.2.2 Restorative Justice

Although restorative practices and thoughts can be traced back to times of ancient Arab, Greek, and Roman civilizations,¹³³ as an influential theory of justice it is a relatively new paradigm. It gained prominence in the 1970s,¹³⁴ as a critical reaction to other theories of justice, especially the retributive one.¹³⁵ There seems to be a common perception of retributive justice as the rule and restorative justice as the exception, as an alternative approach that challenges prevailing assumptions. Thus, a lot of the literature deals with justifying on normative grounds why restorative justice should be applied and how this can be achieved. Having originated as a form of counter-movement to a theory that was no longer regarded adequate, there exists a lot of controversy on the restorative paradigm.¹³⁶ This concerns especially its relation to punishment. Moreover, a huge part of the literature on restorative justice concerns the latter's integration into the legal justice system of states. Innovative measures aim at reconciling restorative justice with more traditional approaches, for instance by incorporating restorative principles into the criminal system in the form of restorative prisons.¹³⁷ As mentioned before, those debates are not of concern here. Instead, the overview depicts some kind of lowest common denominator of restorative justice theorists. Further, restorative measures here have to serve as the other end of the spectrum departing from prosecution, although there is a tendency amongst scholars to reconcile the two: "Increasingly, scholars are coming to see the value of theorising justice in hybrid terms [...]."¹³⁸

In general, restorative justice can be defined as "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future."¹³⁹ Here, it is suggested that a restorative theory of justice puts the harm that was caused by the breaking of a rule at the center. Crime is not so much regarded as a violation of a rule but more a violation of one person by another, and is perceived along the lines of the relationships that it leaves

¹³² Cf. Zehr 1985, 13.

¹³³ Cf. Braithwaite 2002, 3.

¹³⁴ Cf. Jones 2010, 34; Mani 2002, 36.

The term "restorative justice" was coined by Barnett in 1977, cf. Marshall 1999, 7.

¹³⁵ Cf. Marshall 1999, 7, 29.

¹³⁶ Cf. Jones 2010, 35.

¹³⁷ Ibid., 20.

¹³⁸ Daly 2001, 21.

¹³⁹ Marshall 1999, 5.

fractured.¹⁴⁰ Out of this particular conceptualization of crime evolves an emphasis that restorative justice puts on restoring relationships by involving all stakeholders, namely the perpetrator, the victim and the community. In this regard, it criticizes the central and representative role the state takes on in the retributive paradigm, stating that retributive justice takes the process away from those who own it. Regarded as stakeholders are not only the ones directly involved in the crime, namely perpetrators and victims, but also the community. This includes not only those directly affected by the crime but also the society at large because it is their norms that were violated.¹⁴¹ With the main objective being restoration, the process becomes just as important as the outcome – along the lines of the saying ‘the journey is the reward’. Within the process, there is a special emphasis put on dialogue and negotiation.¹⁴² It is suggested that communication between perpetrator and victim not only serves to restore their relationship but also helps the perpetrator to accept his or her guilt and take responsibility for it. As opposed to the *a priori* character of the retributive paradigm, a restorative process leaves the penalty option open for discussion between the participants. The focus does not lie on the kind of action that the offender has to take on as a response to the crime he or she committed. The question of adequate censure becomes secondary because restorative justice is victim-centered.¹⁴³ Emphasis is put on letting the victim tell his/her story in a setting that is favorable to that endeavor. In contrast to the just desert principle, here a specific kind of sanction is chosen with regards to how it can best serve restoration.¹⁴⁴ In this context, one central question is how to reintegrate the offender into the community. The community as understood here is connected by the concept of citizenship, and the offender has to be restored as fellow-citizen. Justice then becomes the (re)building of relationships, with a focus on healing. Thus, even though restorative justice also considers the past in which the crime was committed, its focus on the fulfillment of obligations created by the wrongdoing gives it more of a future-oriented character.¹⁴⁵ A typical example for a restorative procedure is victim-offender mediation.¹⁴⁶

¹⁴⁰ Cf. Zehr 1985, 12; Clark 2008, 198.

¹⁴¹ Cf. Walgrave 2003, 61; Daly 2001, 7; Jones 2010, 98.

¹⁴² Cf. Daly 2001, 8; Jones 2010, 36.

¹⁴³ Cf. Zehr 1985, 13; Walgrave 2003, 61, 64-66.

¹⁴⁴ Cf. Walgrave 2003, 74-75.

¹⁴⁵ Cf. Zehr 1985, 13.

¹⁴⁶ Cf. Marshall 1999, 29.

In summary, the restorative paradigm is based on an ontology that views justice not only in legal but also in moral, social, economical and political terms.¹⁴⁷ Considerations from all of those fields influence the conduct of justice, and the focal point is put on a future-oriented restoration of relationships.

1.2.3 Connection to the Transitional Justice Framework

Incorporated into the research design, retributive and restorative justice serve as characteristics of distinct transitional justice approaches, and as a spectrum along which the latter can be categorized. Even though the basic principles the two respective justice paradigms are based on remain the same, some conceptual peculiarities arise depending on whether they function as a response to an individual crime or within the context of broader political conflict.¹⁴⁸ Further, the responses they provide, and constraints and complications they face in doing so, vary according to the nature and gravity of the crime.¹⁴⁹ The issue becomes more complicated in a situation of violation of human rights: “The call for justice arouses charged political and personal sentiments that are aggravated by the nature of the excesses committed during conflict.”¹⁵⁰ In Rwanda, the nature of the excesses took on the form of genocide.

In order to establish the connection between the retributive and restorative paradigms of justice on the one and the transitional justice framework on the other side, it is necessary to understand the concept of justice in a post-conflict context. As mentioned before, justice is a very wide concept, and there exists no common agreement on neither its nature nor its scope.¹⁵¹ One possible conceptualization of justice is suggested by Mani. Referring to Aristotle’s work, she distinguishes three dimensions of justice that post-conflict societies are challenged to address. Those are legal, distributive and rectificatory justice. Legal justice refers to the rule of law, whereas distributive justice concerns the structural injustices that often underlie conflict.¹⁵² “Rectificatory justice refers here to the question of dealing with injustices in terms of direct physical violence suffered by people during conflict,”¹⁵³ and as such

¹⁴⁷ Cf. Zehr 1985, 13.

¹⁴⁸ Cf. Daly 2001, 6; Roberts 2003, 129.

¹⁴⁹ Duff distinguishes various kinds of harm, which involve different opportunities for restorative and retributive justice to be applied. For example, whereas material harm might be fully repaired, the issue becomes more complex with regards to criminal harm, when it is no longer clear what exact harm was caused by the crime, nor how it could be best addressed, cf. Duff 2003, 44-45.

¹⁵⁰ Mani 2002, 22.

¹⁵¹ Cf. Mani 2002, 50.

¹⁵² Ibid., 5-6.

¹⁵³ Ibid., 7.

connects directly to the transitional justice issue of addressing human rights abuses. These different dimensions of justice are not to be conceptually confused with different approaches to justice. Retributive and restorative justice fall into the latter category. Being paradigms of justice, they revolve around the ‘how’ question, namely how to bring about justice, which ends to reach and means to employ. The dimensions of justice suggested by Mani in contrast rather deal with the ‘what (to address)’ question, namely with the demands of justice and the different kinds of injustices that need to be addressed. Depending on whether a more retributive or more restorative justice process is pursued, different priorities are set and some of the justice demands are rather met than others.

Although the categories put forward by Mani are used, the view proposed here does not fully correspond to the one of the author.¹⁵⁴ Mani states that all three dimensions of justice are interdependent.¹⁵⁵ Nevertheless, it seems that she places transitional justice directly and solely in the framework of rectificatory justice.¹⁵⁶ Transitional justice as understood in the research at hand however is the overarching concept whose mechanisms can address up to all three dimensions of justice. This is based on the understanding that rectificatory justice refers to human rights abuses, distributive justice to structural injustices and inequalities, and legal justice to the rule of law, and transitional justice can encompass all three of them. Furthermore, Mani treats retributive justice, utilitarian punishment, and informal justice, which for her incorporates restorative justice, as sub-categories of the rectificatory justice dimension.¹⁵⁷ In contrast, here it is suggested that retributive and restorative justice are modes, which influence the overall conduct of *all* dimensions of justice as well as the priorities set among them. Thus, a retributive justice process might prioritize legal justice and result in addressing rectificatory injustices in a way that relies on legal mechanisms to a great extent. Opposed to that, a restorative approach might compromise on the issue of tackling legal injustices and instead put a stronger focus on addressing distributive injustices in order to avoid recurring conflict in the future. Hence, depending on the justice paradigm pursued, different instruments are chosen and different objectives are promoted. It is in

¹⁵⁴ It has to be born in mind that Mani’s main concern is with peace-building, and how it connects to justice: “[...] this book roots the endeavour to restore justice in the aftermath of violent conflict within the context of peacebuilding [...]”, Mani 2002, 17.

¹⁵⁵ Cf. Mani 2002, 9.

¹⁵⁶ Ibid., 7.

¹⁵⁷ Cf. DeLaet 2004, 458.

this respect that categories of retributive and restorative justice directly connect to the dependent variable.

1.2.4 Values of the Dependent Variable

As already mentioned in chapter 1.1.4, the dependent variable can be described in terms of a slightly modified version of Huntington's torturer problem. The dependent variable then is the particular transitional justice approach adopted. The values it can take on in the research design at hand are either restorative or retributive justice. It has however to be born in mind that those categories are a simplification of the phenomenon, since first of all no measures are either purely restorative or retributive and secondly the spectrum of transitional justice instruments encompasses in real practice far more than two options. Nevertheless, having only two values for the dependent variable is justified since the research question deals with the general factors that lead a country to adopt a rather retributive or rather restorative mechanism, without exploring in detail how that mechanism then looks like exactly.

Thus, the research problem whether to prosecute or pardon is depicted as the choice between a retributive and a restorative strategy. The literature usually lists truth commissions as an example for a restorative transitional justice instrument.¹⁵⁸ The concern shown for future-oriented issues in the restorative paradigm corresponds to the emphasis that some transitions put on peace and reconciliation, sometimes in exchange for strict application of legal justice. Many authoritarian regimes left the citizens traumatized and deprived of any trust into state institutions. It could be argued that this was one reason for the emphasis that post-authoritarian regimes put on restoring the social fabric as compared to a stronger focus on accountability. Criminal prosecution stands at the other end of the spectrum of transitional justice options. As "the most radical interpretation of acknowledgment and accountability,"¹⁵⁹ it reflects a retributive approach.

It could be argued that, even though the two paradigms share some goals and even processes, they differ in how they set priorities. One example for that is the issue of acknowledging the victim's suffering. In a retributive justice court room setting, this is one effect argued to be achieved, however it is not the primary aim of the court proceeding. The primary aim is to find out about the facts, to establish guilt and find the

¹⁵⁸ Cf. Ibid.; Ntsebeza 2009, 381.

¹⁵⁹ Huyse 2000, 84.

right punishment for the violation of the law.¹⁶⁰ In contrast, in the restorative paradigm, ritual is seen as an essential part in the acknowledgment of the victim's suffering and the restoration of fractured relationships. Emphasis is put on the process.¹⁶¹ The ritual takes on primacy, so that efforts focus on placing the process in a setting that is as supportive to the ritual as possible.

In a post-conflict situation, justice is both a function of political power and a function of political calculation. The former refers to the ability of the governing body to implement a certain kind of justice, the latter to the will to do that.¹⁶² The following section analyzes the characteristic of both in the case of Rwanda.

2 Case Study Rwanda

Every Rwandan is either a genocide survivor or a perpetrator, or the friend or relative of a survivor or perpetrator.¹⁶³

But is it practicable to judge some 87,000 people for genocide and related crimes, in a judicial system whose personnel have been decimated and whose material infrastructure devastated?¹⁶⁴

[...] no judicial system has ever sought to prosecute crimes committed by 125,000 persons against over 800,000 victims.¹⁶⁵

It seems stunning that the decision-makers in Rwanda pursued such an ambitious policy, especially when the specific challenges that this post-genocidal society faced are taken into consideration. As mentioned before, the conduct of transitional justice is highly context dependent and involves the setting of priorities between various goals. By taking into account “what a given transition is *from* and what it is *to*,”¹⁶⁶ a connection is made between the past sought to address and the present in which policies are enacted. Thus, it is first of all important to consider the historical background, in which the conflict has to be placed and out of which certain implications follow. Further, the range of policy options that were suggested, discussed in section 2.2, demonstrates that the transitional justice approach adopted by Rwanda was by no means the only viable one, so that the question of why retributive justice was applied is

¹⁶⁰ Cf. Neier 1998, 222; Walgrave 2003, 70-71.

¹⁶¹ Cf. Jones 2010, 36.

¹⁶² Cf. Huntington 1995, 79; Jones 2010, 33.

¹⁶³ Kagame 2008, xxi.

¹⁶⁴ Schabas 1996, 529.

¹⁶⁵ Drumbl 2000, 291; As can be seen, the estimated number of perpetrators grew over time.

¹⁶⁶ Crocker 2009, 59.

reinforced. In order to solve this puzzle, different factors have to be examined with regards to how they rendered retribution the approach to be chosen.

2.1 History & Implications

About 800,000 people were murdered during the Rwandan genocide, the majority of which belonged to the group of the Tutsi.¹⁶⁷ Various factors and actors played a role in the historical forefront of the horrible events, although it is important to keep in mind that the genocide cannot be regarded the ‘logical’ outcome of any factors that added up to it.¹⁶⁸ Nevertheless, a crucial role was played by ethnicity and its misuse as a tool to propagate mass hatred.

Historically, Rwanda’s population consisted of two major population groups, the majority Hutu and the minority Tutsi, as well as the minor group of the Twa, all of which migrated to the future territory of Rwanda over the centuries. No agreement exists on their relationship before colonization and on the issue if respective Rwandans felt a Hutu or Tutsi group identity at all, especially since the groups mingled due to intermarriage and shared a common history, language, and culture.¹⁶⁹ Hutu and Tutsi initially had a social, as opposed to an ethnic, meaning within the hierarchical organization of the society. Originally, the Tutsi were herdsman, and the Hutu cultivators. Within the process of increasing centralization and annexation of formerly autonomous areas pursued by a monarchy ruled by a Tutsi king, the Tutsi became known as the ruling elite group, whereas the masses were called the Hutu.¹⁷⁰ However, instead of being fixed categories based on ethnic origin, those more constituted political identities that fluctuated over time. For instance, it was possible for a Hutu to be ennobled and become a Tutsi.¹⁷¹ The concept of ethnicity was introduced during colonization. Rwanda was first colonized in 1898 by the Germans, and then passed on to Belgian rule after World War I.¹⁷² Both colonizing states employed a ‘divide and rule’ strategy. In the course of an increasing centralization of power, the colonizers exercised direct control over the Tutsi only, to whom then control over the rest of the population as well as over formerly autonomous areas was granted.¹⁷³ This entailed a discrimination of the Hutu, for example in terms of access to education and good jobs,

¹⁶⁷ Cf. Clark and Kaufman 2008, 1.

¹⁶⁸ Cf. Fujii 2009, 72; HRW 2006, 2.

¹⁶⁹ Cf. Jones 2010, 18; Gourevitch 1998, 47.

¹⁷⁰ Cf. HRW 2006, 3.; Jones 2010, 18-19; Gourevitch 1998, 48; Prunier 18, 25.

¹⁷¹ Cf. Mamdani 2001, 15; Fujii 2009, 60; Prunier 1995, 21-22.

¹⁷² Cf. Fujii 2009, 62-63.

¹⁷³ Cf. Jones 2010, 20-21; HRW 2006, 3. Gourevitch 1998, 54.

and intensified the perception of the Tutsi as a ruling elite and the Hutu as an oppressed class.¹⁷⁴ These developments were accompanied by a manipulation of history. Tutsi scholars told a biased version of history that reinforced the belief in the Tutsi's superiority and distinctiveness that the colonial powers themselves disseminated based on European ideas about race.¹⁷⁵ The Tutsi-centric historical record was subsequently diffused by the written word.¹⁷⁶ At the same time, the Tutsi being depicted as foreigners that had conquered Rwanda centuries ago laid the groundwork on which propaganda against the former would later be based on.¹⁷⁷ In 1933, the Belgian colonial power institutionalized the concept of ethnicity in Rwanda by the adoption of identity cards, which indicated the belonging of a person to one of the three respective 'ethnicities'. At this time, eighty-five percent of the population was identified as Hutu, fourteen percent as Tutsi, and one percent as Twa. This step made the constructed ethnic groups even more permanent in character and embedded in everyday life.¹⁷⁸

In 1959, in the course of decolonization, the Tutsi elite was overthrown in what is commonly referred to as the 'Hutu Revolution'. Subsequently, in 1961, the first republic of Rwanda was established, led by the Mouvement Démocratique Républicain (MDR) party under President Kayibanda.¹⁷⁹ Categories of the Tutsi's distinctiveness, before employed by some Tutsi themselves to institutionalize their power under Belgian rule, were now used by leading Hutu to establish solidarity among the, constructed as a supposedly united and homogeneous but actually highly diverse, Hutu group.¹⁸⁰ During that time, the ideology of 'Hutu power' emerged, which depicted the Hutu as the nation and the Tutsi as an alien race.¹⁸¹ It was this ideology that the propaganda of the genocide as a form of self-defense was later based on.¹⁸² In the course and aftermath of the revolution, about 20,000 Tutsi were killed and an additional 300,000 fled the country into exile.¹⁸³ The events had serious implications for the future of the country. First of all, the violence of those years never being punished added to a culture of impunity and helped to establish a pattern and method of violence. In fact, in 1963 and 1974 two amnesty laws were passed. Those exempted Hutu citizens from being held

¹⁷⁴ Cf. Gourevitch 1998, 57; Fujii 2009, 64-65.

¹⁷⁵ Cf. HRW 2006, 3.; Gourevitch 1998, 54; Fujii 2009, 57-58.

¹⁷⁶ Cf. Fujii 2009, 57.

¹⁷⁷ Cf. Mamdani 2001, 14; Des Forges 1999, *The Hutu Revolution*.

¹⁷⁸ Cf. Jones 2010, 21; Gourevitch 1998, 57.

¹⁷⁹ Cf. ICTR 2000, 2; HRW 2006, 3-4; Des Forges 1999, *History*.

¹⁸⁰ Cf. Fujii 2009, 66-69.

¹⁸¹ Cf. Mamdani 2001, 190.

¹⁸² Cf. Gourevitch 1998, 183.

¹⁸³ Cf. HRW 2006, 3.

accountable for political violence and thus constituted a legal basis for the marginalization of the minority Tutsi group and ongoing violence against Tutsi citizens.¹⁸⁴ Secondly, the events furthered the solidification of the concept of two irreconcilable groups by providing them with diverging memories on the events, depicted as tragic in the emerging Tutsi and as heroic in the emerging Hutu memory.¹⁸⁵ In addition, parts of the exiled Tutsi community, which later on established the RPF, led incursions into Rwanda beginning in the 1960s. Spreading fear about the exiled Tutsi aiming at restoring the monarchy, there were reprisal attacks against Tutsi citizens in the country and the government started to build up the state structure that was later misused to orchestrate the genocide, incorporating so called civil defense units.¹⁸⁶

In 1973, Juvénal Habyarimana overthrew the political regime in a military coup and subsequently founded the second republic of Rwanda, governed by himself as president. Political power shifted away from the central and southern to the northwestern region. This move is representative for Rwandan politics, where the struggle for power was predominantly between regions. In 1975, the Mouvement Révolutionnaire National pour le Développement (MRND) was founded as single party of the Rwandan state.¹⁸⁷ Habyarimana's regime stayed in power until he was killed when his plane was shot down on 6 April 1994. This event marked the beginning of the genocide.¹⁸⁸

Various factors played an important role in the advance of the genocide. First of all, in the late 1980s, Rwanda's economy collapsed so that the country was dependent on help from the donor community. In the course of structural adjustment, the Rwandan government stood under international pressure to conduct political reform and liberalize the country. At the same time, a small number of elites formed an opposition movement, demanding a multi-party system.¹⁸⁹ Moreover, in October 1990 the RPF invaded Rwanda and a guerilla style civil war began.¹⁹⁰ During the conflict, many Hutu civilians were killed by the Rwandan Patriotic Army (RPA), the estimated numbers reaching from 25,000 up to as many as 45,000 deaths for the time period April to August 1994 alone. RPA soldiers also committed war crimes and crimes against humanity, which is a politically charged topic in post-genocide Rwanda.¹⁹¹ In 1993, the

¹⁸⁴ Cf. Melvern 2008, 24; Brannigan and Jones 2009, 195-196.

¹⁸⁵ Cf. HRW 2006, 3.

¹⁸⁶ Cf. HRW 2006, 3-4; Fujii 2009, 70.

¹⁸⁷ Cf. ICTR 2000, 2-3; HRW 2006, 4.

¹⁸⁸ Cf. Oomen 2009, 185.

¹⁸⁹ Cf. ICTR 2000, 3; Gourevitch 1998, 180.

¹⁹⁰ Cf. HRW 2006, 4-5.

¹⁹¹ Cf. Des Forges 1999, *The Rwandan Patriotic Front*; Brown 187.

Arusha Accords peace agreement was signed. Among other things, it included a power-sharing plan for the political system in Rwanda.¹⁹² All those events put pressure on Habyarimana and forced him to introduce a multi-party system in 1991.¹⁹³ However, in order to prevent a loss of power, extremist forces used the civil war as an excuse to stop the reform process and to militarize the society under the guise of civilian self-defense. Propagating mass hatred and fear of the Tutsi, the constructed ethnic conflict served the government as a distraction mechanism diverting attention away from political and legitimacy problems and was used as a way to consolidate and preserve power. Actually however, regional identities and political opinions constituted the real cleavage.¹⁹⁴ Thus, the violence was not a spontaneous eruption of ancient ethnic hatred but planned and structured by the Rwandan authorities.¹⁹⁵ One distinct feature in the Rwandan genocide was the central role that the media, more precisely a radio station, *Radio Télévision Libre des Mille Collines*, and a newspaper, *Kangura*, assumed in inciting the population. Spreading fear of a re-established Tutsi hegemony, extremist propaganda portrayed the Hutu as the eternal victims and the killings as a matter of self-defence.¹⁹⁶

Violence against Tutsi had prevailed in Rwanda since it had gained independence and massacres of Tutsi and political assassinations already took place in the beginning of the 1990s.¹⁹⁷ The genocide started on 6 April 1994 and was ended 18 July 1994 with the RPF's military victory. More than half a million Tutsi and 5000 Hutu, the latter mainly members of the political opposition, as well as sympathetic Twa were killed during the genocide.¹⁹⁸ After the military victory, the RPF pursued massive arrests of suspected perpetrators in order to stop the ongoing violence.¹⁹⁹ Violence however did not end together with the war because exiled parts of the defeated Rwandan army kept on attacking Rwanda from neighbouring countries, while individuals within Rwanda launched reprisal attacks against Hutu citizens.²⁰⁰

There are various distinct features of the Rwandan genocide that posed specific challenges in the post-conflict situation and had serious implications for the conduct of transitional justice in the country. First of all, since people literally killed their neighbors with whom they had long-standing ties, those acts constituted not only a

¹⁹² Cf. ICTR 2000, 4.

¹⁹³ Cf. Ibid., HRW 2006, 4.

¹⁹⁴ Cf. ICTR 2000, 5; Fujii 2009, 45-46, 74; Melvern 2008, 21.

¹⁹⁵ Cf. Des Forges 1999, *Introduction*.

¹⁹⁶ Cf. HRW 2006, 6-8; ICTR 2000, 6-7.

¹⁹⁷ ICTR 2000, 8; HRW 2006, 7.

¹⁹⁸ Cf. Fujii 2009, 53-56; Clark and Kaufman 2008, 1.

¹⁹⁹ Cf. Jones 2010, 82.

²⁰⁰ Cf. Sarkin 1999, 782; Prunier 1995, 321.

physical but also a social violation of an extreme kind. In addition, it was large groups, not individuals, going on killing sprees. The killing was public and at close range, with mainly machetes and sticks being used as killing instruments, adding to the extreme cruelty of the Rwandan genocide.²⁰¹ There was further an enormously high number and concentration of killing and extensive use of rape. The genocide left about forty percent of the population either dead or exiled. In addition, the killings being organized in a grass-roots manner resulted in a high level of conspiracy due to massive involvement of the population at all levels of society.²⁰² Thus, the country's institutions were not only shattered because of the violence, but also deprived of people with expertise, since most were either dead, in exile, or suspects of crimes related to the genocide. Accordingly, after the genocide only about twenty-five per cent of judicial personnel was left.²⁰³ Further, most infrastructure had been destroyed during the conflict. Especially critical was the state of the prisons and the lack of even basic equipment in official state buildings. Moreover, due to Rwanda's long-standing history of a culture of impunity, the challenge was less to rebuild institutions than more to build them anew. Especially the rule of law had never really existed due to an inefficient and corrupt justice system that served the government as a political instrument.²⁰⁴ Another point that influenced the perception of necessary actions in post-genocide Rwanda was the international community's failure to intervene to stop the genocide. Even though UN peacekeeping forces arrived in Rwanda in October 1993, the United Nations Assistance Mission for Rwanda (UNAMIR) was ineffective because it was overburdened and under-resourced, lacking the necessary UN Chapter VII mandate.²⁰⁵ Fearing another failed peacekeeping operation like the one in Somalia and misinterpreting the situation in Rwanda as being caused by ancient tribal hatred, the UN Security Council denied UNAMIR the support it needed to be able to intervene.²⁰⁶ Further, the necessity to stop ongoing violence and establish order put the Rwandan government under serious time constraints.²⁰⁷ Finally, decisions about post-genocide policies were made within a highly emotional context.²⁰⁸ However, the main challenge resulting from the unique situation that characterized

²⁰¹ Cf. Fujii 2009, 3, 7; Drumbl 2000, 289.

²⁰² Cf. Jones 2010, 28; Prunier 1995, 327.

²⁰³ Cf. Jones 2010, 84; ICG 1999, 4.

²⁰⁴ Cf. Schabas 1996, 531; Cf. ICG 1999, 3-4; Cf. Jones 2010, 80-81.

²⁰⁵ Cf. Williams 2008, 49-51.

²⁰⁶ Cf. Des Forges 1999, *UNAMIR*.

²⁰⁷ Cf. Jones 2010, 81-82.

²⁰⁸ Cf. ICG 1999, 4.

Rwanda in the aftermath of the genocide was the absolute necessity for reconciliation, since there was no possibility for two distinct states to emerge in its territory.²⁰⁹

Never before in modern memory had a people who slaughtered another people, or in whose name the slaughter was carried out, been expected to live with the remainder of the people that was slaughtered, completely intermingled, in the same tiny communities, as one cohesive national society.²¹⁰

Those are the factors that characterized the situation that Rwanda found itself in after the genocide and out of which a range of objectives for transitional justice in the country can be derived, some of which in tension with each other. First of all, one urgent goal was to combat the culture of impunity that had prevailed in the country since decolonization. Within that, the country faced the twin challenges of addressing the crime of genocide while at the same time building a legitimate and functioning legal system from scratch.²¹¹ Further, in order to render revisionism impossible, the establishment of an accurate and independent historical account of the genocide and its antecedents was important,²¹² including the need of a reconciliation of history, more precisely of the debate about the nature of Tutsi-Hutu relations before colonization.²¹³ Out of this, one tension concerning the politics of memory can be derived. Whereas one argument was that the topic of ethnicity had to be included and confronted, the post-genocide government declared referral to ethnicity a crime of divisionism.²¹⁴ Since Rwanda had witnessed the deadly consequences of people being defined by their belonging to an ethnic group, a major concern was establishing individual responsibility for the crimes, so that no collective guilt would be ascribed to the Hutu. Another issue that especially external observers pressed for was bringing every perpetrator to account instead of pursuing victors' justice, thus also prosecuting RPA soldiers who had committed crimes.²¹⁵ Furthermore, in Rwanda's post-conflict situation balancing the objectives of bringing about justice and consolidating a democracy was a very difficult undertaking because of the high stakes that different population groups had in each option. Whereas most members of the minority group of the Tutsi wanted the perpetrators to be brought to account, most of the majority Hutu had an interest in democratic decision-making, not only out of fear of revenge directed against them but

²⁰⁹ Cf. Drumbl 2000, 290.

²¹⁰ Gourevitch 302.

²¹¹ Cf. Jones 2010, 81; Schabas 1996, 534.

²¹² Cf. Republic of Rwanda 1995, 11.

²¹³ Cf. Jones 2010, 17.

²¹⁴ Cf. Lemarchand 2008, 65-66.

²¹⁵ Cf. Des Forges 1999, *Justice and Responsibility*.

also because they did not want a return to past arrangements, which had been characterized by a power monopoly held by the Tutsi.²¹⁶ Finally, the danger of survivors pursuing revenge had to be addressed. Therefore, detaining suspects and establishing accountability was regarded crucial.²¹⁷

2.2 Transitional Justice Options & Classification of Mechanism Employed

Having ended the genocide by military force, the victorious RPF established the transitional ‘Government of National Unity’²¹⁸, which was consequently the main actor in the decision-making process following the regime change. Because of the shocking scale of the violence and the devastation that it had left Rwanda in, various actors got involved to help the country address its past. This variety of agents resulted in a range of transitional justice options being put forward, some of which more restorative and some more retributive in nature. Two documents, analyzed in the following, demonstrate which options were considered.

First of all, in November 1994, the transitional government organized a conference on the question of possible responses to the genocide, to which various national and international actors were invited. Corresponding to the challenges arising from the country’s specific situation mentioned above, the conference established a range of objectives. Those included bringing the enormous number of perpetrators to justice, addressing the needs of the survivors, dealing with the refugees, establishing security and stability, pursuing reconciliation and preventing such violence from happening ever again.²¹⁹ The transitional government ruled out amnesty from the beginning.²²⁰ Overall priority was given to unity and reconciliation.²²¹ As a means to achieve those goals, justice was regarded as absolutely necessary: “Justice is indispensable for healing and stabilizing the society and for uprooting the impunity.”²²² Further, peace was seen as being linked to reconciliation, which again was regarded as only achievable through the acknowledgment of guilt.²²³ In addition, establishing the truth in a way that renders revisionism impossible was also regarded essential in the process of bringing about national reconciliation. Even though the government stressed the importance of

²¹⁶ Cf. Neier 1998, 84; Mamdani 2001, 274.

²¹⁷ Cf. Jones 2010, 82.

²¹⁸ Cf. Des Forges and Longman 2004, 60.

²¹⁹ Cf. Republic of Rwanda 1995, 6.

²²⁰ Cf. Republic of Rwanda 1995, 16; Schabas 1996, 529.

²²¹ Cf. Republic of Rwanda 1995, 7.

²²² Republic of Rwanda 1995, 7.

²²³ Cf. Ibid.; Sieff and Wright 1999, 775.

establishing accountability from the outset, a more restorative approach similar to the one pursued in South Africa was also considered.²²⁴ The Kigali Conference report mentioned the creation of “para-legal mechanisms such as a Truth Commission”²²⁵ as one alternative to the classical legal system. Especially representatives from South Africa strongly promoted such a commission as the ‘African’ approach to transitional justice.²²⁶ Considering the economic situation Rwanda found itself in, decisions about transitional justice naturally included decisions about the distribution of limited resources. Therefore, some actors argued that money spent on conducting trials should better be used on reparations.²²⁷

The other document that serves as an example for the options debated after the genocide resulted from a conference held by the United States Institute of Peace (USIP) in September 1994. Participants included scholars, officials from the US and the UN, and the prime minister of Rwanda. The report stressed the need for justice and accountability to be established, and thus argued for a retributive approach in the form of criminal prosecution from the outset.²²⁸ However, suggestions were made concerning possible ways in which more restorative mechanisms could also be incorporated into Rwanda’s transitional justice. This first regarded the number of prosecutions to be held. Thinking it resource-wise impossible and further impeding for the country’s stability and reconciliation to bring every perpetrator to account, the report suggested to only prosecute the main offenders, in terms of a symbolic and representative act. For perpetrators further down the chain of command, a more restorative approach then could have been pursued. One concrete option put forward was the setting up of commissions with the power to grant impunity to those who were coerced into killing, and those who would come forward, confess, and compensate.²²⁹ Further, the report suggested setting up a commission of inquiry in addition to the trials.²³⁰

In summary, it can be said that the majority of actors, including the Rwandan government, the international community and human rights NGOs, promoted justice through prosecution and punishment, and thus a retributive approach. Another mechanism being discussed was a truth commission. Such a more restorative approach was however mainly regarded as a supplement to criminal prosecution, and discussions

²²⁴ Cf. ICG 1999, 5; Oomen 2009, 187.

²²⁵ Republic of Rwanda 1995, 9.

²²⁶ Cf. Schabas 2008, 213.

²²⁷ Cf. Brown 2011, 179.

²²⁸ Cf. USIP 1995, 1.

²²⁹ Ibid., 16.

²³⁰ Ibid., 19.

revolved around the possibility to only have trials for some symbolic few, namely the instigators of the genocide.²³¹ Even after Rwanda had already enacted national prosecution as the main policy dealing with the genocide, scholars continued to propose the establishment of a truth commission in the country. To a large part this was regarded necessary in order to have an impartial mechanism to stop perceptions of victor's justice in the country that posed obstacles to national reconciliation.²³²

In the end, Rwanda decided to pursue a policy of maximal accountability and enacted national prosecution as the main mechanism to address the genocide.²³³ On 30 August 1996, Organic Law No. 08/96²³⁴ was passed. It provided the legal basis for the prosecution of genocide, crimes against humanity and war crimes committed between 1 October 1990 and 31 December 1994. The law divided perpetrators into four categories, which corresponded to the gravity of the crimes committed. The organizers of the genocide and those who committed rape were put into category one. All other perpetrators who murdered someone in the genocide were in category two, whereas those who participated but did not kill someone were placed in category three. Category four comprised those who stole or destroyed property. Each category covered a different range of penalties. Until its abolition in 2007, category one offenders could be charged with the death penalty.²³⁵ The law further included two innovative procedures, namely confession and plea-bargaining. Whereas a confession was expected to serve the goals of establishing the truth and bringing justice to victims, plea-bargaining was introduced in order to address the issue of overcrowded prisons.²³⁶ National trials of genocide defendants began in late 1996.²³⁷

The dependent variable takes on a retributive value in the form of Rwanda's policy of national prosecution.²³⁸ The first retributive characteristic is that the transitional justice approach pursued puts punishment at the center, regarding it as the proper way to bring about justice and reconciliation. Further, the process is structured in a way that can be assigned to the retributive justice paradigm. There is no emphasis on dialogue or involvement of all stakeholders. On the contrary, the process is clearly adversarial. Even

²³¹ AI 1994, 10. USIP 1995, 16, 19.

²³² See for example Drumbl 1999, 296; Sarkin 1999.

²³³ Cf. Jones 2010, 29; Kritz et al. 1998, 1486.

²³⁴ "ORGANIC LAW No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990", cf. <http://www.preventgenocide.org/law/domestic/rwanda.htm>.

²³⁵ Cf. ICG 1999, 6; Schabas 1996, 537-539; Brannigan and Jones 2009, 203.

²³⁶ Cf. Schabas 1996, 538-539.

²³⁷ Cf. Schabas 2008, 215.

²³⁸ Cf. Oomen 2009, 187.

though the arrangement of dividing perpetrators into four categories and the use of confession and plea-bargaining renders the approach an innovative one, the main concern remains with establishing the right form of punishment, justified in light of the crime that was committed. Although charges vary according to category and involvement of confession or plea-bargaining, within those ranges they are still fixed *ex-ante*.²³⁹ It is also typical for a retributive approach that the mechanism employed perceives justice mainly through a legal lens. That this was the case in the Rwandan approach can be seen in the emphasis placed on extensive prosecution and also in the fact that rendering justice was regarded as closely connected to the building of a functioning judicial system and a rule of law.²⁴⁰ The classification of the Rwandan transitional justice approach as retributive is furthered by the initial inclusion of the death penalty as sentence. Capital punishment is especially retributive since empirical studies suggest that it does not contribute to objectives such as deterrence more effective than imprisonment. Critics of death penalty in Rwanda argued that it would be viewed as vengeance instead of contributing to the supposed objective of reconciliation.²⁴¹ This perception was reinforced by the way in which the death penalty was carried out, namely in the form of public executions in crowded stadiums.²⁴² Capital punishment was only abolished in 2007, mainly due to external pressure.²⁴³ A final point concerns the priorities set among different objectives and mechanisms. The Kigali Conference suggested an authority with the sole task of producing “a definitive and objective record of this crime”²⁴⁴ to be set up. In 1999, Rwanda established the National Unity and Reconciliation Commission (NURC), which had already been provided for in the Arusha Accords. Even though this could be understood as the country pursuing a more restorative approach, the fact that Rwanda, restrained by limited resources, chose to give financial and temporal primacy to establishing accountability through extensive prosecution again shows that it perceived transitional justice in a retributive manner. In addition, the NURC is not an impartial truth commission but rather a state institution that establishes a historical account according

²³⁹ Cf. Jones 2010, 98-99.

²⁴⁰ Cf. Jones 2010, 81; Kritz et al. 1998, 1487.

²⁴¹ Cf. Schabas 1996, 554.

²⁴² Cf. Des Forges and Longman 2004, 61.

²⁴³ Cf. Brannigan and Jones 2009, 203.

²⁴⁴ Republic of Rwanda 1995, 24

to the governments' view of events and promotes reconciliation through seminars and the like.²⁴⁵

Even though prosecution and punishment can be described as the main mechanism employed by Rwanda to address the genocide,²⁴⁶ with most resources, energy and attention focusing on that area, there were other efforts undertaken as well. Those revolve around the RPF's ideology, which is based on the conviction that the ethnic groups were invented in colonial times and that there is one Rwandan people and all political action should aim at national unity. Many such efforts were coordinated by the NURC and included remembrance, solidarity camps promoting re-education, or new national symbols.²⁴⁷

2.3 Analysis

Four variables are used to explain why Rwanda applied retributive justice in the aftermath of the genocide. The nature of the previous regime, transition type, and the role assumed by external actors and regional stability considerations express the political power that sets the boundaries in which a retributive approach becomes possible. The last variable additionally refers to specific conditions in the post-conflict situation that influenced the range of options available and to policy preferences resulting out of decision-makers' values and beliefs, hence the political will needed for a retributive approach to be ultimately implemented. Due to the multi-causal nature of the research design, all variables are important in explaining the outcome of the torturer problem. Thus, for a retributive approach to be pursued, decision-makers need to have the political power, but also the political will to do so.

2.3.1 Nature of the Previous Regime

The first independent variable to be analyzed is the nature of the previous regime. According to the work of the several scholars elaborated in the theoretical part, a country is more likely to pursue a retributive approach to transitional justice if the former regime enjoyed relatively low levels of legitimacy and at the same time was very repressive, in a way that left the opposition with no opportunity to voice its discontent. The correlation with the dependent variable is supposed to be the stronger the less time there is between periods of repressive violence and the situation in which decisions

²⁴⁵ Cf. Oomen 2009, 190.

²⁴⁶ Cf. Drumbl 2000, 290.

²⁴⁷ Cf. Des Forges and Longman 2004, 61.

about post-conflict policies are made. Further, a high level of complicity should result in a low desire for retribution.

The historical background of Rwanda is important when analyzing the population's relationship to the former regime. The central role that the belonging to an ethnic group assumed in societal life, constructed to distract from the real, political discrepancies, has to be born in mind.²⁴⁸ Thus, it is not possible to speak of the attitude of the population as one, homogeneous unit, towards the regime. Roughly four groups can be distinguished according to their different roles in the history of the country and their relation to the former government: Hutu within the country, Tutsi within the country, exiled Tutsi, and Hutu opposition forces within the country. The latter category refers to the regional struggle for power, mainly between Hutu elites from the southern and those from the northern provinces.²⁴⁹ This is not to say that all those were homogeneous groups. For instance, it is not to be suggested that all Hutu had the same attitude towards the regime, not even that there actually was such a category as 'the Hutu'. However, basing the analysis on this distinction between the named groups is justified in light of the central role that ethnicity assumed in Rwandan politics, and because the interests of the respective ethnic groups were depicted as competing.²⁵⁰ Since the post-independence governments clearly affiliated themselves with the Hutu, and favored them in their policies, the perception of the regime is most likely to have varied according to belonging to one of the groups.

As mentioned before, Rwanda was governed by two regimes following independence. Both were based on the ideology of 'Hutu power' and drew their legitimacy from a group solidarity that was built upon the constructed dichotomy of ethnic groups in the country, as well as upon hate propaganda directed against the Tutsi. Concerning the Hutu, the regime drew its legitimacy from depicting itself as an agent of achieving a better life for them. Here, memories of Rwanda's past played a role, because the Hutu had been discriminated under colonial rule, when the Tutsi held the monopoly of power over the Hutu. However, for the Tutsi, who were discriminated and marginalized after Rwanda gained independence, the regime bore no legitimacy.

To further structure the attitude held towards the former regime, the framework mentioned before as suggested by Nedelsky (2004) can be used. She distinguishes two ways in which authoritarian regimes seek to achieve compliance, namely cooptation and

²⁴⁸ Cf. Fujii 2009, 45.

²⁴⁹ Cf. Fujii 2009, 10.

²⁵⁰ Cf. Brown 2011, 180.

repression. In Rwanda, both were used in an interrelated manner. The Hutu Power ideology was employed to establish solidarity among the Hutu, which were accordingly co-opted to support the regime. Repression, which openly took on the form of marginalizing the Tutsi group while propagating fear of a revived Tutsi hegemony, thus at the same time served to enforce cooptation within the Hutu group: “Killing Tutsi was a political tradition in postcolonial Rwanda; it brought people together.”²⁵¹ In addition, under the guise of ethnic conflict, any emerging political opposition was repressed.²⁵² Nedelsky suggests in a next step to analyze the population’s relationship to the regime. In Rwanda, for both Hutu and Tutsi cooptation as well as internal exile of mainly the latter prevailed for several reasons. First of all, historical experience from the outset of the 1959 Revolution had shown that opposition would be repressed, and massacres served to intimidate Tutsi.²⁵³ Further, the Rwandan culture favored almost unquestioned obedience to authority, a characteristic that was reinforced by the strict hierarchical organization of the society.²⁵⁴ This stems to a big part from the country’s geography and the historical development of its state. Rwanda is located in a very hilly region, so that it originally consisted of numerous micro-states that were within time annexed by the emerging kingdom.²⁵⁵ In the process of centralization of power, a very hierarchical society emerged, with strong authority on the central level, exercised by the king, as well as the local level, represented by chiefs. The hierarchical structure was reflected in the organization of the Rwandan state, which in 1994 consisted of prefectures, which were further divided into communes, sectors and finally cells; a structure that was misused by the regime to ensure compliance and by the instigators of the genocide to execute the massacres.²⁵⁶ Gourevitch (1998) stresses the importance of the Rwandan culture of obedience: “In fact, the genocide was the product of order, authoritarianism, decades of modern political theorizing and indoctrination, and one of the most meticulously administered states in history.”²⁵⁷ Opposition was exercised mainly by the exiled Tutsi community, to whom the return to Rwanda was neglected, and eventually by the RPF. Internal opposition grew in the forefront of the genocide, when Rwanda’s economy broke down due to world market developments and various parties challenged

²⁵¹ Gourevitch 1998, 96.

²⁵² Cf. Fujii 2009, 10, 49.

²⁵³ Cf. HRW 1994, 5; Des Forges 1999, *Habyarimana in Control*.

²⁵⁴ Cf. Mamdani 2001, 200; Prunier 1995, 353; Oomen 2009, 185.

²⁵⁵ Cf. Prunier 1995, 18; Weinstein and Stover 2004, 9.

²⁵⁶ Cf. Gourevitch 1998, 49; Prunier 1995, 20, 25; Weinstein and Stover 2004, 9.

²⁵⁷ Gourevitch 1998, 95.

the single party system enacted by the MRND. It culminated in 1992 when 50,000 people participated in a street protest in Kigali.²⁵⁸

In Rwanda, transitional justice addresses the genocide and its roots. Therefore, in addition to the perception the population had of the regime, the question emerges if it saw the genocide as justified. There were of course many Rwandans who did not perceive the genocide as legitimate. Apart from the Tutsi and members of the political opposition, who were the targets of the violence, there were also Hutu who openly opposed the killings. However, a huge part of the perpetrators after being detained still did not show remorse because they regarded themselves as having acted in a situation of war and denied that genocide had taken place. Due to propaganda, many thought they were acting out of self-defense, and thus perceived the extremists' orders as legitimate.²⁵⁹

Political violence varied over time and was publicly directed against the Tutsi as a group but actually aimed at the repression of any political opposition force. However, repression clearly increased in the period preceding the genocide. In fact, political violence corresponded to the decreasing level of legitimacy of the regime starting in the 1980s. It culminated in the first days of the genocide when several members of the opposition movement as well as moderate politicians from the regime's cabinet were assassinated.²⁶⁰ Thus, the memory of terror was very much afresh in the period following the end of the genocide. Furthermore, decisions about transitional justice were made swiftly, right after the new regime came into power. According to the mentioned hypotheses, both of those factors speak for a retributive approach to be pursued.

A last point concerns the level of complicity, which according to Huntington (1995) and Elster (1998) should be rather low for retribution to be favored. This however assumes that those complicit have the power to influence decisions made about transitional justice. In Rwanda, the level of complicity was extremely high. Estimations are that as many as 750,000 people, constituting about one fourth of the Rwandan adult population, were involved in the killings.²⁶¹ However, those in power to make decisions in the post-conflict situation were almost exclusively the ones that had fought to end the violence. The hypothesis put forward by Huntington and Elster can still provide an

²⁵⁸ Cf. Fujii 2009, 47-52.

²⁵⁹ Cf. Gourevitch 1998, 347; Drumbl 2000, 289- 290; Melvern 2008, 31; Des Forges and Longman 2004, 51.

²⁶⁰ Cf. Des Forges and Longman 2004, 50; USIP 1995, 4; ICTR 2000, 8.

²⁶¹ Cf. Drumbl 2000, 289; Oomen 2009, 185.

explanation for the retributive approach pursued in Rwanda if it is refined in a way that takes into account the stakeholders who have the power to make decisions, and thus the mode of transition. The decision-makers in post-conflict Rwanda were not complicit in the genocide. Hence, while the original hypothesis might hold true in cases where broad societal support is needed after a transition, in Rwanda the post-conflict regime was relatively free to implement its vision of transitional justice, a matter which is discussed in more detail in the next part.

2.3.2 Transition Type

As mentioned before, the variable transition type refers to the process of regime replacement. Based on Huntington's (1994) work, the hypothesis emerges that retributive justice becomes most likely if the opposition enforces the regime change and if in the process the former regime cannot retain a position of power within the country.

It is difficult to place Rwanda, being a post-conflict society,²⁶² in one of Huntington's categories, since the latter refer clearly to the context of post-communist transitions and not to a situation of genocide or civil war. However, the transition mode that Rwanda comes closest to is replacement. The RPF was the opposition force that enforced the regime change by military means. It invaded the country in October 1990. Following this, there were four years of civil war. On 18 July 1994, the RPF stopped the genocide through occupation of the country and consequently replaced the extremist regime. The transition type can thus be summarized as a military victory of the opposition forces.²⁶³ The distribution of power was clearly in favor of the RPF:

The power shift – from Hutu to Tutsi rule – was so sudden and so complete that domestic political constraints on the numbers of perpetrators subject to prosecution all but vanished overnight.²⁶⁴

Most leaders of the former regime who planned the genocide had fled Rwanda, and therefore were in no position to influence the emerging distribution of power within the country.²⁶⁵ However, many retained a power base outside the country and continued the spread of genocide ideology and recruitment of forces in refugee camps, which were full of Hutu refugees as well as soldiers from the former regime's army.²⁶⁶ Inside Rwanda, the military victory was followed by massive arrests of suspected genocide

²⁶² Cf. Crocker 2009, 45.

²⁶³ Cf. Brown 2011, 179.

²⁶⁴ Osiel 2009, 152.

²⁶⁵ Cf. Scharf 1999, 631.

²⁶⁶ Cf. Schabas 1996, 524; Prunier 1995, 313-314.

perpetrators in order to stop ongoing violence and establish a situation of security and stability.²⁶⁷ The thousands of people who were detained no longer posing a threat to the RPF and others staying quiet out of fear about the genocide survivors taking vengeance, added to the RPF's monopoly on political power. The context of the Rwandan transition entails that transitional justice was mainly an elite decision. Even though the post-genocide regime stressed the importance of societal reconciliation and democracy,²⁶⁸ it was relatively free to implement the policy it favored. Understandably, most Hutu did not prefer retribution, since even if they were not guilty there was a risk of them being accused of crimes nevertheless, and due to the overburdened justice system even a person who was innocent or had only committed a minor assault could spend years in prison before being put on trial.²⁶⁹

The RPF had been founded among exiled Tutsi refugees in Uganda. Although the majority of RPF members were consequently Tutsi, it depicted itself as not constituting an ethnic opposition to the Hutu but a political opposition to the extremist regime.²⁷⁰ After the RPF assumed control over the country, it established the transitional Government of National Unity. Pasteur Bizimungu, a Hutu who had been affiliated with the RPF since 1990, became president and General Kagame vice-president.²⁷¹ Even though the government promoted an ideology of a unified nation, in which there was no room for ethnic antagonisms,²⁷² it remained sensitive to giving every ethnic group the feeling to be represented. This was regarded especially important in light of the historical experience of continuous hegemony of one group over the other, and the violence that had resulted out of marginalization. A perceived return to colonial Tutsi hegemony feared by the majority Hutu population was to be avoided. The transitional government thus included various parties, and ministries were given to both Hutu and Tutsi. However, real power remained with the RPF.²⁷³ The transitional government therefore had the political power to implement its favored approach, according to its objectives and beliefs of how to achieve those.²⁷⁴ Thus, the central role that Welsh (1994) assigns to bargaining and compromise in the transition process cannot be confirmed in the Rwandan case. That power was clearly distributed in favor of the RPF

²⁶⁷ Cf. Jones 2010, 82.

²⁶⁸ Cf. Republic of Rwanda 1995, 7.

²⁶⁹ Cf. Neier 1998, 84; AI 1995, 3; Brown 2011, 188.

²⁷⁰ Cf. HRW 2006, 4; Gourevitch 1998, 216.

²⁷¹ Cf. Prunier 1995, 329; BBC News 2000.

²⁷² Cf. Brown 2011, 180; Des Forges 1999, "*Not Hutu, Tutsi, nor Twa*".

²⁷³ Cf. Des Forges and Longman 2004, 60.

²⁷⁴ Cf. Sieff and Wright 1999, 774.

can also be seen in the treatment of RPA soldiers charged with war crimes and crimes against humanity. The majority of those were first of all not prosecuted at all. In addition, the few trials that were held took place in military courts of which the public had little knowledge and were characterized by light sentences.²⁷⁵

2.3.3 External Actors & Foreign Policy Considerations

In addition to factors derived from the domestic context, forces from outside Rwanda also influenced the outcome of the torturer problem in the country. As mentioned before, Kaufman (2005) stresses that it is important to understand why states get involved in the transitional justice process of other countries. He suggests two criteria on which different transitional justice options are commonly judged. Subsequently, according to him, external actors' support of a country's post-conflict policy depends first of all on the latter's correspondence to domestic and/or international law, and second of all on if it is perceived to be just in terms of legitimacy, fairness and impartiality.²⁷⁶ Accordingly, it is to be tested if external actors and the international climate they were operating in promoted retributive justice. Further, foreign policy considerations of Rwanda and their influence on transitional justice also have to be taken into account.

There are two main ways in which external actors were involved in the transitional justice process in Rwanda. On the one hand, after the end of the genocide, international interest in Rwanda's post-conflict policies was high, so that many agents assumed a consulting position, promoting what they regarded the best approach for the country to take. On the other hand, donors and NGOs played an important role in providing the financial resources and technical assistance for the judicial infrastructure and institutions that were needed to conduct the genocide trials.²⁷⁷ Since Rwanda, whose bad economy had been further devastated by the genocide, depended on foreign aid, it could be assumed that donors could exercise a certain influence over the country's post-conflict policies in determining how the aid money would be used. However, two factors restricted donors' power in that area. First of all, the structural adjustment programs of the 1990s were named as one factor explaining the context, which made the genocide possible, since they added to the impoverishment of the population and thus

²⁷⁵ Cf. Jones 2010, 11, 190; Brown 2011, 187.

²⁷⁶ Cf. Kaufman 2005, 60.

²⁷⁷ Cf. Brown 2011, 181; Schabas 1996, 527-528; Oomen 186-187.

the fight for resources.²⁷⁸ Secondly, donors also shared in the complicity of the genocide, because aid money had been used by the authoritarian regime to finance repression and violence, and a failure to stop the foreign aid flow had provided the regime with a legitimate appearance.²⁷⁹ Since both of these points could be used as a sort of moral blackmail for assisting post-genocide Rwanda in every possible way without conditions attached, donors' influence was somewhat limited.²⁸⁰

In its decision to establish the ICTR, the UN, representing the international community, clearly chose a retributive approach to transitional justice after the Rwandan genocide. This can be explained by various factors. To begin with, international norms and laws have to be considered. Based on past experience rooted in the Nuremberg Trials, for the international community "criminal trials and incarceration of selected guilty individuals constitutes the preferred and often exclusive mechanism to respond to *all* situations of genocide and crimes against humanity."²⁸¹ The body of international law, largely building on international humanitarian and criminal law and the Genocide Convention, thus promotes a retributive approach to justice.²⁸² The application of retributive justice was rendered even more likely by the official finding that genocide had taken place in Rwanda, which brought the legal and political obligation to bring the perpetrators to account with it.²⁸³ This corresponds to Kaufman's criterion of 'what is just'. Further, acknowledging the violence as genocide had powerful moral implications.²⁸⁴ Having failed to intervene to stop the massacres, the international community was highly motivated to help Rwanda to address that period and move forward, and thus clear the conscience of the international community itself.²⁸⁵ In addition, the decision to pursue a retributive approach with the establishment of an *ad hoc* tribunal for Rwanda has to be placed into the temporal context of a revival of international jurisdiction. With the establishment of the ICTY, the international community had just reaffirmed its adherence to human rights and the consequences that would result from violating the latter. The failure to intervene in the Rwandan genocide and the threat of accusations of racism provided the international community with another reason to spend as much energy and resources on transitional justice in Rwanda

²⁷⁸ Cf. ICG 1999, 2; Mani 2002, 130.

²⁷⁹ Cf. Brown 2011, 190; Oomen 2009, 186.

²⁸⁰ Cf. Brown 2011, 181, 192.

²⁸¹ Drumbl 2000, 288.

²⁸² Cf. Drumbl 2000, 288, 296. USIP 195, 15; Neier 1998, 123.

²⁸³ Cf. Sieff and Wright 1999, 764; Williams 2008, 53.

²⁸⁴ Cf. Sieff and Wright 1999, 776; Williams 2008, 53.

²⁸⁵ Cf. Oomen 2009, 187.

as it had done in the former Yugoslavia, and demonstrate this to the world in a symbolic manner by the establishment of a second international tribunal.²⁸⁶

The ICTR itself can then be regarded an independent variable influencing transitional justice in Rwanda. Since the ICTR from the beginning on assumed primacy over any measures enacted on the national level,²⁸⁷ it clearly restricted the range of options that could be implemented within Rwanda. The tribunal promoted a retributive approach and sought to prosecute the masterminds of the genocide.²⁸⁸ Thus, it would have been difficult to establish a South African style truth commission, providing amnesty from prosecution for a full and truthful account of what happened. Further, a certain competition over custody emerged between the ICTR and the Rwandan government. This tension can provide an additional explanation for the government's swift adaption of the Organic Law No. 08/96.²⁸⁹ On the other side, the restricting influence of the ICTR should not be overestimated since most of the extremist leaders had already fled Rwanda after the RPF's military victory, and there would still have been the possibility to employ a more restorative approach on the national level for those perpetrators that were further down the chain of command. Moreover, it has to be born in mind that the Rwandan government had initially asked for a tribunal to be established, and only withdrew its support because of disagreements concerning mainly points such as the location of the tribunal, its temporal jurisdiction being limited to 1994, the exclusion of the death penalty, and the possibility of prison sentences being served outside of Rwanda.²⁹⁰ Thus, the ICTR can be seen as both, a restriction on the range of transitional justice options available in Rwanda as well as an expression of the retributive approach that was favored by the Rwandan government from the very beginning.

Another category of agents to be considered is that of external non-state actors. This includes scholars from the emerging transitional justice epistemic community and NGOs. Especially the latter influenced the post-conflict policy debate by publishing detailed information about the atrocities and by advocating their favored solutions.²⁹¹ Most scholars who focused their work on Rwanda as well as individuals who consulted the Rwandan government due to their experience in other transitions regarded

²⁸⁶ Cf. Des Forges and Longman 2004, 52; Jones 2010, 32-33.

²⁸⁷ Cf. Jones 2010, 95.

²⁸⁸ Cf. Kritz et al. 1998, 1473.

²⁸⁹ Cf. Drumbl 2000, 297.

²⁹⁰ Cf. Schabas 2008, 209-210.

²⁹¹ Cf. Sieff and Wright 1999, 761.

prosecution as the necessary reaction to the crimes committed during the genocide.²⁹² NGOs drew similar conclusions. Especially human rights NGOs clearly demanded the crimes to be condemned and the perpetrators to be held responsible.²⁹³ Their lobbying efforts critically contributed to the international community's acknowledgment that genocide had taken place and the establishment of the ICTR.²⁹⁴ Various NGOs called the violence in Rwanda 'genocide' while it was still ongoing, as a statement published in a HRW report in May 1994 demonstrates:

Human Rights Watch, *the Fédération Internationale des Droits de l'Homme* (based in Paris), Amnesty International, the International Centre for Human Rights and Democratic Development (based in Montreal, Canada), Oxfam UK and other international nongovernmental organizations have condemned the slaughter as genocide.²⁹⁵

By disseminating detailed information that showed the seriousness of the situation and the cruelty of the atrocities, the NGOs put pressure on the UN to investigate and react. The latter subsequently sent a mission of inquiry to Rwanda.²⁹⁶ Further, NGOs insisted on reacting to the genocide with a retributive justice approach. For instance, HRW stated as early as May 1994 that the "international community must insist upon accountability for genocide, crimes against humanity and violations of international humanitarian law."²⁹⁷ In a similar manner, AI published the following in a report: "It is essential to bring those responsible for human rights violations and abuses to justice. [...] Prosecution and punishment break the cycle of crime and impunity."²⁹⁸ AI further stressed the "duty of the Rwandese authorities – and those of other countries – to try people accused of genocide [...]"²⁹⁹ as a measure complementing the efforts undertaken by the ICTR.

It can be inferred that human rights NGOs played an important role first of all in establishing an account of the massacres, which brought mentioned legal and moral obligations with it. They further pressured the international community and reminded it of the steps that had to be taken. In addition, the NGOs' work was of importance to the transitional governments' retributive approach. Due to the good reputation and impartiality of organizations such as HRW or AI, the information they disseminate and

²⁹² Especially Des Forges, Schabas, Prunier: Cf. Drumbl 2000, 292.

²⁹³ Cf. HRW 1994, 14; Sieff and Wright 1999, 768.

²⁹⁴ Cf. Sieff and Wright 1999, 765, 775.

²⁹⁵ HRW 1994, 10.

²⁹⁶ Cf. Jones 2010, 105; Sieff and Wright 1999, 765.

²⁹⁷ HRW 1994, 14.

²⁹⁸ AI 1994, 8.

²⁹⁹ AI 1995, 11.

conclusions they draw out of it are commonly accepted to be true and unbiased.³⁰⁰ In Rwanda, it was not necessary to publish information about the scale and horror of the atrocities in order to put the government under pressure to take action, since the latter, emerging as the victorious power out of a civil war and not being complicit in the genocide, had the intention to address the crimes anyway. However, the reports published by NGOs provided the Rwandan transitional government with legitimacy and credibility with regards to the policies it enacted to address the genocide. The numbers established by independent and objective agents showed the enormous scale of the violence, and conclusions drawn by the NGOs, namely the necessity to address those crimes in a retributive manner, supported the government in its stance on the subject. Having an objective and well-respected actor coming to the same conclusion could further be used to avert accusations of victor's justice with regards to the government's initial decision to prosecute and punish every person who committed genocidal crimes.³⁰¹

Thus, external actors favored a retributive approach to be applied in the Rwandan transitional justice process. And even among those that suggested the more restorative approach of a truth commission, the latter was by most only regarded as a mechanism to be employed in addition to trials. It also has to be mentioned that many who initially promoted a retributive approach changed their mind after trials started. This has however to be ascribed to the dysfunctional Rwandan justice system, which in many points failed to provide international legal standards.³⁰²

Another variable that involves issues beyond the domestic realm concerns foreign policy considerations of Rwanda. Again, the question arises, if those were favorable to a retributive approach. The most pressing issue in the field of foreign affairs in the aftermath of the genocide was the repatriation of refugees. Throughout the genocide and the RPF invasion about two million people, out of a total population of about seven million, fled to Rwanda's neighboring countries Burundi, Tanzania, Uganda, and Zaïre, today's Congo. In addition, the atrocities had displaced an enormous number of people inside of Rwanda.³⁰³ Returning the masses of refugees, and reintegrating them into

³⁰⁰ Cf. Sieff and Wright 1999, 761-762.

³⁰¹ However, the government still had to face those accusations within time. Critics based those on the one-sidedness of prosecution and arbitrary arrests; See for example Des Forges and Longman 2004, 60-61, Osiel 2009, 154 and Brown 2011, 186.

³⁰² Cf. Jones 2010, 86-87.

³⁰³ Cf. Oomen 2009, 186; Prunier 1995, 312.

society became a crucial topic for the transitional government.³⁰⁴ One factor explaining the urgency that the repatriation of refugees had is that after the genocide about forty per cent of the population was either dead or in exile, and there was subsequently an enormous lack in human resources.³⁰⁵ Furthermore, there was ongoing conflict in the refugee camps, some of which were under the control of extremists that had fled Rwanda after the RPF's victory. Therefore, the return of the refugees also became a point of interest for the RPF in terms of its political control over the population, which could only be granted if the latter was within the country's borders.³⁰⁶ In addition, with infiltrations from the camps into Rwanda starting in September 1994, the refugee problem posed a serious threat to the country's security situation. The settling of this issue was also pressed for by the international community, and was made a condition for Rwanda to receive foreign aid.³⁰⁷ However, many refugees refused to go back to Rwanda because returnees were often arrested on the accusation of participation in the genocide, even if they were promised otherwise beforehand, and revenge killings took place.³⁰⁸ In summary, the main dilemma concerning the refugee issue was that the Rwandan government saw their repatriation as necessary in order to secure stability, whereas international organizations working in the camps as well as the refugees themselves feared that they would be subjected to acts of revenge in Rwanda.³⁰⁹ Concerning the decision to apply retributive justice, the refugee problem added to the government's perception that priority was to be given to the re-establishment of security and peace within the country. The fact that some of the instigators of the genocide still launched attacks from abroad added to the government's perception that extremists did not give up their horrible goal of Tutsi extermination and violence needed to be stopped, and that this was only possible through detention followed by prosecution and, if guilt was proven, punishment.³¹⁰

2.3.4 Values and Beliefs

This far, the analysis has taken into account factors that influence the choice of transitional justice approach in terms of political power and capacity. In addition to that, the political will to implement a certain policy has to exist. Therefore, decision-makers'

³⁰⁴ Cf. Republic of Rwanda 1995, 6.

³⁰⁵ Cf. Prunier 1995, 327.

³⁰⁶ Cf. Prunier 1995, 314; AI 1995, 7; Gourevitch 1998, 167.

³⁰⁷ Cf. Prunier 1995, 315-316.

³⁰⁸ Cf. AI 1995, 4, 7.

³⁰⁹ Cf. Prunier 1995, 321; Kritz et al. 1998, 1489.

³¹⁰ Cf. Kritz et al. 1998, 1489; Schabas 1996, 548.

beliefs about which policy is best suited to reach the objectives they prioritize also matters. According to Elster (1998), “many regimes have based their policies on beliefs about the cathartic powers of truth and about the beneficial deterrent effects of severe punishments.”³¹¹ Since a complex analysis of individual decision-makers’ beliefs and of their aggregation into a policy would exceed the scope of this thesis, values and beliefs are derived from the policy preferences that were officially stated. In addition, the choice of transitional justice approach is influenced by the conclusions that decision-makers draw out of the constraints under which they act. The question is whether both factors, conclusions drawn from specific constraints as well as leaders’ values and beliefs, were conducive to a retributive justice approach.

As elaborated in chapter 2.1, the main factors that transitional justice in the aftermath of the Rwandan genocide had to take into account were the culture of impunity, the ideology of ethnic hatred,³¹² the high level of complicity in the killings, the state of the institutions after the genocide and the urgent need for reconciliation. On base of this, the transitional government set up various objectives, which it regarded as interconnected. Among those were healing and stabilizing the society, promoting reconciliation, establishing a truthful account of the genocide, bringing perpetrators to account, combating impunity, and developing a functioning rule of law.³¹³ In the Kigali Conference, the objectives were summarized as follows:

The Conference’s overall objective was to provide for the Rwandan government and the Rwandan society a forum for developing a viable and coherent national policy to respond to the genocide in a manner that, on one hand re-establishes accountability and uproots impunity and on the other hand enable us to stabilise the society quickly.³¹⁴

The application of retributive justice to achieve those goals has to be seen in light of the general beliefs that were held about the benefits of such an approach. In the already mentioned arguments that are commonly brought forward prosecution is regarded as the best way to give the new regime credibility and legitimacy, to set moral standards, to fight impunity while having a deterring effect, to bring about justice, and to acknowledge victims’ suffering and counteract revisionism by establishing a truthful account of what happened. Those corresponded to the needs that decision-makers in Rwanda thought transitional justice had to address.³¹⁵ Furthermore, bringing individual perpetrators to account was illustrated as a way to establish individual responsibility,

³¹¹ Elster 1998, 43.

³¹² Cf. Republic of Rwanda 1995, 10.

³¹³ Cf. Kritz et al. 1998, 1487, 1492; Jones 2010, 98, 183; Republic of Rwanda 1995, 6-7.

³¹⁴ Republic of Rwanda 1995, 8.

³¹⁵ Cf. Republic of Rwanda 1995, 7.

and thus counter the deadly Hutu-Tutsi dichotomy by preventing guilt from being ascribed to the whole Hutu group.³¹⁶ Moreover, it was taken into account that it had been the government, which had misused its power and the state apparatus to incite the population and to plan the genocide.³¹⁷ Therefore, establishing a functioning rule of law was regarded essential in order to avoid such an event from ever happening again.³¹⁸ All of those factors were favorable to a retributive approach.

Another point of analysis referring to the impact of decision-makers' beliefs is suggested by Sieff and Wright (1999), who argue that "when political leaders view peace and justice as reconcilable, they are more likely to advocate prosecutions."³¹⁹ In Rwanda, the government perceived the two not only as reconcilable but even as interdependent. Justice in terms of bringing genocide perpetrators to account while at the same time establishing a rule of law in the country was regarded as absolutely necessary for a stable and secure future situation to emerge.³²⁰ Accordingly, decision-makers' beliefs reinforced prosecution and punishment as a viable transitional justice option.

Concerning the constraints, under which decision-makers acted, the situation was first of all characterized by serious time pressure. In order to stop the ongoing violence, offenders had to be detained immediately. For the same reasons there was an urgent need to prosecute the planners of the genocide, many of which continued the killings from neighboring countries, especially targeting witnesses.³²¹ However, there were also factors that rendered a retributive approach difficult to implement. The most serious challenge was posed by the high number of suspected genocide perpetrators, coupled with the devastated state of the country's legal institutions and infrastructure. By 1996, 120,000 people were detained,³²² and over time the number of people estimated to have participated in the genocide grew up to 750,000.³²³ Even though many external actors declared it impossible to bring every perpetrator to account, the transitional government insisted on its approach of maximum accountability.³²⁴ Thus, this specific challenge could not induce the government to move away from its highly retributive approach. However, recognizing the impossibility to try every perpetrator, the government was

³¹⁶ Des Forges 1999, *Justice and Responsibility*.

³¹⁷ Cf. Republic of Rwanda 1995, 6.

³¹⁸ Cf. Kritz et al. 1998, 1492.

³¹⁹ Sieff and Wright 1999, 769.

³²⁰ Cf. Republic of Rwanda 1995, 7; Kritz et al. 1998, 1487.

³²¹ Cf. Jones 2010, 82; Scharf 1999, 635.

³²² Cf. Jones 2010, 83.

³²³ Cf. Oomen 2009, 185.

³²⁴ Cf. Republic of Rwanda 1995, 7.

prompted to adjust its approach and thus categorized offenders in Organic Law No. 08/96, while recognizing that it might not be able to prosecute all guilty.³²⁵ Despite this innovative clause, Rwanda implemented a retributive process. Hence, the conclusion that decision-makers drew out of this specific constraint was to find a way to still apply retributive justice to as many perpetrators as possible.

2.3.5 Evaluation

In summary, there were various factors that bore an influence on the choice of transitional justice approach in Rwanda. As mentioned before, none of the analyzed variables can account for the outcome of the torturer problem in the case of Rwanda on its own. However, taken together the analyzed features present before, during, and after the regime change resulted in the retributive approach that the country pursued after the genocide.

In the case study at hand, the dependent variable takes on the value of retributive justice. As already mentioned, transitional justice can be regarded as a function of political power and political will. In Rwanda, political power after the genocide was held by the RPF. Since the latter emerged as the victorious power out of a military conflict and occupied the country, there was no need to balance the interests of a multitude of actors with different agendas in the form of a compromise. This specific shape of the variable of 'transition type' has implications for the impact of the variable of 'nature of previous regime'. Power being distributed clearly in favor of the RPF, it did not depend as strongly on societal support to implement its favored policy. Thus, while experiences the population had made in the past played a certain role, the attitudes that the ones in power after the transition held towards the former regime were those that mattered most. Among the actors that made decisions about transitional justice, the previous regime enjoyed no legitimacy. Therefore, they favored the application of retributive justice. Further, the former regime's employment of high levels of repression rendered a retributive approach more likely. In addition, repression grew over time, and the time span between the height of the violence and the time when decisions about transitional justice were made was very short, which according to the theories also points towards the enactment of prosecution and punishment. Concerning complicity, the high level of participation in the crimes constituted one of the main obstacles for the government to pursue a retributive approach. However, this had practical capability

³²⁵ Cf. Kritz et al. 1998, 1486.

reasons, and did not depart from a lack of political power to enact prosecution. Since the decision-makers in post-genocide Rwanda were not affiliated with genocidal crimes of the previous regime, they promoted a retributive approach despite the high level of complicity within the society. The role played by external actors, who had a strong presence in post-genocide Rwanda, also explains why retributive justice was applied. The international community itself clearly pursued a retributive approach with the establishment of the ICTR. In addition, international norms promoted retributive justice. NGOs further played an important role in attaching the label 'genocide' to the violence in Rwanda and pointing out the political, legal and moral consequences of this, and subsequently pushed for perpetrators to be brought to account. This backed the transitional government in its policies by providing its stance on the subject with credibility and legitimacy. Finally, most individuals that assumed a consulting role in post-genocide Rwanda initially also promoted a retributive approach. With regards to regional stability considerations of Rwanda, the central concern was the threat that the refugee issue and ongoing attacks from refugee camps abroad posed to the country's security as well as to political power. The conclusions drawn out of this, namely the need to detain perpetrators and put them on trial, also pointed towards a retributive approach. Finally, the political will to pursue retributive justice showed itself in decision-makers' values and beliefs, expressed in the objectives the transitional government established on the base of what it saw as causes of the violence as well as objectives it set for the future. Priorities set by the government in this regard confirm its belief in retributive justice as the best approach. In addition, the time pressure resulting out of the need to stop the ongoing violence only served to reinforce the governments' belief in the necessity to put the perpetrators on trial. Finally, the most serious challenge to a retributive approach was posed by the high number of potential defendants. The fact that the government pursued a policy of maximal accountability despite this constraint reflects its strong political will to apply retributive justice.

Conclusion

In the Rwandan genocide, about 800,000 people, mainly Tutsi, but also Hutu and Twa who sympathized with the former, were killed by an estimated number of 750,000 perpetrators from the Hutu population group. The genocide was ended together with the RPF's military victory in the Rwandan civil war, which had been going on for four years. Facing a traumatized population split into alleged perpetrators and victims, the

RPF had to make decisions about how to deal with the horrible past events, while at the same time leading Rwanda into a stable future in which such violence would not reoccur. The political leaders subsequently decided to pursue a policy of maximal accountability, with the goal of putting every single suspected genocide perpetrator on trial and punishing the guilty. This highly retributive approach constituted the main policy employed by Rwanda to deal with the genocide. Considering the practical challenges in terms of resources, time, personnel, and the number of potential defendants, as well as the Western origin of the retributive understanding of justice, it seems astonishing that Rwanda enacted this particular policy.

The question this thesis departed from was why Rwanda chose to apply retributive justice after the genocide. On the base of scholarly work written mainly on third wave transitions, different variables were explored in terms of the influence they had on Rwanda's decision to enact a retributive transitional justice approach. In conclusion, Rwanda's choice of a policy focusing on retribution can be explained by the following factors. It was partly the result of a mode of transition that provided the opposition party that enacted the regime change with a monopoly of political power, and of an enormously brutal and repressive former regime that enjoyed no legitimacy in the eyes of the decision-makers of the post-genocide era. In addition, the majority of external actors pursued a policy that promoted retribution in light of the serious human rights violations. Further, there was a situation of regional crisis triggered by the Rwandan refugees that made criminal prosecution of the genocide perpetrators appear crucial to the country's security. And finally, the particular choice of transitional justice approach was also the outcome of decision-makers' values and beliefs according to which retribution seemed the best option to achieve the policy goals that were established with regards to the country's future.

While accounting for the particular policy the country chose, testing the existing hypotheses on the Rwandan case study at the same time contributes to the conceptual framework of transitional justice. Even though the bulk of scholarly work that provided the conceptual basis for the analysis stems from the context of post-communist transitions, most of the hypotheses drawn from those were verified in the Rwandan case. Some had to be adjusted because they did not correspond to the specific context in which the Rwandan regime change has to be placed. Thus, it was demonstrated that in the Rwandan case the influence of the feature 'level of complicity of the population' was rendered less important due to the specific shape of another variable, namely the

‘transition type’. The outcome of the Rwandan mode of transition was a power monopoly being held by the very forces that had enacted the regime change. Therefore, the decision-makers were relatively free to implement their favored approach, and did not depend as much on societal support. It follows that the presence of a high level of complicity of the population in the country was not posing an obstacle big enough to make the dependent variable take on a less retributive value. At the same time, the limited influence of this specific variable cannot be solely ascribed to the present mode of transition, but also to actors’ values and beliefs, and the role that external actors played in strengthening the power position of the RPF and legitimizing its transitional justice policy. This demonstrates that such analysis has to be based on a multi-causal model that takes into account a variety of factors as well as their interaction. One of the variables on its own might constitute a necessary condition that has to be fulfilled to render a particular approach possible, but only by additionally taking into consideration all other factors influencing post-conflict decision-making, it can be fully explained why a particular approach was adopted in the end.

In conclusion, it can be said that Rwanda did favor a retributive approach. Features that characterized the Rwandan situation before, during, and after the genocide resulted in the particular transitional justice policy it implemented.

In a globalizing world where conflicts are increasingly of an inter-society nature, Rwanda serves as a valuable example for the issues at stake in a post-conflict society. Of course every country is unique, and faces particular challenges as well as opportunities. In most countries emerging from a period of violence the power balance is not distributed as clearly in favor of one party as this was the case in Rwanda. Further, the fact that in Rwanda genocide occurred entailed strong legal, political and moral obligations that might not be present in other cases. Accordingly, there is a need to constantly adapt the variables of the research design to present conditions. However, the underlying dilemmas as well as the basic factors influencing decision-making remain the same.

Due to the increased involvement of state and non-state external actors in the transitional justice conduct of countries, the international dimension deserves more attention in such kinds of analysis. The Rwandan genocide took place over fifteen years ago. Since then, the already considerable influence of external actors and international norms further increased. Especially international norms became more durable and the commitment made by the international community to the adherence to human rights

was institutionalized in form of the ICC. Although there are nevertheless still many cases of human rights abuses, and the international community's actions are in many cases based exclusively on power interests, the establishment of the ICC constitutes a significant step that reinforces the primacy given to retributive justice. The international dimension also gains importance due to the growing epistemic community in the field. This is manifested in a proliferation of institutes that offer consultation and advice on a variety of transitional justice instruments, many of which more restorative in character.

The latest developments in Northern Africa demonstrate that issues of transitional justice are of central importance in the present world. Although the outcomes of the recent revolutionary movements of the so-called 'Arab spring' still remain to be seen, the countries in which a regime change was brought underway will have to make decisions about how to deal with their repressive past one way or another. The results such decision-making will come to are likely to be influenced by the very variables that were discussed in this thesis. Additionally, the decision-makers in those countries will most likely be more restricted in their power to implement their favored approach than this was the case in Rwanda due to the existence of the ICC, which makes amnesty as a bargaining tool to induce the ruling elite into resigning peacefully almost impossible. Nevertheless, the existence of the ICC does certainly not imply that in the future every country will implement a retributive approach. Although the ICC clearly embodies retributive justice, it only aims at prosecuting selected individuals very high up the chain of command for their responsibility in human rights violations. Questions concerning which approach out of a range of transitional justice options to adopt, questions that are influenced by the very factors that were discussed in this thesis, will still keep countries occupied in the future.

Bibliography

Scientific Literature

Bachmann, Klaus. *Vergeltung, Strafe, Amnestie. Eine vergleichende Studie zu Kollaboration und ihrer Aufarbeitung in Belgien, Polen und den Niederlanden*. Frankfurt: Peter Lang Int., 2011.

BBC News. "Analysis. Why Bizimungu mattered." *BBC News Online* March 23, 2000. Accessed August 29, 2011. <http://news.bbc.co.uk/2/hi/africa/688587.stm>.

Benomar, Jamal. "Justice after Transitions." In *Transitional justice: how emerging democracies reckon with former regimes*, edited by Neil J. Kritz, 32-41. Washington D.C.: United States Institute of Peace, 1995.

Braithwaite, John. *Restorative Justice & Responsive Regulation*. New York: Oxford University Press, 2002.

Brannigan, Augustine and Jones, Nicholas A. 2009. "Genocide and the Legal Process in Rwanda. From Genocide Amnesty to the New Rule of law." *International Criminal Justice Review* 19(2): 192-207.

Brown, Stephen. "The rule of law and the hidden politics of transitional justice in Rwanda." In *Peacebuilding and Rule of Law in Africa: Just Peace?*, edited by Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, 179-196. New York: Routledge, 2011.

Clark, Phil. "Establishing a Conceptual Framework: Six Key Transitional Justice Themes." In *After Genocide*, edited by Phil Clark and Zachary D. Kaufman, 191-206. London: Hurst, 2008.

Clark, Phil and Kaufman, Zachary D. "The Past is Prologue: Planning the 1994 Rwandan Genocide." In *After Genocide*, edited by Phil Clark and Zachary D. Kaufman, 1-19. London: Hurst, 2008.

Clark, Phil, Kaufman, Zachary D., and Nicolaïdis, Kalypso. "Tensions in Transitional Justice." In *After Genocide*, edited by Phil Clark and Zachary D. Kaufman, 381-392. London: Hurst, 2008.

Crocker, David A. "Reckoning with Past Wrongs. A Normative Framework." In *Ethics & International Affairs. A Reader*, edited by Joel H. Rosenthal and Christian Barry, 45-64. Washington D.C.: Georgetown University Press, 2009.

Dallaire, Roméo. *Shake Hands with the Devil: The Failure of Humanity in Rwanda*. New York: Carroll & Graf Publishers, 2003.

Daly, Kathleen. 2001. "Restorative justice: the real story." Paper presented at Scottish Criminology Conference, Edinburgh, 21-22 September 2000. Accessed July 31, 2011. http://www.griffith.edu.au/__data/assets/pdf_file/0011/50321/kdpaper12.pdf.

DeLaet, Debra L. 2004. Review of *Beyond Retribution. Seeking Justice in the Shadows of War*, by Rama Mani. *Development in Practice* 14(3): 457-458.

Des Forges, Alison. 1999. "Leave None to Tell the Story: Genocide in Rwanda." *Human Rights Watch*. Accessed July 31, 2011. <http://www.hrw.org/legacy/reports/1999/rwanda/>.

Des Forges, Alison and Longman, Timothy. "Legal responses to genocide in Rwanda." In *My Neighbor, My Enemy. Justice and Community in the Aftermath of Mass Atrocity*, edited by Eric Stover and Harvey M. Weinstein, 49-68. Cambridge: Cambridge University Press, 2004.

Drumbl, Mark A. 2000. "Sclerosis: Retributive Justice and the Rwandan Genocide." *Punishment & Society* 2: 287-307.

Duff, Antony. "Restoration and Retribution." In *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms?*, edited by Andrew von Hirsch, Julian v. Roberts, and Anthony Bottoms, 43-60. Portland: Hart Publishing, 2003.

Elster, Jon. 1998. "Coming to terms with the past. A framework for the study of justice in the transition to democracy." *European Journal of Sociology* 39: 7-48.

Elster, Jon. *Closing the Books. Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004.

Fujii, Lee A. *Killing Neighbors. Webs of Violence in Rwanda*. New York: Cornell University Press, 2009.

Goldstone, Richard J. 1998. Foreword to *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*, by Martha Minow, ix-xiii. Boston: Beacon Press.

Gourevitch, Philip. *We wish to inform you that tomorrow we will be killed with our families*. New York: Farrar, Straus and Giroux, 1998.

HRW. 2006. "The Rwandan Genocide. How It Was Prepared." Accessed August 08, 2011. <http://www.hrw.org/legacy/background/africa/rwanda0406/>.

Huntington, Samuel P. "The Third Wave: Democratization in the Late Twentieth Century." In *Transitional justice: how emerging democracies reckon with former regimes*, edited by Neil J. Kritz, 65-81. Washington D.C.: United States Institute of Peace, 1995.

Huyse, Luc. "To Punish or to Pardon: a Devil's Choice Dealing with Human Rights Violations Committed Under a Previous Regime." In *Human Rights Commissions and Ombudsman Offices. National Experiences throughout the World*, edited by Kamal Hossain, Leonard F. M. Besselink, Haile Selassie Gebre Selassie, and Edmond Völker, 83-88. The Hague: Kluwer Law International, 2000.

ICG. 1999. "Five years after the genocide in Rwanda: Justice in question." *ICG Report Rwanda No. 1*.

- ICTJ. 2008. "What is Transitional Justice?" Accessed July 31, 2011.
<http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.
- ICTR. 2000. "Prosecutor vs. Kanyabashi" (Case No. ICTR-96-15-I). Accessed July 31, 2011.
<http://www.unict.org/Portals/0/Case%5CEnglish%5CKanyabashi%5Cindictment%5Cindex.pdf>.
- Jones, Nicholas A. *The Courts of Genocide*. Oxon: Routledge, 2010.
- Kagame, Paul. Preface to *After Genocide*, by Phil Clark and Zachary D. Kaufman, xxi-xxvi. London: Hurst, 2008.
- Kaufman, Zachary D. 2005. "The Future of Transitional Justice." *St. Antony's International Review* 1(1): 58-81.
- Kritz, Neil J. "The Dilemmas of Transitional Justice." In *Transitional justice: how emerging democracies reckon with former regimes*, edited by Neil J. Kritz, xix-xxx. Washington D.C.: United States Institute of Peace, 1995.
- Lemarchand, René. "The Politics of Memory in Post-Genocide Rwanda." In *After Genocide*, edited by Phil Clark and Zachary D. Kaufman, 65-76. London: Hurst, 2008.
- Llewellyn, Jennifer J., and Howse, Robert. 1998. *Restorative Justice: A Conceptual Framework*. Ottawa: Law Commission of Canada. Quoted in Jones, 2010, 33-34.
- Mamdani, Mahmood. *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*. Princeton: Princeton University Press, 2001.
- Mani, Rama. *Beyond Retribution. Seeking Justice in the Shadows of War*. Malden: Blackwell Publishers Inc., 2002.
- Marshall, Tony F. *Restorative Justice. An Overview*. London: Home Office, Research Development and Statistics Directorate, 1999.
- Melvyn, Linda. "The Past is Prologue: Planning the 1994 Rwandan Genocide." In *After Genocide*, edited by Phil Clark and Zachary D. Kaufman, 21-31. London: Hurst, 2008.
- Minow, Martha. *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*. Boston: Beacon Press, 1998.
- Moghalu, Kingsley Chiedu. "Prosecute or Pardon? Between Truth Commissions and War Crimes Trials." In *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, edited by Chandra Lekha Sriram and Suren Pillay, 69-95. Scottsville: University of KwaZulu Natal Press, 2009.
- Moran, John P. 1994. "The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?" *Communist and Post-Communist Studies* 27(1): 95-109.
- Nedelsky, Nadya. 2004. "Divergent Responses to a Common past: Transitional Justice in the Czech Republic and Slovakia." *Theory and Society* 33(1): 65-115.

Neier, Aryeh. *War Crimes. Brutality, Genocide, Terror, and the Struggle for Justice*. New York: Times Books, 1998.

Ntsebeza, Dumisa B. "Can Truth Commissions in Africa deliver justice?" In *Human Rights in Africa. Legal Perspectives on their Protection and Promotion*, edited by Anton Bösl, and Joseph Diescho, 375-388. Windhoek: Macmillan Education Namibia, 2009.

Oomen, Barbara. "Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda's Multi-layered Justice Mechanisms." In *Building a Future on Peace and Justice*, edited by Kai Ambos, Judith Large and Marieke Wierda, 175-202. Berlin, Heidelberg: Springer-Verlag, 2009.

Osiel, Mark. *Making Sense of Mass Atrocity*. New York: Cambridge University Press, 2009.

Oxford Dictionaries. 2011. "Deserts." Accessed July 31, 2011.
<http://oxforddictionaries.com/definition/deserts>.

Prunier, Gérard. *The Rwanda Crisis. History of a Genocide*. New York: Columbia University Press, 1995.

Roberts, Paul. "Restoration and Retribution in International Criminal Justice: An Explanatory Analysis." In *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms?*, edited by Andrew von Hirsch, Julian v. Roberts, and Anthony Bottoms, 115-134. Portland: Hart Publishing, 2003.

Roht-Arriaza, Naomi. "The new landscape of transitional justice." In *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*, edited by Naomi Roht-Arriaza and Javier Mariezcurrena, 1-16. New York: Cambridge University Press, 2006.

Sarkin, Jeremy. 1999. "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda." *Human Rights Quarterly* 21(3): 767-823.

Schabas, William A. 1996. "Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems." *Criminal Law Forum* 7(3): 523-560.

Schabas, William A. "Post-Genocide Justice in Rwanda: A Spectrum of Options." In *After Genocide*, edited by Phil Clark, and Zachary D. Kaufman, 207-227. London: Hurst, 2008.

Scharf, Michael P. 1999. "Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide." *Journal of International Affairs* 52(2): 621-638.

Sieff, Michelle and Wright, Leslie Vinjamuri. 1999. "Reconciling Order and Justice? New Institutional Solutions in Post-Conflict States." *Journal of International Affairs* 52(2): 757-779.

- Smith, Charles D. 1995. Introduction to *Transitional justice: how emerging democracies reckon with former regimes*, by Neil J. Kritz, xv-xvii. Washington D.C.: United States Institute of Peace.
- Sriram, Chandra Lekha. "Introduction: Transitional Justice and Peacebuilding." In *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, edited by Chandra Lekha Sriram and Suren Pillay, 1-18. Scottsville: University of KwaZulu Natal Press, 2009.
- Teitel, Ruti G. 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16: 69-94.
- UN Security Council. 2004. "The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary General" (S/2004/616). 23 August 2004.
- Villa-Vicencio, Charles. "Inclusive Justice: The Limitations of Trial Justice and Truth Commissions." In *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, edited by Chandra Lekha Sriram and Suren Pillay, 44-68. Scottsville: University of KwaZulu Natal Press, 2009b.
- Villa-Vicencio, Charles. "Transitional justice and human rights in Africa." In *Human Rights in Africa. Legal Perspectives on their Protection and Promotion*, edited by Anton Bösl, and Joseph Diescho, 33-51. Windhoek: Macmillan Education Namibia, 2009a.
- Von Hirsch, Andrew, v. Roberts, Julian, and Bottoms, Anthony. *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms?* Portland: Hart Publishing, 2003.
- Walgrave, Lode. "Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime." In *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms?*, edited by Andrew von Hirsch, Julian v. Roberts, and Anthony Bottoms, 61-78. Portland: Hart Publishing, 2003.
- Weinstein, Harvey M. and Stover, Eric. "Introduction: conflict, justice and reclamation." In *My Neighbor, My Enemy. Justice and Community in the Aftermath of Mass Atrocity*, edited by Eric Stover and Harvey M. Weinstein, 49-68. Cambridge: Cambridge University Press, 2004.
- Welsh, Helga A. 1994. "Political Transition Processes in Central and Eastern Europe." *Comparative Politics* 26(4): 379-394.
- Welsh, Helga A. 1996. "Dealing with the Communist past: Central and East European Experiences after 1990." *Europe-Asia Studies* 48(3): 413-428.
- Williams, Paul D. "The Peacekeeping System, Britain and the 1994 Rwandan Genocide." In *After Genocide*, edited by Phil Clark, and Zachary D. Kaufman, 43-63. London: Hurst, 2008.

Zalaquett, José. "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints." In *Transitional justice: how emerging democracies reckon with former regimes*, edited by Neil J. Kritz, 3-31. Washington D.C.: United States Institute of Peace, 1995.

Zaum, Dominik. "Balancing Justice and Order: State-building and the Prosecution of War Crimes in Rwanda and Kosovo." In *After Genocide*, edited by Phil Clark, and Zachary D. Kaufman, 363-379. London: Hurst, 2008.

Zehr, Howard. 1985. "Retributive Justice, Restorative Justice." *New Perspectives on Crime and Justice: Occasional Papers of the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice* 4.

Research Material

AI. 1994. "A call for UN human rights action on Rwanda and Burundi." Index Number IOR 41/002/1994. Accessed August 27, 2011.
<http://www.amnesty.org/en/library/asset/IOR41/002/1994/en/2d81b5bf-eb0b-4766-a767-449d3a053e5c/ior410021994en.pdf>.

AI. 1995. "Rwanda: Crying out for justice." Index Number AFR/47/005/1995. Accessed August 26, 2011.
<http://www.amnesty.org/en/library/asset/AFR47/005/1995/en/1465e54a-eb61-11dd-b8d6-03683db9c805/afr470051995en.pdf>.

HRW. 1994. "Genocide in Rwanda: April – May 1994." *Human Rights Watch/ Africa* 6(4). Accessed August 26, 2011.
<http://www.hrw.org/sites/default/files/reports/RWANDA945.PDF>
<http://www.hrw.org/sites/default/files/reports/RWANDA945.PDF>.

Kritz, Neil J., Muna, Bernard, Pillay, Navanethem, and Rudasingwa, Theogene. 1998. "The Rwanda Tribunal and its relationship to national trials in Rwanda." *American University International Law Review* 13(6): 1469-1493.

National Service of Gacaca Jurisdictions. 2011. "Context or historical background of Gacaca Courts." Accessed July 31.
<http://www.inkiko-gacaca.gov.rw/En/Generaties.htm>.

Organic Law No. 08/96. Accessed August 29, 2011.
<http://www.preventgenocide.org/law/domestic/rwanda.htm>.

Republic of Rwanda. Office of the President. 1995. "Genocide, impunity and accountability: Dialogue for a national and international response." *Recommendations of the conference held in Kigali from November 1st to 5th, 1995*.

USIP. 1995. "Rwanda. Accountability for War Crimes and Genocide. A Report on a United States Institute of Peace Conference." Accessed August 21, 2011.
<http://www.usip.org/files/resources/SR13.pdf>.

Curriculum Vitae

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Higher Education

M.A. Erasmus Mundus Global Studies

01/ 2011 – 09/2011

University of Vienna, Austria

Major: Global History

09/ 2010 – 12/ 2010

University of California, Santa Barbara, USA

Majors: Global Culture, Development Studies

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University of Wroclaw, Poland

Majors: International Relations, Economics

B.A. International Cultural and Business Studies

10/ 2006 – 09/ 2009

University of Passau, Germany

Majors: American and English Studies, Political Sciences,
Business Administration

Bachelor Thesis: "Using Collective Memory: Die Rolle von
Abraham Lincoln in Barack Obama's Selbstdarstellung."

09/ 2008 – 01/ 2009

University of Bangor, Wales: Exchange Term

Majors: English Literature, Business Administration

07/ 2004

Obermenzinger Gymnasium, Munich, Germany

Abitur (school-leaving certificate)

Work Experience

08/ 2008 – 09/ 2008

American Consulate General, Munich, Germany

Internship in the Consular Section:

Translation and research work

Assistance of applicants in the visa section

Data administration in the passport section

07/ 2007 – 11/ 2007	kuwi.netzwerk international e.V. , Passau, Germany Internship: Publication of the Year Book Organization, layout, distribution, editorial responsibility
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Additional Qualifications

Workshops	Cross-cultural training, intercultural communication, visualization & presentation
Conferences	China's quest for African resources Entwicklungszusammenarbeit zwischen Afrika und Europa Governance in the EU (Danube Summer School) Nation branding in a globalized world

Extra-curricular activities

02/ 2009 – 09/ 2009	Active member of Amnesty International , Passau
09/ 2008 – 01/ 2009	Participation in the students newspaper Seren of Bangor University
10/ 2006 – 09/ 2009	Active member of kuwi.netzwerk international e.V. , Passau