UNIVERSITY OF KWAZULU-NATAL

COLLEGE OF LAW AND MANAGEMENT STUDIES,

SCHOOL OF LAW

HOWARD COLLEGE

Truth and Reconciliation in South Africa vs Gacaca Courts in Rwanda: Transitional Justice mechanisms, and the need for reparations

Andile Nomvelo Fidelia Msane

220082380

This research proposal is submitted in pursuance of the requirements for the degree of Masters of Laws

Supervisor: Sandhiya Singh

2021

DECLARATION REGARDING ORIGINALITY

I, Andile Nomvelo Msane declare that:

A. The research reported in this dissertation, except where otherwise indicated, and is my original research.

B. This dissertation has not been submitted for any degree or examination at any other university.

C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

D. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:

    a. their words have been re-written, but the general information attributed to them has been referenced;

    b. Where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

E. Where I have reproduced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was written by myself alone and have fully referenced such publications.

F. This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the sources being detailed in the dissertation/thesis and in the References sections.

Signed: Andile Msane

Date: 15 September 2021

ACKNOWLEDGEMENT

‘Deep down in your cells. You know the truth. You are exquisite. And yes. You are that powerful. And it scares you’- Nayyirah Waheed

To the women in my life,

Firstly, my appreciation goes to my older sister, Fezeka Msane. I would not have survived this journey without your understanding, patience, and tolerance for all my frustrations and your meals made with love. For every egg made ‘half cooked, sunny side up’, I got the strength to push a little more. I love and appreciate you. For our bundle of joy Lumanele Usemuhle, I thank you for opening me up to a love I wouldn’t have otherwise known. Stay shining. *Uyisbusiso empilweni yami.*

To my mother, Ncengani Mthethwa without your love for academia, I would never have thought it possible to achieve as much as I have. Your resilience and tenacity to push through all adversities has been a motivating force during this journey. If you can achieve all that you have, with three daughters and responsibilities, who am I not to try. I am after all, your daughter. You created distant galaxies in a brain hardwired to stay grounded on earth. Thank you for the love. Being a role model and more importantly, letting me be the wild bird I am, I am able to sough because you left the window open. For that I love and thank you for cutting a path so it might be easier for us to walk.

To my favourite person in the whole world, my baby sister Smilo Mfeka, you are the reason I try so hard. Thank you for being a little gem of wisdom. Thank you for always making me laugh. I hope to inspire you to go after what you believe you deserve, which is the world. I hope you are never afraid of failure. I hope you root for yourself as much as I root for you. You are the best part of me. You are greatness. I love you baby girl.

For the bedrock of friendships, my small circle of friends and soul mates, Teddy Nkosi for your 14 years of consistency, Siphosetu Matebese for truly seeing me, and Sthembiso Ngwekazi for the depth. I thank you all for the constant affirmation of how great I am (which I still do not believe), reminding me of my strength and pushing me further by engaging in discussions you all had no knowledge of, simply to get me thinking differently, for allowing me to vent, for listening to my frustrations, for the advice, the laughs, the wine and piercings, I will forever be indebted to you all. Thank you for everything.

To my supervisor, Ms Sandhiya Singh, this journey was never easy for us both, thank you for seeing this through to the end with me. Thank you. Your work is appreciated.

To Professor Caroline Goodier, thank you for the seminar that reminded me how close I was to the end. Not only did you provide me with direction, you also gave me torch to help me along the way. Thank you.

To myself, I did it! I really did it! I have never been prouder of myself than I am now, I will ride this wave for a long time. I deserve an expensive bottle of wine to be drank from the bottle because why not. PS: no PhD talk for at least 3 years though; we need to rest girl!

Finally, for making it possible, our heavenly Father, Jehovah. I couldn't have done this without the little bit of hope that I am not alone and that there is a greater power in life wanting what is best for me. I believe. Thank you.

ABSTRACT

The year 1994 will forever be earmarked as the most eventful year in the history books of both South Africa and Rwanda. For South Africa, the year represented a long-awaited transition from an apartheid and segregationist government to one of democracy. This placed an obligation on the government to restore national unity, to hold accountable the perpetrators of apartheid and to repair the victims and survivors of apartheid. The creation of the Truth and Reconciliation Commission was situated primarily on the fulfilment of these aims.

More than two decades ago, while South Africa was moving away from conflict, in April of 1994. Also, in April 1994, Rwanda was emerging into an ethnically fuelled genocide in an attempt to hold the perpetrators accountable for their actions, it became apparent that the existing judicial system had been debilitated and would be incapable of handling the amount of cases before it. This led to the creation of Gacaca Courts which were tasked with the investigation and prosecution of crimes committed between 1 October 1990 and 31 December 1994.

The topic of discussion was prompted by the visible failure of both governments to cater for the needs of its citizens and to address past injustices brought about as a result of the mass human rights violations. Moreover, the overwhelming lack of literature on the topic of reparations for African countries post conflict, prompted the need to look at transitional justice mechanisms and to decipher to what extent they deliver justice and peace practically, as opposed to theoretical ideals. Further, the need to call out both governments for the controversial, yet accurate claim that without the payment of reparations (which comes in many forms) justice has not been done and both governments have failed its citizens for over two decades. Finally, this topic was prompted by the effort to not only fill the gap in the understanding of reparations in Africa and within transitional justice but also an attempt to influence legislation impacted in this regard.

This dissertation will look at the ways in which comparison can be made between the South African Truth and Reconciliation Commission following Apartheid and the Gacaca Courts following the Rwandan Genocide with regard to the restorative approaches employed in both cases as well how sexual violence was handled respectively. It explores the effectiveness of Gacaca Courts, the positive changes it's made possible for the Rwandan citizens as well as its short comings. It also explores the effectiveness of the TRC as well as its shortcomings and makes a comparison between SA, Namibia and Zimbabwe on the land question. In addition to

this, it will look at the practical application of reparations in the country specific context, in chapters 2 (South Africa) and 3 (Rwanda) respectively.

Moreover, this paper will argue that without the reparations aspect of the countries proposals being fulfilled in its entirety, the process to justice and peace is incomplete and justice cannot be said to be done. It will also look at the forms that reparations can take as well as how that has been applied, and ought to be applied in the specific countries. Recommendations for each country are made and explained in detail in chapter 4.

Two recommendations for South Africa are made in this dissertation. It is recommended that the registration period for individual reparations for the survivors of apartheid be re-opened, further, it is recommended that government deals with the land reform issues on an urgent basis.

The successes of Gacaca Courts are commendable; however, the failures have been detrimental to the lives and health of the victims of genocide. It is in this breath that three recommendations are made for a more effective and far reaching operation. It is recommended that the Rwandan Patriotic Front be held accountable for the crimes committed during and after the Genocide and not be exempted from law. Further, it is recommended that government establish a compensation fund for victims and finally, it is recommended that crimes for sexual violence and sexual reproduction get special attention and crime specific reparations.

CONTENTS

CHAPTER 3

RWANDA: GACACA COURTS AND REPARATIONS

CHAPTER 4

CONCLUSION

ABREVIATIONS USED IN THE TEXT

AC - Amnesty Commission

ANC - African National Congress

BBBEE - Broad Based Black Economic Employment

CRSV - Crimes Related to Sexual Violence

EFF - Economic Freedom Fighters

FARG - *Fonds d'Assistance aux Rescapes du Genocide*

HRV - Human Rights Violations

ICTJ - International Centre for Transitional Justice

ICTR - International Criminal Tribunal for Rwanda

IRG - Individual Reparation Grants

RR - Reparations and Reconciliation Committee

RPF - Rwandan Patriotic Front

TRC - Truth and Reconciliation Commission

UNSC -United Nations Security Council

CHAPTER 1: INTRODUCTION

1.1 Background

.

The 1994 Rwandan Genocide[1] and mass killings had chilling consequences for victims, survivors and perpetrators alike. The International Criminal Tribunal for Rwanda (ICTR) was established through a United Nations Security Council (UNSC) Resolution in Arusha for the 'sole purpose of prosecuting persons responsible for genocide as defined in Article 3 and other serious violations of international humanitarian law (such as crimes against humanity in Article 4 of the Statute) committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other prosecuting such violations committed in the territory of neighbouring states'.[2] The ICTR was tasked with this momentous duty. However, it was subsequently felt that for a myriad of reasons, including the need to advance restorative justice mechanisms, time, speed and cost of cases, as well as the large number of perpetrators and the overcrowding of prisons,[3] an alternative approach was needed to deal with crimes that did not include the core international crimes.

The Genocide resulted in overpopulated prisons and the domestic criminal justice system buckled under the weight of prisoners awaiting trial. The collapse of the Rwandan judicial system meant that justice could not be delivered.[4] This called for an alternative and radical measure to bring the perpetrators to justice, hence the Gacaca courts. [5]

Gacaca courts are a vast network of local tribunals that employ restorative measures in order to alleviate prison overcrowding, to reunite prisoners with their families and to provide redress for the victims of crimes.[6] The primary aim of Gacaca courts is to employ restorative and

[1] Within a period of four months, from April to July 1994, Rwanda experienced the most extensive genocides in history, which saw nearly one million Rwandans were killed as a result of ethnic discrimination, violence and Civil war. The most harm was suffered by the Tutsi at the hands of the Hutu. K Brouneus 'Truth-Telling as Talking Cure? (2008) 54.
[2] UN Security Council, Statute of the International Tribunal for Rwanda (as last amended 13 October 2006) 8 November 1994.
[3] M Rettig 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 30.
[4] C Clapham 'Gacaca: A Successful Experiment in Restorative Justice?' (2012) 1. The TRC was established by virtue of Section 2 of the Promotion of Unity Act 36 of 1995.
[5] *Ibid.*
[6] M Rettig 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 30.

reparative measures, keeping in line with African tradition to deliver justice.[7] This restorative and reparative justice approach to crimes committed in the context of the Rwandan armed conflict was intended to address the needs of victims and perpetrators of Genocide. [8] The Gacaca courts were created to function in a similar way to the Truth and Reconciliation Commission[9] (TRC) in South Africa.[10] Both Rwanda and South Africa share a history of conflict that they have sought to overcome through the introduction of new constitutional settlements.

From 1996 to 1998, Archbishop Desmond Tutu led the TRC after apartheid (racial separation) ended in South Africa. The Truth and Reconciliation Commission, was established to address, peacefully, the atrocities of apartheid in the country.[11] The commission was mandated to bear witness to the crimes perpetuated by the apartheid government, record testimony from survivors and in some cases 'to grant amnesty to the perpetrators of crimes relating to human rights violations, reparation and rehabilitation'.[12]

The TRC accomplished its work through three committees which were interrelated and interlinked. The first was the Human Rights Violations (HRV) Committee which was responsible for the investigation of 'human rights abuses that took place between 1960 and 1994'.[13] The second committee was the Reparation and Rehabilitation (R&R) Committee 'which was charged with restoring victims' dignity and formulating proposals to assist with rehabilitation'. [14]The final committee was the Amnesty Committee (AC) which 'considered applications for amnesty that were requested in accordance with the provisions of the Promotion of National Unity and Reconciliation Act[15] (the Act).

In *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*[16], the amnesty clause in section 20(7) of the Act came under fire for its

[7] *Ibid.*
[8] T Hauschildt 'Gacaca Courts and Restorative Justice in Rwanda' (2012) 7.
[9] The TRC was established by virtue of Section 2 of the Promotion of National Unity Act 35 of 1995.
[10] K Brouneus 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) 57.
[11] J A Vora 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans' (2004) 301.
[12] Truth and Reconciliation Commission https://www.sahistory.org.za/article/truth-and-reconciliation-commission-trc-0 [accessed 08/ 04/2020].
[13] Act 35 of 1995.
[14] Act 35 of 1995.
[15] Act 35 of 1995.
[16] 1996 (4) 672).

unconstitutionality because it granted amnesty to perpetrators who had committed unlawful acts associated with political objectives. In an unfavourable finding, the court held that the amnesty clause was constitutional, because when read together with the epilogue of the interim Constitution[17], it permitted limiting the people's right to have their disputes settled by a court of law as provided for in section 22 of the Interim Constitution. The court further stated that granting amnesty to the perpetrators was a necessary incentive in order to get the truth from persons and organisations who were liable for acts committed in the past because without the incentive, they would not have been forthcoming with the truth and this would have made uniting and reconciling the country more difficult.[18] There is some truth in the courts finding, but more than that, there is a hindrance on peoples' rights not only to seek accountability from the perpetrators, but also to seek civil liability claims from the state. Instead of this being a step to unite the nation, it drove the wedge further than intended and failed to deliver justice for the victims.

The objectives of the commission,[19] were, primarily 'to promote national unity and reconciliation in a spirit of understanding which transcends the conflict and divisions of the past' [20]this would be achieved by bringing to the open, the full picture of the causes, nature and extent of the human violations as per section 3 (1) (a). What follows is s a series of powers or methods of achieving the objectives which include facilitating the granting of amnesty but is not limited to that. Section 3(b) is of relevance to the subject matter of the dissertation because national unity and reconciliation would be done by restoring the dignity of victims by granting them an opportunity to relay their experiences and finally, to report the findings in (a) –(c) as well as give to recommendations.[21]

The TRC can be seen as a revolutionary way of addressing interethnic and interracial conflicts arising due to racial injustices in South Africa's past. It has been said to be 'one of the most remarkable efforts of peace making in recent human history'.[22] The Commission worked simultaneously with the justice system and made recommendations to the judiciary (courts) regarding the best way to achieve reconciliation. It was as independent body, which according to the constitution of commission in section 7 (2) (b) had to be impartial and comprise of people

[17]1996 (4) 672) Para 2.
[18] 1996 (4) 672) Para 17.
[19] Found in Section 3(1) of Act 35 of 1995.
[20] Act 35 of 1995 above.
[21] Act 35 of 1995.
[22] J A Vora 'The Effectiveness of South Africa's TRC' (2004) 305.

without a high political profile, however, it was met with resentment because the perceptions were that it remained a political body ,having been born out of political compromise.[23]

Vora argues that 'all truth commissions can be considered as compromise whereby deals were worked out within the framework of political negotiations surrounding the transitions'[24]. South Africa was faced with the obligation to transform from an 'oppressive minority-ruled racist regime'[25] to a democratic government.[26] The truth and reconciliation process in South Africa was certainly costly, in terms of its failure to produce retributive justice.[27] The same can be observed from Gacaca Courts in Rwanda.

Studies have shown that the survivors who participated in Gacaca Courts have expressed their dissatisfaction with the results of Gacaca.[28] They expressed that they feel unsafe and unwanted.[29] In the neighbourhood, they are harassed, threatened and isolated.[30] Further, they believe that, but for the law prohibiting violence, the genocide would start all over again and 'they would be wiped off the face of the earth'.[31] The women further expressed that they thought the 'genocidaires had not changed in their attitudes since 1994'.[32] The voices of the victims of gang rape and those who witnessed their children and families being slaughtered, who later testified in Gacaca Courts and were subjected to humiliation, threats and harassment demonstrate that Gacaca Courts cannot then be called a successful experiment in restorative justice.[33]

On 4 May 2012, the Gacaca courts completed their work and came to a close. Eight years later, there are lingering doubts about whether they were a success or merely a failed attempt at restoring peace in Rwanda. With varying opinions from both Rwandan citizens and academic scholars, one thing remains a constant, Rwanda has made great strides toward national reconciliation.

---

[23] *Ibid*.
[24] *Ibid.*
[25] *Ibid.*
[26] J A Vora 'The Effectiveness of South Africa's TRC' (2004) 304.
[27] J L Gibson 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 411.
[28] K Brouneus 'Truth-Telling as Talking Cure? (2008) 68.
[29] K Brouneus 'Truth-Telling as Talking Cure? (2008) 66.
[30] K Brouneus 'Truth-Telling as Talking Cure? (2008) 67.
[31] M Rettig 'Gacaca: Truth, Justice, and Reconciliation?' (2008).
[32] K Brouneus 'Truth-Telling as Talking Cure? (2008) 66.
[33] C Clapham 'A Successful Experiment?' (2012) 5.

The question to be considered is how best the traditional approach of restorative justice can be reconciled with the western approach of reparations and/or compensation. The assumption usually advanced by academic literature 'is that truth-telling is healing and leads to reconciliation',[34] but is it sufficient to reconcile the community without addressing the victims' immediate needs of safety, security, education and health care through reparations? The justification for the traditional approach is that truth-telling and reconciliation is necessary for peace building. It is worth exploring whether reparations and compensation for past crimes would not offer the necessary pathway to peace building.

This paper is aimed at answering the questions below:

1. How is the need for reparations addressed through mechanisms of transitional justice in post conflict societies?
2. What is the legal framework for reparations in South Africa? In this regard, the form of reparations employed in South Africa, and how successful this has been will be explored.
3. What is the legal framework for reparations in Rwanda? In this regard, the form of reparations adopted by Rwanda and how successful this has been will be explored.

It is important to mention the limitations of this research in order to raise awareness of the various challenges experienced in conducting this study and how they were overcome as well as to make relevant recommendations for the relevant bodies. Firstly, because this paper is an empirical study, it mostly relied on research papers conducted by other academics. This posed a challenge because people have different agendas in their reporting, and this is usually reflected in their papers and their findings. It was then important to tread lightly when relying on these findings. Further, biases and prejudices were common in research papers whether knowingly or not, for instance, American scholars who also happened to be White males, were not as openly critical of the TRC as much as the Black South Africans were. It was essential to ensure that the research was based on fact rather that feelings in order to produce a well thought out argument and one which made a valid contribution to literature. This was done through keeping an open mind and understanding why such biases exist and how not to perpetuate them.

[34] K Brouneus 'Truth-Telling as Talking Cure?' (2008) 57.

Further, South Africa and Rwanda were intended to be used as a comparative study of how African countries used reparations post conflict to reconcile the survivors and perpetrators and to further rebuild the respective countries trust in government. However, it became apparent that there were not enough common grounds for comparison because the Rwandan Genocide differed immensely from Apartheid in South Africa.

For instance, the crimes related to sexual violence needing urgent focus were not as eminent in South Africa and the TRC did not mention sexual violence crimes due to a number of factors such as the missing bodies of victims, reluctance to speak about ones experiences, instead retelling traumas of their loved ones. Further, the speaker's expressions were often lost in translation and transcription.[35] This is discussed in detail in comparison to the Rwandan sexual violence cases and a common thread is made between the sexual violence cases in Rwanda and South Africa in chapters 2 and 3.

Further, an additional block to the comparison was due to the fact that South Africa has extensive legislation regarding land reform and land redistribution as means of reparation whereas Rwanda lacks such extensive legislation. The mechanisms of the TRC operated differently from that of Gacaca courts, the main link was that both had intended a similar outcome of using alternative methods to deal with post conflict societies. Rwanda had proposed a Reparations fund which never materialised and South Africa had enacted the Presidents fund which had and still has various limitations needing to be worked out. Both funds if properly structured with the proper guidelines, qualified people in government, checks and balances to halt corruption and greed, can serve as effective ways to restore the dignity of those violated as well as to fully reunite the parties at opposing ends of the conflict.

These differences made the comparative study difficult to carry out, instead the countries were used as case studies for the argument because of the similarities they share and that was more effective. The justification for using these two countries as a case study is that both countries are within the African diaspora and both experienced mass violations of human rights in the form of apartheid and the Genocide. Both countries have a colonial past which gave rise to the tension, in South Africa, along racial lines and in Rwanda, along ethnic lines. Both South Africa and Rwanda creatively created alternative justice systems to the criminal justice procedure in order to overcome their tumultuous past and to tackle issues born out of the crimes. Further, and most important to this discussion, both countries had ambitious plans where they proposed

[35] A Oboe "The TRC Women's Hearings as Performance and Protest in the New South Africa" 61.

reparations as strategies to deal with the past and reconcile the population in each country, however, both countries failed to deliver on this promise.

Moreover, there is an extensive gap in literature focusing around reparations for post conflict societies. This gap presented challenges because there was very little knowledge to base the argument on, little support for the direction to be taken and ancient texts with which to use as foundation, but times have transformed beyond the imagined times of those articles yet the literature available does not reflect these changes. For instance, earlier research on the TRC emphasised the 'rainbow nation' agenda and presented it in a way that made it seem like reality, however, looking at South Africa in 2020, it is evidenced that the rainbow nation is an unrealistic notion advanced by the TRC founders with no plan to get Black/ people of colour and White people to live in unison. The reality is that there is still resentment and hatred in the hearts of Black people due to the governments' failure to change their living conditions, there is still racism, exclusion and prejudice from White people as well as those of other races as well. Failure to acknowledge this reality does not make it disappear. This paper then becomes relevant in this regard because it looked at the true South African situation and reported it accurately.

In the same breath, the Rwandan Government, attempting to get rid of the ethnic classification, created a 'one Rwanda for all' notion whereby each person is recognised as Rwandan, instead of either Hutu or Tutsi, with the hopes that this would unite the country. Yet in the case studies, various participants mentioned that although they will not publicise their ethnicity, in their hearts they will always know which ethnicity they fall under as well as who belongs within their ethnicity and who does not. This is another example of the government placing a bandage on an open wound and expecting a miraculous recovery. This realisation was evidenced in the literature available[36]; it is possible that the true feelings of the participants in the case studies were hidden, either out of fear or a necessity to present a success story.[37] Literature has to reflect the changing attitudes of people as well, because failure to do so, creates an even bigger gap between theory and reality.

[36] F du Toit Reconciliation and Transitional Justice: The case of Rwanda's Gacaca Courts (2011). M Westberg 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' (2010). K Brouneus 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008).

[37] K Brouneus 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008).

With these limitations noted, recommendations will be made in order to fill in the gaps and to offer insight into the possible directions to be taken, as well as raise questions worth exploring, even if no answers are provided.

In the discussion of retributive justice and transitional justice, it is trite that the peace versus justice debate is inevitable. The 'essence of the debate is whether peace should take precedence'[38] over justice or vice versa*;* these concepts are opposed; or they are compatible with each other.[39] When reference to peace is made, it should be considered alongside security for those who testified in Gacaca Courts to ensure that peace building and security are not merely concepts, but a lived reality. [40] The peace v Justice discussion is relevant because it becomes evident that both South Africa and Rwanda had to navigate through the same debate after their respective conflicts such as the Rwandan Genocide and the South African Apartheid Regime. Were they to prioritise justice for their victims or were they to prioritise peace for the perceived overall good of the country? This discussion is imperative to the research because peace v justice is part and parcel to the study of transitional justice.

1.2 Peace versus Justice Dichotomy

The dilemma facing those taking lead in peace negotiations (such as human rights activists and peace negotiators) is having to balance the immediacy of halting the conflict and the demands of attaining justice.[41] In a conflict situation, where the priority is to halt the violence and human rights violations, the main question is centred on the perpetrators and particularly what should be done with them. Two basic solutions have been provided by academics. Firstly, the perpetrators should be put on trial in front of a tribunal, secondly, amnesties need to be granted in order to reach a peace agreement at the first instance.[42] To put it briefly, it 'is a choice between justice and peace'.[43]

[38] P R Williams 'The Peace vs Justice Puzzle and the Syrian crisis' (2018) 418.-419.
[39] P R Williams 'The peace vs Justice Puzzle and the Syrian crisis' (2018) 419.
[40] *Ibid.*
[41] P R Williams 'The peace vs Justice Puzzle and the Syrian crisis' (2018) 419.
[42] J Langer 'Peace vs. Justice: The Perceived and Real Contradictions of Conflict Resolution and Human Rights' (2015) 167.
[43] J Langer 'Peace vs. Justice: The Perceived and Real Contradictions of Conflict Resolution and Human Rights' (2015) 167.

The reason for the dichotomy is that people on opposing sides have differing opinions about which factor is to take precedence and the reason(s) therefor. The peace advocates are of the belief that pursuing justice and accountability will lead to the creation of more conflict whereas their counterparts, the justice and accountability advocates, opine that without accountability and justice there can be no sustainable peace.[44] During a crisis, the negotiators are forced to confront the trade-off between peace and justice as they determine which approach will offer more valuable and pragmatic strategies in an effort to achieve the intended outcome.[45]

In the case of South Africa for instance, the 1994 newly elected democratic government, realising that the situation following the apartheid regime was dire, was faced with having to choose between the countries peace and the victim's justice. The promulgation of the Promotion of National Unity and Reconciliation Act[46] in 1995 can be seen as a choice for peace or "national unity'' over justice. This is discussed fully in chapter 2. In the case of Rwanda, after their justice system was completely broken down due to the conflict between the Hutu and Tutsi, here was an introduction of Gacaca Courts, which aimed to not only prosecute the perpetrators but also to deliver justice to the victims and their families. This can be seen as a combination of both peace and justice. This is discussed in more detail in chapter 3.

How these two options are exercised in reality requires that the starting point would be to define these concepts. Peace can be defined as either negative or positive. 'Negative peace is the absence of violence'[47] or the annihilation of conflict, whereas positive peace is about including positive mechanisms such as reconciliation and reparation. [48] This means, 'peace is not merely the absence of armed conflict, rather, it is the restoration of justice'[49], and this thus renders the debate a false dichotomy as both factors of peace and justice play an important role to the rehabilitation of societies previously in conflict.[50] Justice on the other hand is usually associated with the improvement of law. This often goes hand in hand with implementing actions that focus on' increasing the capacity of law institutions, such as the police and courts in order to improve access to justice'.[51]

---

[44] K Mansour and L Riches 'Peace versus Justice: A False Dichotomy' (2017) 1.
[45] P R Williams 'The peace vs Justice puzzle' (2018) 419.
[46] *Ibid*
[47] K Mansour and L Riches 'Peace versus Justice' (2017) 2.
[48] K Mansour and L Riches 'Peace versus Justice' (2017) 2.
[49] *Ibid*.
[50] *Ibid*.
[51] W Bennett and T Wheeler' Justice and peace go hand in hand – you can't have one without the other' (2015).

Bassiouni accounts that within the human rights arena lies 'a constant tension between the attraction of realpolitik and the demand for accountability'.[52] The explanation of these two concepts shares similarities with that of justice and peace. Realpolitik is defined as the pursuit of political settlements which is unencumbered by moral and ethical limitations and often operates contrary to the interests of justice for the 'victims of gross violations of human rights'.[53] Pursuing realpolitik will settle the immediate problems of a conflict, however, this will be at the expense of long-term peace, stability, and reconciliation. This can be thought of as prioritising peace over justice because the immediate priority becomes halting the on-going conflict and reducing the number of deaths. However, in order to attain genuine peace, the victims' needs have to be addressed in order to provide a sense of closure to a wounded society.[54]

Williams defines this as the peace-first approach which, as the name suggests, is a single-minded approach which prioritises ending the conflict at any cost and pushing aside any other goals that impede the priority of peace.[55] 'The peace negotiator's role is to end the conflict, not to assume the role of a prosecutor and assign responsibility or call for justice'.[56] The advantages of the peace first approach are that it ends human suffering, as putting an end to an on-going conflict drastically reduces the number of casualties and the possible harm. Further it ends harm to both the environment and the infrastructure while allowing for the states to initiate re-building plans. Finally, it encourages national reconciliation and social reconciliation.[57]

South Africa can be used as an example of a country that employed the peace first approach and the model of the benefits of prioritizing peace. During peace negotiations such as those of the TRC following apartheid, peace was prioritised in that the interim Constitution.[58] The Constitution had been promulgated and had 'formed the foundation for the first non-racial general elections in South Africa'[59], included an amnesty clause which granted amnesty to all those who has been involved in 'acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'. While not without

[52] M C Bassiouni 'Justice and Peace' (2003) 191.
[53] *Ibid.*
[54] *Ibid* 191-192.
[55] P R Williams 'The peace vs Justice Puzzle' (2018) 421.
[56] Anonymous, Human Rights in Peace Negotiations (1996) [hereinafter Human Rights in Peace Negotiations]. 256.
[57] P R Williams 'The peace vs Justice puzzle' (2018) 423.
[58] Act 200 of 1993.
[59] P R Williams 'The peace vs Justice puzzle' (2018) 423.

controversy, peace focused agreements granting amnesty have been considered a success in laying a foundation for lasting peace.[60] In *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [61] it was stated that a commitment to a transition towards a "more just, defensible and democratic political order would not be achieved without committing to reconciliation and national unity" and that in order to do this, it would be crucial to "close the book on the past because much of the unjust consequences of the past could never be fully reversed". [62] The epilogue of the interim constitution[63] states that the South African people would have to overcome the gross violations of human rights and the legacy of hatred, fear, guilt, and revenge. Taken in this peace v justice context, it becomes clear that peace was a priority over justice. Further, the epilogue states that people (particularly the ones who had been imprisoned, silenced, or driven into exile in consequence of their resistance to that control and its consequence[64]) should work towards understanding, reparation and Ubuntu instead of vengeance, retaliation and victimisation. Instead of accountability, it speaks about amnesty for the perpetrators.

The demand for accountability, in contrast, 'demands sanctions for those responsible for carrying out human rights violations, taking responsibility, as well as establishing a clear record of truth and efforts made to provide redress to victims as per the goals of restorative justice'.[65] Accountability can then be seen to be the other arm of justice. Attaining justice requires that not only are the responsible people held accountable for their actions, but also that the victims' needs be prioritised.

Williams refers to this approach as the justice first approach.[66] The 'justice-first approach advances the notion that accountability through prosecution'[67] should take precedence and should be negotiated as a matter of urgency. It further advances the idea that although peace is being sought, it should not be sought after, at the expense of the pursuit for justice. This means that the justice approach encompasses elements of peace within it, however said elements should not be at the expense of justice.[68] The justice first approach is willing to allow conflict

[60] P R Williams 'The peace vs Justice puzzle' (2018) 428.
[61] 1996 (4) 672).
[62] 1996 (4) 672) Para 2.
[63] Act 200 of 1993
[64] *1996 (4) 672) Para 2*
[65] M C Bassiouni 'Justice and Peace' (2003) 191.
[66]P R Williams 'The peace vs Justice puzzle' (2018) 430.
[67] *Ibid.*
[68] P R Williams 'The peace vs Justice puzzle' (2018) 431.

to continue if it means justice will be served at a later stage. [69] Due to the gross violations of human rights, victims tend to favour the justice first approach which finds its footing in retributive justice. The appeal for the justice first approach is understandable, but in reality it is not sustainable because the route would take longer to attain and that would mean more deaths and more human rights violations in the time justice is being sought out. It is worth differentiating between transitional justice and retributive justice.

Those coming from the human rights world acknowledge and agree that the best way to deal with peace and justice simultaneously is to adopt the peace with justice route. However, there is still a disagreement as to what extent aspirations for justice can be left to stand in the way of peace making.[70] The first step is to accept that there is a dilemma. There has to be acceptance that when you insist on justice within peace, peace becomes more complicated. However, the fact that there is this complication does not mean there has to be a choice of one over the other. With the victims in mind, as well as the societies that will live with the end of conflict, it is up to academics and peace negotiators to come up with solutions that have peace and justice nurture and support and reinforce each other.[71] We need solutions that deal with legal, moral and practical considerations when dealing with societies with a history of mass atrocities.

The Rwandan Gacaca Courts are a prime example of the attempt at the incorporation of both peace and justice into a single system. On one hand, the perpetrators had to be held accountable and the victims were given a platform to air their grievances while of the other hand, the government attempted to encourage peace by encouraging unified living areas instead of segregation.

This is where transitional justice becomes important. Transitional justice incorporates societal practices and the way people live, as it is an evolving standard that has come from interpretations of 'international human rights law and international humanitarian law'.[72] The International Centre for Transitional Justice (ICTJ)[73] , which 'invests knowledge, effort and commitment to healing fractured communities'[74] points out that transitional justice is 'the

[69] P R Williams 'The peace vs Justice puzzle' (2018) 432.
[70] J Mendez. 'Justice or Peace? Can We Have Both?' (2014) 7.
[71] *Ibid.*
[72] J Mendez. 'Justice or Peace? Can We Have Both?' (2014) 8.
[73] With experience spanning over 15 years in over 40 countries, works for justice in countries immerging from conflict and human rights violations. Ictj.org
[74] Ictj.org

application of a human rights policy in particular circumstances'[75], the circumstances as we have come to know are usually the attempts used to eradicate past abuses. Transitional justice includes unearthing the true events that occurred, to understand the harms that were caused, while simultaneously holding those responsible to account for their actions, without neglecting the needs of victims and communities for healing and reconciliation for a just and peace future.[76]

From these societal practices, combined with the law, results legal standards which have within them principles that are accepted and validated by practice, as well as the most authoritative interpretations of international law. [77] The essence of transitional justice is found within the four main obligations which have to be considered in the face of mass atrocities. Firstly, truth-telling takes priority there can be no healing without truth, the discoveries of who, what, where and why have to be made and disclosed to the public and the victims particularly[78].

Secondly, justice has to be served. These crimes are egregious and cannot go unpunished. This places on the state, the duty to investigate, prosecute and punish with utmost regard and respect for principles of fair trial and due process. The third is reparations which is discussed in detail in chapter 2. The victims are entitled to reparations that do not insult their dignity as human beings; reparations are a symbolic expression of recognizing the harm they suffered. Finally, institutional reform as the fourth component of transitional justice. This places an obligation on the state to reform all the institutions that were used to carry out these human rights violations.[79]

These four components are obligations because they are not choices. The state cannot choose to respect one over the other, all four have to be carried out. However, these are obligations of means, not of results because, in particular, the question of reparations has proven to be difficult especially after mass destruction of infrastructure. Due to this, a state that is unable to pay reparations nevertheless has to actively uncover the truth, disclose it, and prosecute those found guilty of the accusations against them, with good faith and with respect for the legal standards.[80]

---

[75] ICTJ (2009). 'What is Transitional Justice?'https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf. [Accessed 08/04/20202].
[76] P McCold, J Llewellyn and D W. Van Ness 'Briefing Paper #1: An Introduction to Restorative Peacebuilding' (2007)4.
[77] P McCold 'An Introduction to Restorative Peacebuilding' (2007) 8.
[78] J Mendez. 'Justice or Peace? Can We Have Both?' (2014) 8.
[79] J Mendez. 'Justice or Peace? Can We Have Both?' (2014)8.
[80] *Ibid.*

Transitional justice encompasses both retributive and restorative justice.[81] Restorative justice is victim-based and prioritises peoples' relationships and human rights while ensuring accountability, reconciliation and the possibility of deterring recurrence.[82] Restorative justice values the active participation of those most affected to determine how far reaching the harm was, as well as to provide redress. Restorative Justice is a justice theory that reflects principles such as being 'harm-focused, relational, participatory and democratic'.[83]

On the other hand, 'retributive justice takes a punitive approach, advocating specifically for the punishment of criminals'.[84] However, it's important to note that justice can not only be dispensed through courts, rather from the available opportunities and transactions available in any given society.[85] Outside of courts and the law, justice would be granting proportional educational, cultural or economically sustainable opportunities to the victims and survivors of the conflict.

It is evidence that peacebuilding cannot be separated from the promotion of justice because the separation will undermine both, as peace and justice are interdependent. Peace and justice have to be advanced as complementary objectives rather than one taking precedence over the other. 'History has repeatedly shown that justice and peace are inextricably linked, that one cannot exist without the other in a way'.[86] The challenge becomes reconciling the unavoidable tension between the two concepts.

Using the South African TRC to elaborate and substantiate, the TRC enjoys celebrated status as a success story, however, a careful analysis reveals that reconciliation has not been as vast as the TRC creators such as the legislators and the new government had hoped, particularly from the populace of the White minority and the Black majority in the country. Although negative peace has been attained, in that there is no on-going war, positive peace has not yet been attained as there is still a very disproportionate distribution of resources and access to opportunities.[87] In this instance, justice has not been served.

---

[81] K Mansour and L Riches 'Peace versus Justice' (2017) 5.
[82] K Mansour and L Riches 'Peace versus Justice' (2017) 5.
[83] P McCold, J Llewellyn and D W. Van Ness 'Briefing Paper #1: An Introduction to Restorative Peacebuilding' (2007).2.
[84] K Mansour and L Riches 'Peace versus Justice' (2017) 5.
[85] W Bennett and T Wheeler' Justice and peace go hand in hand – you can't have one without the other' (2015).
[86] H Jallow 'Justice and the Rule of Law: A Global Perspective' (2009) 78.
[87] K Mansour and L Riches 'Peace versus Justice' (2017) 4.

In the case of Gacaca Courts, justice was not merely served when the perpetrators of genocide were locked away, rather, there had to be measures put in place to advance the needs of the victims in a way that restores their livelihood. This could have included involving the survivors in decision making, guaranteeing access to resources that would alleviate poverty and to strengthen their security.

Peace has to be understood as' not merely the absence of armed conflict but the restoration of justice'[88]. For this reason, justice cannot be sacrificed for the illusion of immediate peace. Both justice and peace are essential values required 'for the prevention and deterrence of future conflicts'.[89]

Kofi Annan, the late, former Secretary General of the United Nations stated that 'We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace.'[90] This statement supports the notion of peace with justice. It supports the idea that these two ideas are not mutually exclusive but can be woven together to achieve a more sustainable peace.

This demonstrates that positive peace equals justice and so, justice and peace are compatible to each other rather than being opposed concepts. In order to attain positive peace which is impactful and sustainable, any approach to restorative justice has be victim-centred and aimed at reconciliation and accountability.[91] Restorative justice does not require one to decide between peace and justice, instead, it allows both concepts to flourish along one another. This then means restorative justice can offer common ground to solve this dilemma. At its core, restorative justice is 'concerned with and committed to establishing peaceful relationships based on values of mutual respect, concern and dignity'[92] which underpin international human rights.[93]

The primary tenets of the 'peace with justice' approach ought to be summarized as follows, firstly being inextricably connected and complementary to one another; secondly, both should

[88] M C Bassiouni 'Justice and Peace' (2003) 191-192.
[89] M C Bassiouni 'Justice and Peace' (2003) 192.
[90] Statement, Secretary-General's Remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role (2003).
[91] Y Sooka 'Dealing with the past and transitional justice: building peace through accountability' (2006) 11.
[92] P McCold, J Llewellyn and D W. Van Ness 'Briefing Paper #1: An Introduction to Restorative Peacebuilding' (2007).
[93] P McCold, J Llewellyn and D W. Van Ness 'Briefing Paper #1: An Introduction to Restorative Peacebuilding' (2007).

be promoted and pursued, regardless of how complex and difficult they are, thirdly; 'the grave need for peace should be found in conjunction with recognition of the demand for justice; and finally, when mishandled, peace and justice may clash, but peace should never justify impunity'. [94] Including peace in justice, shifts the idea of justice from retributive approaches to restorative approaches and allows citizens to seek effective reconciliation. Seeking long term peace means envisioning more than an immediate end to a conflict, instead it 'relies on justice to be both sustainable and enduring'.[95] Recognising the two concepts as concurrent is the direction that most human rights advocates favour because it brings meaningful and sustainable peace as opposed to the short term peace which could be attained from the use of a single element between peace and justice. .

Peace and justice can be incorporated into peace negotiations if we recognize that there is no one size fits all solution and that all conflicts are idiosyncratic. This means peace negotiators have to reject any solutions that close the door on justice in the future. This requires that they do not easily accept blanket amnesty agreements as they make securing justice a lot more difficult to obtain in the long run. It is also to be understood that concessions have to be made in order to get to mutually beneficial solutions. The peace negotiators would then have to deter aspirations of justice in order to cease fire and allow for conditions that allow for justice truth-telling and reparations to be possible within the framework of international law.[96] Peace negotiators have to work towards attaining the highest delivery of justice which is consistent with lasting peace. This can be done by consulting with the victims of the crimes and human rights violations in order to deliver justice that is aimed at peace. Victims have to be empowered by being given the voice to speak during peace negotiations, in order that they see justice to be done. Consultation with the victims is one such way to incorporate peace with justice.

It can be concluded 'that peace and justice can be mutually reinforcing instead of being exclusive'.[97] Long term peace is dependent on and relies on justice and accountability for sustainability.[98] In reality, the choice is rarely between one or the other, rather, a complex

[94] B Krzan '*International Criminal Court Facing the Peace vs. Justice Dilemma'* (2016) 87.
[95] P R Williams 'The peace vs Justice puzzle' (2018) 445.
[96] J Mendez. 'Justice or Peace? Can We Have Both?' (2014)12.
[97] J Langer 'Peace vs. Justice: The Perceived and Real Contradictions of Conflict Resolution and Human Rights.' (2015) 183.
[98] J Langer 'Peace vs. Justice: The Perceived and Real Contradictions of Conflict Resolution and Human Rights.' (2015) 183-184.

combination of the two will be employed as the intrinsically linked concepts. This calls for a new understanding of justice as not being embedded in retributive justice, rather as being part of restorative measures that allow going beyond the typical prosecution mechanisms.[99] 'In fact, a lot of synergy exists between the two fields of justice and peace, as long as peace is not only defined as negatively as the absence of war, but positively as social justice'.[100] This understanding will result not only in a clear direction as to the application and practicality of the peace with justice route. It will also result in more pragmatic and effective means to end conflict and deliver justice to the societies ridden with strife.

This dissertation, which is appropriately titled "Truth and Reconciliation in South Africa vs Gacaca Courts in Rwanda: Transitional Justice mechanisms, and the need for Reparations" argues that reparations have to be part and parcel in the discussion of transitional Justice. This means we cannot speak of peace and justice without mentioning the need to repair people who have been harmed and violated. The dissertation argues that reparations are a necessary part of achieving post conflict peace. Below is the discussion of the various forms of reparations, reparations as development, reparations as community service and reparations as preferential access and how they were and ought to be included in South Africa and Rwanda following their well-documented conflicts.

1.3 Reparations

The idea of reparations stems from the basic law maxim that all harm is to be remedied. Reparations in this context can be defined as 'measures that aim to repair or redress the impact of harm to provide remedy for the systematic violation of human rights commonly associated with armed conflict.'[101] 'Reparations are generally framed as repair for past damage, putting the victim back where he or she would have been had the wrong not occurred'.[102]The elements of reparations are they are firstly, the most victim-centred of existing transitional justice mechanisms[103], secondly, they encompass material and symbolic forms of redress and thirdly,

[99] J Langer 'Peace vs. Justice.' (2015) 183.
[100] J Langer 'Peace vs. Justice.' (2015) 184.
[101] U.N. women. A window of opportunity: Making Transitional Justice work for women. 16 2nd ed. (2012).
[102] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)160.
[103] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 110.

they can be awarded to individuals and collective through judicial or administrative mechanisms.[104]

Reparations in this context, refer to programmes which render payments of cash or services to large groups of people who suffered wrongs and harms that had been committed under permissible laws but would under the current law be unlawful. 'The rendered payments justify a backward -looking approach of corrective justice, rather than forward-grounds such as the deterrence of future'.[105] The payment of reparation involves three important relationships. Firstly, 'the relationship between the original perpetrator and the original victim'[106]; secondly, 'the relationship between the original doer and the possible payer of reparations'[107]; third and finally, 'the relationship between the original victim and the possible claimant or beneficiary of the reparations'. [108] Reparations at their core are paradoxical because they aim to return a person to their previous position before the harm was caused, but at the same time, how do you replace, amongst other things, loss of serenity and loss of whole communities including friends and family.[109] Reparations differ from post-conflict settlements in that they include a quality of atonement and remorse and they are the societies embodiment and recognition of the harms suffered.[110]

Reparations as previously mentioned, can be either individual or collective, as well as material or moral reparations. Material reparations for an individual can be inclusive of restoring a person's good name, restitution, access to property as well as 'medical, psychiatric or occupational therapy aimed at rehabilitation'[111]. They may go further as to include 'monetary compensation, in the form of a lump-sum, or pension for the victim and for the survivors of those killed'.[112] On the other hand, material reparations for a collective can be restitution of communal, cultural and religious property lands, educational and health facilities and other damaged public buildings.[113] Moral reparations, which are often grouped under the umbrella

[104] *ibid*
[105] E A Posner and A Vermeule 'Reparations for Slavery' (2003) 691.
[106] E A Posner and A Vermeule 'Reparations for Slavery' (2003) 698.
[107] *Ibid.*
[108] E A Posner and A Vermeule 'Reparations for Slavery' (2003) 698.
[109] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)159.
[110] *Ibid.*
[111] *Ibid.*
[112] E A Posner and A Vermeule 'Reparations for Slavery' (2003) 698.
[113] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)159.

term ‘satisfaction’ are often about restoring the dignity of loved ones, dead or alive and re-telling the stories with aims of achieving justice. Moral reparations ‘may include the disclosure of the facts of a victim's mistreatment or a loved one's death, disclosure or the names and positions of those responsible’[114] in order that they suffer the consequences, be it criminal prosecution or the loss of their positions.

‘Moral reparations may also be as basic as the identification and exhumation of the bodies of victims, and assistance in reburials and culturally appropriate mourning ceremonies’.[115] Perhaps more important would be ways of paying tribute to those who lost their lives in ways such as days of remembrance, renaming parks and streets, as well as public holidays. Further, the reform of education, rewriting of history textbooks as well as educating on tolerance of each other’s differences serve as a means to convey the ‘non repetition agenda’. This is because they work, not only to aim to expose and punish the responsible, but also to limit the role they play and the power they have in society.[116]

The question of reparations is without a doubt logically and morally challenging because it raises the question of how the government is to adequately assess the losses sustained as well as the difficulty of placing monetary value to a life lost. Due to the sheer psychological and physical sufferings from the genocide, it can be argued that this is an irreparable crime.[117] For instance, when state agents are involved in conflict, the state has a duty to provide reparations. Even if their direct involvement cannot be proven, ‘where a state is complicit in the violations, or where a state fails to use due diligence to investigate and prosecute the violations, the state incurs responsibility’.[118]

The Basic Principles[119] provide that compensation ‘should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation,’ including for physical and mental harm and for ‘moral damage.’[120] For this argument’s sake, these

[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*
[117] The Guardian – why compensation 3.
[118] N Roht-Arriaza, ‘Reparations Decisions and Dilemmas’ (2004)164.
[119] The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles) General Assembly resolution 60/147 of 16 December 2005.
[120] *Ibid.*

provisions could be interpreted to include the physical and psychosocial harms that arise as a consequence of sexual assaults as well'.[121]

It has been deduced by the academic literature above that reparations have a twofold purpose, firstly, the serve as an acknowledgment that wrongs have been done to people and that the state responsible for said violations shows atonement to the survivors and victims as well as those who suffered death at the states hands or watchful eye. Secondly, reparations are backward-looking in that they aim to restore (in the narrowest sense) the victims to the positions they were in before the violations. This is usually achieved through financial means such as compensation, but reparations take other forms as well.

1.3.1 Reparations in operation

In cases of mass human rights violations, some 'governments have instituted administrative schemes in order to pay reparations to the victims of said violations'[122]. These schemes are effectively operational in well off countries, or countries with an identifiable number of victims. [123] In South Africa, it was held that a reparations programme would be better suited to deal with civil claims especially considering the states limited resources. The Truth and Reconciliation Commission was divided into three commissions, one of which dealt with reparations and rehabilitation. True to the limitation of funds, the reparation commission did not have an independent budget like the other two commissions. This meant that the commission could only recommend that a reparations commission be enacted in terms of legislation.

The amounts recommended as payment for reparations were not individualised based on the degree of suffering or the type of violation, instead the amount was based on what the TRC defined as 'sufficient to make a meaningful impact on the quality of lives of the victims'[124]

The TRC also recommended symbolic reparations such as renaming streets, constructing burial and memorial sites, as well as the creation of culturally appropriate ceremonies. Further, to an extent, the public hearings held by the TRC as well as the publication of reports also served as

[121] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 120.
[122] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)173.
[123] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)173.
[124] Truth and Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be considered by the President.*

moral reparations. [125] These schemes are not without weaknesses and shortcomings. One such problem concerns the definition of who qualifies as a victim. Governments will usually balance the limited funds with the demands of the affected individuals; however, the results have not been satisfying and this has resulted in a limited or narrow definition of who is a victim. Certain states, in an effort to spend limited funds on the worst violations limited the definition of a victim to include only those who were killed or 'disappeared by the security forces, leaving aside the vastly larger number of those who were tortured while in detention and survived, and those who were forced into exile'.[126]

South Africa used the same restrictive interpretation by only including those who fell victim to the gross violations prohibited under South African and international law such as killings and torture to the definition of who a 'victim' is.[127] This move was criticised for having excluded the pillars of apartheid and shifted the focus from Whites as the largest benefactors of apartheid to a small group of security force operatives who could easily be characterized as 'bad apples'.[128] Another problem frequently experienced with the implementation and administration of reparation schemes is centred on the degree of individualised evidence for damages. It has been demonstrated that the more individualised a claim, the more evidence will be need and consequently, the longer the process will take.[129] At the same time, refusal to individualize claims means there is a failure to recognise that some people suffered, still suffer and so should be compensated accordingly. [130]

Studies show that the victims needs are not a one size fits all, some victims of human rights violation wanted states to acknowledge that harm had been done to them, they wanted knowledge of who and how it was done. They wanted their good name restored as justice and moral reparations. On the other hand, other victims were ambivalent about monetary reparations as they believed it was money that would still return to the state, others refused accepting monetary payments as they felt it was ''blood money'[131] used to silence them instead of dealing with the bigger problems.[132] Moreover, what the studies also showed was that there

[125] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)173.
[126] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004)178.
[127] *Ibid.*
[128] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004)178.
[129] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004)179.
[130] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004)180.
[131] *Ibid.*
[132] *Ibid.*

was an understanding from the victims that accepting monetary reparations was not enough if there was still reluctance on parts of the government to prosecute the wrongdoers.[133] Material reparations without further effort from the state to bring to justice those responsible, was seen as nothing more than a deflection of attention from the wrongdoers to the governments shallow effort at covering up history. [134]

The alternative to individualised claims would be the creation of a collective reparation scheme. 'Reparations, whether through courts or administrative compensation schemes, are designed to be implemented by a generally functional system, not one suffering massive breakdowns in every facet of life and governance'.[135] These collective schemes work best when there is a balance between meeting the victim's right for reparation as well as the necessity for social reconstruction after mass violations which resulted in the destruction of buildings and other state resources.

In matters requiring collective reparative schemes, the court's influence in ordering reparations weighed against the availability of resources proves a difficult challenge when considering the very large numbers of both victims and perpetrators. In practise, three broad, overlapping and fitting models have been encouraged. They are 'reparations as development, reparations as community-level acknowledgement and atonement and reparations as preferential access'.[136] There are different benefits and purposes for Individual and collective reparations. Individual reparations serve as recognition of specific harm to an individual and to their worth and dignity as a bearer of rights and should be satisfied. Collective reparations, which also serves overlapping benefits, caters to the collective harms of a community as well the harms to social cohesion and re-establishing social solidarity and the maximum and effective use of resources.[137]

1.3.2 Reparations as development

[133] *Ibid.*
[134] *Ibid.*
[135] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004)181.
[136] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004)186.
[137] N Roht-Arriaza and K Orlovsky 'A complementary relationship: reparations and development' (2009) 3.

The concept of reparations as development is one that looks at the communities which suffered violations on both a human and infrastructural level with the primary aim of restoring them to the position they were in before, or better yet, to surpass the level. Development efforts affect reparations outcomes. The relationship between development and reparations is closely related and intertwined because, 'the more development focuses on strengthening the services that will most likely be used by reparations beneficiaries, the more effective the reparations program or project is likely to be'.[138]

Historically, conflict and genocide occur in places which are detrimentally poor due to inequalities, and poverty as the driving forces for the violence. Women and children are amongst the minority groups of people who suffer the most damage and destruction from violence and conflict. In the most affected conflict areas, the need for economic development takes precedence.[139] For a far reaching implementation of community-based development projects, there has to be a recognition of all the harm that was done to the entire community and its members have to be given 'a concrete focus around which to begin rebuilding the fragile ties among neighbour's that were stretched or broken during the conflict'.[140] Development, in broad terms is the process whereby a society effectively works to increase the 'general and individual prosperity and welfare of its citizens'[141]. This is often achieved by building infrastructure and institutions which are necessary to ensure a fulfilling life for its members and upholding their dignity.[142]

It is worth noting that oftentimes, community members flee away from the places they previously called home or are displaced during conflict, in order to return stability to the villages, community based projects and reparations are better suited to integrate and stabilize the areas.[143] The key aspect for the success of community based reparations is the full participation of community members, from the priority aspects to the design of the programs. The appeal for collective reparations is that they avoid the challenge of having to decide or choose between reparations and other, equally essential priorities. The ultimate goal for

[138] N Roht-Arriaza and K Orlovsky 'A complementary relationship: reparations and development' (2009) 1.
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*
[142]N Roht-Arriaza and K Orlovsky 'A complementary relationship: reparations and development' (2009) 2.
[143] *Ibid.*

collective reparations is social transformation.[144] Viewing reparations as development also allows states to facilitate receiving redress from third parties or the parties responsible for fuelling the conflict. This is because they can view this as an acknowledgment of their wrongdoings and atone for their actions. [145]

The drawback of this approach to reparations is that it conflates the government's obligations of providing services to its citizens with the obligation of making reparations for the harms done. This approach, if not practised with caution will allow for governments to fulfil their obligations to its citizens, only to turn around and label it as 'reparations'. This conflation of the States responsibility is nothing more than the government's abdication or renunciation of their legal duties to their citizens.

Another drawback to this approach is that, in areas with clear geographical lines, especially along racial or class divides, it becomes a major challenge to target developmental reparations to the true survivors and victims. The position or placement of development aid is an important consideration because the most affected victims and survivors have to benefit, have to have access, and have to take advantage of the provisions. [146]

Another obstacles to pursuing a 'reparations as development' framework is the differing mandates, cultures and conceptualization of goals between those focused on 'transitional justice,' and those in government, focused on post conflict development.[147] They will often encounter challenges due to the differences in 'vocabulary, professional biases, restrictive mandates and attainment of goals'.[148]

1.3.3 Reparations as community service

The social reconstruction agenda after genocide goes beyond reparations, it is inclusive of 'prosecutions, disclosure of the nature, pattern, extent and consequences of the violations'[149], cleansing of those responsible from positions of public trust, structural changes to avoid

[144] N Roht-Arriaza 'Reparations, Decisions and Dilemmas' (2004) 187.
[145]N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004)188.
[146] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004)189.
[147] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004)189
[148] N Roht-Arriaza and KOrlovsky 'A complementary relationship: reparations and development' (2009) 2-3.
[149] *Ibid.*

repetition and commemoration.[150] True to the nature of violence and genocide, for the large number of victims and perpetrators who turned against their neighbours, the situation becomes more difficult to remedy. In these situations, court prosecutions become impossible to carry out and individual reparations are inadequate and oftentimes inaccessible. It is no doubt however that although prosecutions, be it international, national or domestic are appropriate and should be sought after, achieving justice in this manner proves to be a challenge because sufficient resources are not available to try everyone. This then calls for alternative methods to hold the leaders, organizers and enthusiastic practitioners of genocide or crimes against humanity responsible.[151]

In such situations, governments have to use mechanisms that serve to deliver justice, while also integrating the offenders back into society. More often, these measures are perceived as punishment, but they also have a 'reparatory element which can be emphasised and developed'.[152] Reparations as community services aims to re-socialise the offenders with their victims in a way that promotes reconciliation. This requires that two situations be met. Firstly, the perpetrators have to publicly confess the crimes to the victims and their families, this usually happens in truth telling hearings which are used as a way for the victims and survivors to know who inflicted harm on them and their families, where the bodies are buried etcetera. Secondly, the victims have to be given the chance to speak about their experiences openly and with no judgments.

These community reconciliation programs have proven to be more effective in situations where low-level perpetrators and their victims have to live in close proximity with one another, where the power disparities are relatively small and finally, where neither the perpetrators nor government have the resources to pay for compensation. [153] It seems they are more appropriate in rural areas rather than in urban areas.[154]

Investing back into the community is in itself a demonstration of moral reparations because it is an acknowledgement of the harms that occurred and a promise of a better future where the governments, along with the victims and perpetrators will work together to effectively transition from a tumultuous past to one with tolerance, understanding and compassion. The

[150] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004) 192.
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*

practice of the perpetrator publicly atoning for his/her wrongdoing in front of the community, the community being able to question and challenge the perpetrators story, and ultimately settling on a resolution and plans of integration makes the community programs appealing to post conflict societies. It had been suggested that the rewards of this mechanism surpass those which are strictly punitive as they rarely allow for atonement, apologies and positive or restorative justice.[155]

The drawbacks for this mechanism of using reparations as community services are that there are dangers of victims feeling that they should not demand more from the perpetrators in their legal actions, so as to not get in the way of community reconciliation. Further, there may be preconditions that exist within communities that favour this route before seeking other remedies. For instance, some communities may value community unity and harmony over individual rights' and this may result in a hindrance of seeking other legal remedies. [156] Finally, because community services as reparations deal effectively with low level perpetrators being integrated into communities, they would be more trustworthy if there were assurances that the organisers and leaders of the crimes against humanity and violence incited against ordinary people were being dealt with elsewhere. It is paramount that they are not seen as trade-offs for justice, instead they should be seen to serve the purpose for which they were designed.[157]

1.3.4 Reparations as preferential access

The third way of thinking about reparations, does not need a separate budget for individual reparations, but the victims suffering is recognised and catered for by being granted preferential access to services and public goods as they become available. This approach recognises that wrongs were done, and in order to make up for the suffering, places the victim at the forefront of service delivery. It corrects the marginalisation and ostracism through priority access to government services such as state subsidised housing, transport and education. [158] The underlying rationale for this mechanism is that it attempts to repair the individual harm of victims and foregrounds the idea that government owes a debt to the survivors instead of prioritising monetary compensation. Emphasis is placed on educational and health care benefits

[155] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004)197.
[156] *Ibid.*
[157] *Ibid.*
[158] *Ibid.*

but does not conflate the states obligation to deliver on these basic services with the obligation to remedy past harm. [159]

As per the other two approaches, this mechanism also has drawbacks or shortcomings. Firstly, if there is a large number of victims, the idea of moving them to the front of the line would defeat the purpose of catering for them before everyone else because they would all find themselves in the same situation. Secondly, there are no clear guidelines as to how long these programs are supposed to last before the debt is fully paid. Further concerns relate to how these special statuses would be administered and using what administrative apparatus'. Other concerns are centred on the human dignity of the victims, most victims would not want to publicly claim they have been victimised and are now benefitting from that harm. Finally, resentments can be created among those who are not beneficiaries of the preference-based approach as well as creating victimisations too.

A successful application of the reparation programme would be one that is inclusive all three approaches mentioned above. A programme that recognises the importance of developing the community and the living conditions of the victims and survivors and aims to improve the economic confines while also working to reconcile the community ties by getting both perpetrator and victim to publicly talk about their experiences. This would require the perpetrator to publicly confess and atone for their wrongdoings. Such a programme would put the victims ahead of the government service delivery programmes as a way to recognise their sufferings and also do right by them. Much benefit would be observed by post conflict societies if they were to implement and develop in ways that work best for their climate. 'Much will depend on the specific culture and the relationships among organized state power, perpetrators and victims'. [160]

'The use of one or more of these three approaches should keep the focus on inclusion, moral reparation, community-level solutions and access to the necessary resources'.[161] It is a given that in some areas, different approaches will work better than others, but including the different elements of each approach will certainly place the societies at better places than they would be if they exclusively chose one approach. What should remain constant is the participation by both the victims and survivors and the community at large as subjects on their own, rather than objects for the purpose of reparations. Reparations may be the most tangible and visible

[159] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004)199.
[160] *Ibid.* 199-200.
[161] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004)200.

expression of both acknowledgement and change, and in that sense an important contributor to reconciliation and social reconstruction.[162]

Reparations programs can help to create 'sustainable, culturally relevant change while addressing both root causes and survivors' immediate needs'.[163] The desirable outcomes of reparations are that they change the citizen's relationship to the state that they build civic trust as well as creating opportunities for the victims and perpetrators to contribute to building new societies. It is imperative that reparation programs adopt a victim first approach which will create a long-term positive interaction between state as the sizeable group of citizens through the creation of trust and right possession among the citizens. The concepts used, as well as the intention of the programs are essential for the development of the relationship between reparations and development. [164]'A complementary relationship is most likely when both types of programs emphasize social integration, respond intelligently to the realities and limitations of the state, and develop a growing body of knowledge regarding effective delivery mechanisms'.[165]

In the following chapters, an analysis of these approaches will be conducted in two almost similar post conflict societies. They are however different in so far as the crimes and transitional justice mechanisms are concerned. Chapter 2 will look at the transitional justice methods applied in South Africa after apartheid as well how far reparations were granted. Chapter 3 will explore the application of reparations in Rwanda.

[162] *Ibid.*
[163] N Roht-Arriaza 'Reparations Decisions and Dilemmas' (2004) 198.
[164]N Roht-Arriaza and K Orlovsky 'A complementary relationship: reparations and development' (2009) 4.
[165] N Roht-Arriaza and K Orlovsky 'A complementary relationship: reparations and development' (2009) 4-5.

CHAPTER TWO

SOUTH AFRICA: TRUTH AND RECONCILIATION AND REPARATIONS

The period spanning 1948 to 1994 will forever be earmarked as a part of history that adversely shaped South Africa's history, as well as its economic, political and social spheres. This was the period of apartheid, a segregationist regime that legalised unfair discrimination and segregated the South African population along racial lines, which promoted inequality, the effects of which are still prevalent in South Africa today.[166] Emerging from a new democracy, the government was faced with a challenging and monumental task of 'creating a bridge from the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice'[167] to a future characterized by civil unity, co-existence, peace and reconciliation.

Apartheid severely affected thousands of people and further exacerbated the racism experienced at the time before the label of apartheid. 'The aftermath of decades of apartheid and centuries of colonialism left a legacy of enormous social and economic inequality, as well as a deep-seated national psychological trauma'.[168] In order to rebuild national unity and reconciliation, there had to be an acknowledgement of the human rights violations and the pain suffered by the majority of the population. The year 1994, marked a major turning point in South Africa with its first democratic elections, ending the 46-year reign of apartheid. The responsibility placed on the new South African government was to address the legacy and persistent serious effects of apartheid. It is on this basis that the TRC was established.

The aim of the TRC, which was led by Archbishop Desmond Tutu from 1996 to 1998, was to address, in a non-violent manner, the atrocities committed during, and as a result of apartheid in South Africa.[169] Section 3(1) (a)- (d) of the Promotion of National Unity and Reconciliation Act[170] states that the objectives of the commission was to bear witness to, record and, in some

[166] Apartheid is described as racial segregation on the grounds of race in South Africa from the periods of 1948-1994.
[167] PE. Andrews 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 1156.
[168] PE. Andrews 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 1156.
[169] J A Vora 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans' (2004) 301.
[170] Act 34 of 1995, Section 3.

cases, grant amnesty to the perpetrators of crimes relating to human rights violations, reparation and rehabilitation'[171] as stated in chapter one.[172]

The work of the TRC was accomplished through three committees. The first was the Human Rights Violations (HRV) Committee in Sections 12-15 which was 'responsible for the investigation of human rights abuses that took place between 1960 and 1994'[173]. The second was the Reparation and Rehabilitation (R&R) Committee in Sections 23-27 which was 'charged with restoring victims' dignity and formulating proposals to assist with rehabilitation' [174] through making recommendations to the President. With respect to the R and R Committee, reparations and rehabilitation were to be implemented as a way of acknowledging that harm was caused, that because there were detrimental effects to their livelihoods, they had to be repaired and rehabilitated. These measures could not, nor were they intended to, resurrect the dead, nor adequately compensate for pain and suffering, but they could improve the quality of life for victims of gross human rights violations and/or their dependants. It was held by the drafters of the Promotion of National Unity and Reconciliation Act that a reparations programme would be better suited to deal with civil claims especially considering the state's limited resources. True to the limitation of funds, the R and R Commission did not have an independent budget like the other two commissions. This meant that the commission could only recommend that a reparations commission be enacted in terms of legislation as per section 25(1) (b) of Promotion of National Unity and Reconciliation Act.

The final committee was the Amnesty Committee (AC) in Sections 16- 22 'which was responsible for considering applications for amnesty that were requested in accordance with the provisions of the Promotion of National Unity and Reconciliation Act'.[175] The establishment of an amnesty committee was challenged for constitutionality in *Azanian People Organisation and Others v The President of the Republic of South Africa and Others.*[176] Where members of the public challenged the constitutionality of the amnesty provisions in the TRC Act, arguing that it unjustly deprived victims of their constitutional right of access to courts.

[171] Act 34 of 1995.
[172]Truth and Reconciliation Commission https://www.sahistory.org.za/article/truth-and-reconciliation-commission-trc-0 [accessed 08/ 04/2020].
[173] Act 34 of 1995.
[174] Act 34 of 1995.
[175] Act 34 of 1995 Section 16-22.
[176] 1996 (4) 672).

The amnesty section, expunged both criminal and civil liabilities, and this meant victims were deprived of their rights to seek judicial reparations through civil procedures and damage claims in courts. The courts finding of upholding the constitutionality of the section as well as permitting amnesty for criminal liability in order to create an incentive for the disclosure of the truth falls short of international standards of prosecuting crimes against humanity which will be discussed in detail under the international legal obligations on South Africa.

The early 2000's represented a change in the reception of the Promotion of National Unity and Reconciliation[177] and especially the amnesty clause prompted a quartet of cases[178] in which the Constitutional Court was tasked with the duty to revisit the nature, scope and effect of the amnesty clause application.[179] One such case was *Albutt v Centre for the Study of Violence and Reconciliation (CSVR)*[180] which looked into the TRC process and the meaning of national reconciliation and the limits brought on by the amnesty clause, as well as the possibilities for democracy.

In *Albutt v CSVR*, Mr Albutt was an apartheid criminal who was unable to apply for amnesty under the TRC process (his crime was committed after the cut of date for amnesty) and was serving an eight year sentence in prison.[181] Mr Albutt later applied for presidential pardon under former president Thabo Mbeki's rule. These applications were assessed behind closed doors and the names of the apartheid criminals were not released to the public. Civil society groups including CSVR, requested that these names be released and that their victims be given an opportunity to make representations before such persons are pardoned. This argument was largely based on the fact that the TRC process favoured and encouraged victim participation and transparency[182] and the President had committed to that process, but the operations of the presidential pardon were contrary to that as victims were not given the opportunity to make representations. It was held by Ngcobo CJ that the decision to exclude victims from participating in the process was irrational, in light of the objectives of 'national reconciliation and national unity' under the TRC Act.

[177] Act 34 of 1995
[178] Such as, but not limited to *The Citizen v McBride* 2010 (4) SA 148 (SCA), *Albutt v CSVR 2010* (3) SA 293 (CC).
[179] W le Roux "The Democratic turn and the limits of) Constitutional Patriotism after the truth and Reconciliation Commission: Albutt V CSVR" 51.
[180] 2010 (3) SA 293 (CC).
[181] 2010 (3) SA 293 (CC).
[182] 2010 (3) SA 293 (CC) para 60.

It goes without saying that in Africa, specifically South Africa and Rwanda which is discussed in-depth in Chapter three, an exchange of truth is imperative in order for the advancement and promotion of reconciliation. 'Each side ought to be able to present its version of the truth, to be heard and acknowledged'.[183] Acknowledging the validity of each other's truths avoids future conflicts. From the functions of the TRC, it can be deduced that truth-telling was prioritised in order to restore peace between the opposing parties. However, truth-telling does not equate justice. Once the truth about the past are revealed, the victim's needs have to be addressed. This means their losses and abuses have to be prioritised, listened to and addressed. There have to be measures put in place in order deliver sustainable peace and justice.

The reality is that without reparations, generations of children suffer the effects of poverty, malnutrition, homelessness, illiteracy, as well as a general sense of powerlessness which was constantly and consistently sustained by the institutions of apartheid. Skills and resources are needed to reform the republic - South Africa has neither. In order to propose changes to the mandate and operation of the TRC, it is then important to look at the areas that made the TRC less successful in achieving its intended goals. It will also show why many South Africans see the TRC as a façade that, through Desmond Tutu coined the very delusional term of 'rainbow nation' without making an effort to have people from different races truly united and living as one with a shared acknowledgement of the past.

From 1996, hearings were held in town halls, civic centres, and churches across the country where the TRC recounted the violations of human rights in South Africa through the testimony of victims and perpetrators alike.[184] The key aspect was the focus on the construct of restorative justice rather than on retributive justice, it was a quasi-legal procedure which did not necessarily provide victims of gross human rights violations with appropriate treatment. The TRC was not entirely helpful for national reconciliation and the question of its value for particular individuals was contentious.[185] It needs to be emphasized that the TRC was an imperfect process as the perpetrators of apartheid have not been brought to justice and the

[183] J Clark 'The three Rs: retributive justice, restorative justice, and reconciliation' (2008) 335.
[184] J A Vora and E Vora 'The Effectiveness of South Africa's TRC' (2004) 305.
[185] D J Stein 'The impact of the truth and reconciliation commission on psychological distress and forgiveness in South Africa.' (2008).

victims have often not been adequately compensated. [186] It is useful to consider the findings of the South African Truth Commission. While others found it deeply traumatic to re-live these events in public, some felt there could be no reconciliation without reparations, which were seen as an attempt to buy the silence or acquiescence of victims.[187] This stance is particularly based on the idea that reparations are being granted in exchange for forgiveness of the perpetrators. [188]

Due to the fact that the commission would be dealing with human rights abuses perpetrated from 1960 to 1994, the mandated period for them to complete their task was very limited and there were no clear methods of working. This resulted in poor coordination of the TRC mandate.[189] This yet again brings into question the true intention of the drafters of the TRC. Had the drafters truly intended to carry out all these tasks in an effective manner, they would have given themselves more than 18 months and a further 6 months if requested through application, and a mere 3 months for the completion of the report. At the time of inception of the TRC, accountability had to be prioritized in order to bypass the tension between perpetrator and victim, however, the haste in which this was done, resulted in more flaws than solutions.[190] The TRC Failed to properly check the allegations on which it relied, further, the key findings were based on hearsay evidence the basic principles of fairness were not complied with.[191]

Another notable critique of the TRC was the dilemma created by its dual status as both a quasi-legal enterprise by engaging in fact finding evidentiary explorations as in a legal process and a creative mechanism with its attempts of using alternative approaches to make healing and truth telling possible. The creative approach which allowed for victims to relate narratives of struggle and suffering unencumbered by formalistic legal conventions situated the TRC within a peculiar legal paradigm.[192] The TRC was neither a judicial approach nor a politically independent body. However, it has been said that this institutional hybridity 'introduced into the public culture of South Africa an educational element' vital to a successful transition to democracy despite the tension it created between the TRC as a quasi-legal institution and a

[186] D J Stein 'The impact of the truth and reconciliation in South Africa.' (2008).
[187] D J Stein 'The impact of the truth and reconciliation in South Africa.' (2008).
[188] *Ibid.*
[189] V Jardine 'The Truth and Reconciliation Commission: success or failure?' (2008) 2.
[190] V Jardine 'The Truth and Reconciliation Commission: success or failure?' (2008) 2.
[191] J Kane-Berman Foreword, in A Jeffery 'The Truth about the Truth Commission' (1999).
[192] PE Andrews 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 1176.

victim-centred body.[193] Further, the TRC faced several backlash for having only dealt with cases that exceeded the wide latitude of abuse permitted by apartheid laws. For instance, under apartheid laws, detention without trial, pass laws, racial segregation of public amenities, forced removals and 'Bantu' education policy were legal, yet the Promotion of Unity Act excluded these from the ambit of the TRC.[194]

Perhaps the biggest criticism of the TRC, and one with the most detrimental effects for the South African population today, is that people found that 'truth' and 'reconciliation' did not automatically amount to 'justice'. Instead 'justice' was often traded for 'truth' and 'reconciliation'.[195] This realisation is most probably the reason for the lack of social Justice for Africans today. Generally, it appears that there is no restorative blueprint that satisfies a wide range of victims at present.[196] Despite its international reputation as a success story, South Africans themselves have been less sanguine about the TRC[197]. Whilst the process was cathartic for victims, many felt that the process 'bought their adversaries freedom, but left them emotionally enslaved'.[198] Truth and reconciliation processes should not lose sight of the goal of societal transformation because providing justice to victims and holding perpetrators accountable are equally important ideals.[199]

Had the TRC been a success, the inequality experienced by the Black Majority would not be as vast as it is today. Although there is no on-going conflict between Black and White people, most Black people are living in squalor, residing in informal settlements, earning minimum wages, and without access to opportunities for career or academic advancement. This failure to level the playing field has resulted in resentment and criticism of the government's failure to address the historical injustices. Scholars such as Gibson are of the opinion that the TRC was a success by stating that it 'contributed positively to the initiation of democratic reform in

[193] PE Andrews 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 1176.
[194] R Wilson 'The politics of truth and reconciliation in South Africa: legitimizing the post-apartheid state' (2001)34.
[195] G O'Malley G 'Respecting Revenge: The Road to Reconciliation,' (1999) 13.
[196] M Adami International Judicial Bodies: Is Restorative Justice the Means to End the Peace v Justice dilemma?https://blogs.lse.ac.uk/internationaldevelopment/2017/12/15/internationaljudicial-bodies-is-restorative-justice-the-means-to-end-the-peace-v-justice-dilemma/ [Accessed 15 April 2020].

[197] K Mansour and L Riches 'Peace versus Justice: A False Dichotomy' (2017)
[198] *Ibid.*
[199] F du Toit 'Reconciliation and Transitional Justice' (2011) 430.

South Africa'.[200] Gibson further states that the truth exposed atrocities, which, may have made some people less likely to reconcile. He also substantiates this statement by saying that the TRC also documented atrocities by all parties in the struggle against apartheid and forced people to acknowledge that the 'other side' was also 'unfairly victimized'. This statement is a Whitewashed version of the true events of apartheid and does not reflect the opinions of South Africans who lived through the apartheid era. If Gibson's statement about the other side were true, it would mean, Black people who fell victim to institutionalised racism understood that their oppressors were also victims to the system that not only changed the direction and course of history, but also left millions of Black people destitute and displaced. This is in no way a true reflection or understanding of the internal conflict based on race and resulting in exclusion and oppression between White and Black people that still persists, at an institutional level.

Looking at reparations entails looking at 5 core areas that have to be covered in reparations programmes.[201] Firstly, redress, which refers to the 'right to fair and adequate compensation'[202] has to be prioritised as a way of recognising the past injustices and taking accountability by the perpetrators of apartheid. Then, restitution, which is the right to be reinstated, as far as possible to the position one occupied prior to the violations has to be considered as part of reparations mechanisms as well. Further, rehabilitation, 'which is the right to the provision of medical and psychological care and fulfilment of significant personal and community needs'[203] has to be included as these services are essential after mass human rights violations. Forth, restoration of one's dignity which is oftentimes achieved thought symbolic reparations has to be provide for.

Finally, reassurance that the harms and violations will never occur in the future, and this entails enacting legislation 'which contribute to the maintenance of a stable society'.[204] It is then imperative to trace the international legal obligations as well as the legal framework giving effect to the applicability of reparations in South Africa and to measure it against the 5 areas mentioned above, to decipher how effective they were in delivering justice to the majority of the victims of apartheid, if effective at all.

[200] J L Gibson 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 411-413.
[201] L Fernandez 'Reparations policy in South Africa for the victims of apartheid' (2009).
[202] L Fernandez 'Reparations policy in South Africa for the victims of apartheid' (2009) 213-214.
[203] L Fernandez 'Reparations policy in South Africa for the victims of apartheid' (2009) 214.
[204] *Ibid.*

2.1 International legal obligations on South Africa

Apartheid, was an international crime, this can be defined broadly as "those international criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind or is contrary to fundamental humanitarian values, or which is the product of state action or a state-favouring policy"[205]. Apartheid threatened the peace and security of South African citizens and it was gravely contrary to values of humanitarian law. The International Criminal Court (ICC) jurisdiction for the most classic international law crimes which are genocide, crimes against humanity and war crimes. It is safe to assert that all three of these crimes are recognized as the most 'classic' international law crimes. The Rome Statutes principle of complementarity was designed to leave the primary responsibility of international law crimes prosecution to the national courts, however, the ICC is also the reserve court for States who are "unable or unwilling" to prosecute.[206]

While the ICC has been given jurisdiction over both genocide and crimes against humanity, this leaves unanswered the question whether States are under an international legal obligation to prosecute genocide and crimes against humanity.[207] For political reasons, the democratic South African government was unwilling to implement in practice their duty to prosecute apartheid founders for the crimes against humanity. The amnesty clause of the TRC not only denied justice for the majority of the population, it also stopped the ICC from intervening and exerting their duty to prosecute when it came into operation in 2002.

The South African government, by including the amnesty clause in the TRC mechanism, negated the duty to prosecute. This means the TRC fell short of international standards because it precluded civil claims, as well as prosecution. In comparison to Gacaca Courts which did priorities prosecutions, South Africa dismally failed to uphold international standards, at the very least, reparations should have been catered for. The 1985 UN Declaration of Basic Principles for Victims of Crime and Abuse of Power[208] as well as the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

[205] M. C. Bassiouni of "international crimes", "international delicts" and "international infractions": Introduction to International Criminal Law (Transnational, 2003) 24.
[206] Rome Statute of the International Criminal Court (Last amended 2010), 17 July 1998.
[207] J Wouters "The Obligation to Prosecute international law crimes" 7
[208] General Assembly resolution 40/34 of 29 November 1985.

Human Rights Law and Serious Violations of International Humanitarian Law[209] (the Basic Principles) should be used as a foundation to understand international reparations norms and the States duty and responsibility to its citizens.[210] Further, South Africa is a signatory to a number of international law instruments such as the Universal Declaration of Human Rights which stipulates that 'everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted by the constitution or by law'. South Africa is also a signatory to the International Covenant on Civil and Political Rights which provides that every person who has been a victim of gross human rights violations is entitled to an effective remedy. Further, the Rome Statute of the International Criminal Court has directed the Court to establish principles relating to reparation of victims, including restitution, compensation and rehabilitation.[211]

The failure to extend reparations to all actual victims is a violation of international standards relating to the protection of people in times of national strife. South Africa can learn from countries such as Brazil, Guatemala, and Sierra Leone, which have established ongoing victim registration procedures. Sierra Leone undertook a one-year long victim registration project because the government recognized the importance of reparations for war victims. The one-year project was designed as a catalyst for the start of critical intervention which would establish a database on war victims profiles.[212] This was because the initial registration of victims which started in December 2008 until March 2009, then later amended to June 2009 was insufficient.[213]

The findings demonstrated that the number of victims taking part in the registration process increased by 50% to 100% each month.[214] The one-year registration project was able to reach more people than the initial registration project, it was not without its limitations (such as the exclusion of victims of sexual violence as well as those living in rural areas), but the improvement in registered victims amounting to 29, 733 suggests that this was an important achievement and a remarkable first offering.[215] South Africa could learn from the project of

[209] General Assembly resolution 60/147 of 16 December 2005.
[210] The Right to a Remedy and Reparation for Gross Human Rights Violations (2018) 303
[211] Rome Statute of the International Criminal Court (Last amended 2010), 17 July 1998.
[212] M Suma and C Correa "Report and Proposals for the implementation of reparations in Sierra Leone" (2009).
[213] M Suma and C Correa "Report and Proposals of reparations in Sierra Leone" (2009)1.
[214] M Suma and C Correa "Report and Proposals of reparations in Sierra Leone" (2009) 2.
[215] M Suma and C Correa "Report and Proposals of reparations in Sierra Leone" (2009) 13.

Sierra Leon especially because of the large number of victims excluded from the TRC definition and benefits thereof.

Further, countries such as Argentina following the period of military rule from 1976-1983[216], and Chile have repeatedly extended or reopened victim registration procedures and these are examples' that South Africa can follow to ensure that the exclusion of victims is halted.[217] After the end of military dictatorship from 1973 to 1990 in Chile, the initial National Truth and Reconciliation Commission, also known as the Rettig Commission, concluded that there were 168 people classified as "victims of political violence and 90 as victims killed by civilians for political reasons"[218]. This figure was not the true reflection of the events in Chile and this prompted the creation of the National Corporation for Reparations and Reconciliation (NCRR) in 1991 which operated for 4 years and continued the identification of victims. The corporation concluded that 899 new cases qualified for victim status. Through the social and legal assistance programs it operated, the commission assisted the victims by expediting proceedings to ensure that the victims enjoyed the benefits to which they were entitled. Further, educational and cultural programs as well as legal studies and research programs were established and eligible victims' beneficiaries were entitled a monthly pension, children of the disappeared were exempted from military services and entitled to educational benefits and priority access health care services provided by the state.[219]

Previously excluded victims of apartheid or their family members in South Africa could stand to greatly benefit from the reopening of victim registration procedures that would enable them eligibility for reparations as per the example in Chile. It is evidence that allowing for the opening of registrations would yield more benefit for the excluded victims and it would enable to government to reach larger numbers and do right by them.

[216] C M Wilson "Argentina's Reparations Bonds: An Analysis of Continuing Obligations" (2004).
[217] South African Coalition for Transitional Justice (SACTJ) Comments on the Draft Regulations Published By the Department of Justice Dealing with Reparations for Apartheid Era Victims (2011) 5.
[218] R Carranza " The series of reparations programs in Chile" (2006) 1.
[219] R Carranza " The series of reparations programs in Chile" (2006) 2.

2.2 The Legal framework for reparations in South Africa

'Reparation and rehabilitation' are terms which have been used to describe the process where there is state intervention to assist victims overcome the harm they endured, as well as to restore their dignity while fostering a promise of non-repetition. Reparations are intended to relieve the suffering of victims and afford justice to them by removing consequences of the wrongful acts as much as possible and as such, reparations should cater to the needs and the wishes of the victim.[220] 'The fact of the matter is that, without providing for some measure of reparation to the victims, healing and reconciliation will not take place'.[221] Reparations can take form in financial payment, however, there are a variety of ways that reparations can be paid, and this will be demonstrated in the way the reparations and rehabilitation committee made recommendations. The 'Committee looked at individuals, communities and the nation as a whole when making recommendations which were intended to achieve reparation and rehabilitation'[222].

This approach was important because it considered all the role players in the violations, such as the state, victims and beneficiaries. 'Victims of gross human rights abuses have the right to reparation and rehabilitation'[223] because of the losses they have suffered. It was also important to compensate them in some way, because the takeaway from *Azanian People Organisation and Others v The President of the Republic of South Africa and Others*[224] was that the interim Constitution authorised the amnesty clause for the greater good of the nation and holding the perpetrators accountable would further derail the reconciliation.[225] The 'amnesty process meant they were unable to claim damages from the perpetrators of apartheid'.[226]

The Constitution of South Africa, which has been heralded as the most progressive internationally[227], recognised the importance of this transition and made provisions for the enactment of legislation that would squarely work to investigate and give a broader picture of the human rights violations. This was premised on the understanding that 'there was a need

[220] L Fernandez 'Reparations policy in South Africa for the victims of apartheid' (2009) 210.
[221] L Fernandez 'Reparations policy in South Africa for the victims of apartheid' (2009).
[222] Truth and Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be considered by the President.*
[223] *Ibid*.
[224] 1996 (4) 672.
[225] 1996 (4) 672 para 17.
[226] Act 35 of 1995. Section 18(1).
[227] A progressive Constitution https://businessmediamags.co.za [assessed 06 September 2021].

for tolerance but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization'.[228] This is the foundation on which the Promotion of National Unity Act[229] was drafted. The 'TRC was seen as one of the foundational institutions in South Africa to bridge the apartheid past and the democratic future'[230] focusing on racial healing, racial 'harmony, and racial reconciliation, as evidenced by its empowering statute', the Promotion of National Unity Act.

Chapter two of the Act establishes the TRC as a juristic person. Chapter 5 provides for the establishment of the reparations and rehabilitation committee. This committee was tasked with considering matters referred to it by the human rights committee as well as the amnesty committee. The reparations committee also had the duty to make recommendations which included urgent interim reparations and other appropriate measures for reparations for victims as stipulated in Section 25(1) (b) (i). [231] Section 27 confers, upon the parliament and the president, the power to make decisions based on the recommendations of the reparations committee. [232] The Act falls short of saying what the reparations should entail. Instead, it only establishes that the committee tasked with receiving the applications for reparations; 'may make recommendations which may include urgent interim measures'[233] and the final reparations package would be decided by the President.[234]

The Truth Commission was intended to achieve the objectives in section (3), which were, primarily, to 'facilitate the granting of amnesty to persons who made full disclosure of all the relevant facts relating to acts associated with a political objective and compliance with the requirements of this Act as per section 3(b)'[235] as well as carrying out the functions in section (4) of the National Unity and Reconciliation Act[236] which were to facilitate, 'initiate or coordinate, inquiries into gross violations of human rights, including violations which were part of a systematic pattern of abuse',[237] the gathering of information and the receiving of

[228] Truth and Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be considered by the President.*
[229] Act 87 of 1995.
[230] *Ibid.*
[231] Act 87 of 1995.
[232] Act 87 of 1995.
[233] Act 35 of 1995.
[234] Act 35 of 1995.
[235] Act 35 of 1995.
[236] Act 35 of 1995.
[237] Act 35 of 1995, S 4 (a).

evidence from any person, including persons claiming to be victims of such violations or their representatives,[238] 'facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such acts'.[239]

Legally, since the TRC was set up by an Act of Parliament the reparations and reconciliation committee were under a duty to 'propose measures that would give reparation to the victims of human rights violations; and rehabilitate the victims and give back the human and civil dignity of people who suffered human rights violations'[240]. This means the committee had to report back to the President and parliament for the final execution instead of carrying out the recommendations themselves. The quantum of compensation payable as reparations were not individualised based on the degree of suffering or the type of violation. Instead, the amount was based on what the TRC defined as 'sufficient to make a meaningful impact on the quality of lives of the victims'.[241] The Committee proposed a Reparation and Rehabilitation Policy that had five parts.

The first part were reparations which were needed immediately after the scourge of apartheid, because the victims of these gross human rights violations needed immediate assistance in order to sustain their compromised livelihood. These were called interim reparations and were used to assist the victims in accessing the services and facilities they needed such as services provided by government, non-government organisations and/or private sector. Further, victims were 'given limited financial assistance in order to get to or to pay for services where no free services or goods were available'[242]. This provision applied to the relatives and dependants of a victim as well. The urgency of these reparations was not felt because although the recommendations were made in 1998, the payments were only made in 2003. The government's handling of urgent matters should have been an indication of how the other recommendations would be handled.

[238] Act 35 of 1995, S 4(b).
[239] Act 35 of 1995, S 4(c).
[240] Act 35 of 1995.
[241] Truth and Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be considered by the President.*
[242] Truth and Reconciliation Introduction by Minister of Justice Mr Dullar Omar Reference https:www.justice.trc/justice.gov.za. [Accessed 17 September 2020].

Secondly, material reparations in the form of Individual Reparation Grants (IRG) were made, these were special individual financial grant scheme to 'acknowledge the suffering caused by the gross human rights violations.

Material reparations are primarily about addressing the material and economic deprivation that people suffered during the conflict.[243]The IRG also provided information and advice in order that victims obtained services and established a reasonable standard of living'[244]. It was proposed that each victim of gross human rights violations, as decided by the Commission, would receive a financial grant 'between R17 000 and R23 000 each year for 6 years'[245]. The IRG was calculated according to a formula which considered the ease of 'access to services and facilities; as well as a daily living cost subsidy based on the socio-economic circumstances of the applicant, which included the number of dependants and/or relatives, without neglecting the differences in the living costs in rural and urban areas'.[246]

Then, symbolic reparations whose satisfaction and impact was ultimately dependent on the socio economic standing of the victims, it goes without saying those in better financial and economic standing would appreciate this gesture more than those who were not in good standing, socio-economically. The TRC recommended symbolic reparations which contribute to a sense of acknowledgment and recognition, these can take form in public apologies, public memorials to commemorate victims in the hope to aim to restore the non-material aspects of life[247], renaming streets, constructing burial and memorial sites, as well as the creation of culturally appropriate ceremonies. Further, to an extent, the public hearings held by the TRC as well as the publication of reports also served as moral reparations. [248] Further, the TRC recommended that Community Rehabilitation Programmes were to be addressed, it did not, however offer clear guidelines or a criteria to be followed in order to identify communities who would be eligible for the reparations. What it did was provide an outline for the various types of collective reparations, based on the needs survivors expressed at the TRC.[249] Amongst the list were health and social services including resettlement for forcibly displaced people. Mental

[243] The Right to a Remedy and Reparation for Gross Human Rights Violations (2018) 33,
[244] *Ibid.*
[245] Truth and Reconciliation Introduction by Minister of Justice Mr Dullar Omar Reference https:www.justice.trc/justice.gov.za [accessed 17 September 2020].
[246] *Ibid.*
[247] The Right to a Remedy and Reparation for Gross Human Rights Violations (2018) 304,
[248] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)173.
[249] Truth and Reconciliation Committee, 'A summary of reparation and rehabilitation policy', 1998, s. 3.4, http://www.justice.gov.za/trc/reparations/summary.htm (accessed 14 July 2021).

health services, adult education programmes, physical reconstruction of school buildings and housing projects in areas mass destruction of housing displacement[250]. Finally, Institutional Reform had to be considered and catered for too.

It becomes clear that the reparations recommended by the TRC were backward looking, in that they were intended to address the harm that had been caused by apartheid crimes, and not necessarily the harm caused by ongoing situations of disadvantaged communities. The failure to address the ongoing situations is prevalent in how people are living today, their access to basic services and the opportunities available and accessible to them.

The Regulations to the Promotion of National Unity and Reconciliation Act[251] made special provision for the individual reparation grant. Section 3(1) of the Regulations state that 'an identified victim is entitled to a once-off final reparation grant in the amount of R30 000 which has to be paid to an identified victim, or their spouse, if the former is deceased.'[252] Most importantly, the Committee was expected to 'report to the Commission with its findings and make recommendations that would be considered by the President with a view to making recommendations to Parliament and enacting regulations to give effect to the recommendations made'. [253]

Section 42 of the Promotion of National Unity and Reconciliation Act established the President's Fund (the Fund), which was to offer reparation measures to victims and communities. It reads as follows, "(1) The President may, in such manner as he or she may deem fit, in consultation with the Minister and the Minister of Finance, establish a Fund into which shall be paid (a) all money appropriated by Parliament for the purposes of the Fund; and (b) all money donated or contributed to the Fund or accruing to the Fund from any source. (2) There shall be paid from the Fund all amounts payable to victims by way of reparation in terms of regulations made by the President" [254]

[250] Rubin M, 'A transformative justice approach to reparation – A case study of the community rehabilitation programme in South Africa', unpublished Masters Dissertation, 2014, p. 41.
[251] Promotion of National Unity and Reconciliation Act 34 of 1995: Regulations regarding reparation to victims (2003) No.R1660.
[252] Promotion of National Unity and Reconciliation Act 34 of 1995: Regulations regarding reparation to victims (2003) No.R1660.
[253] Act 35 of 1995
[254] Act 35 of 1995, Section 42.

The section allowed for the President, to work with the Minister of Justice and Minister of Finance, in such manner as he deemed fit to establish a fund which would be used for the payment of reparations in terms of regulations made by the President. Section 42(2A) of the Act provides that 'all amounts payable by way of reparations towards the rehabilitation of communities, must be paid from the Fund'.[255]

While the TRC wrote its own Act, most of the recommendations by the TRC were heavily influenced by a political mandate and this is evidenced by the amnesty clause. The discourses of the past as well as political gains were favoured more than victims' needs and rights. In order to prevent such political manipulation, and give effect to the rights and needs of the victims, there had to be clear and concrete standards set out and developed.[256] In recent developments, there have been tensions between individual reparations and community reparations/rehabilitation. In 2018, the Department of Justice and Constitutional Development invited interested parties to submit written comments on the proposed revised draft Regulations[257] relating to community rehabilitation and reparations to victims of the apartheid era in the form of medical and educational benefits.

The concerns raised by civil society groups and organisations are centred on the narrow definition of 'victim'. The Regulations define victims as 'those who suffered physical, mental, or emotional injury,' 'and who either testified before or registered with the TRC prior to the release of its report in 2003'. [258] Almost 18 000 registered victims and their dependants are included in this definition as they 'received a one-time lump sum payment from the government in 2003. However, at least 65 000 victims of the gross human rights violations should be entitled to the reparations'[259] on the basis of their suffering as per the TRC Act definition, yet they are excluded under the Regulations. The Act defines victims in broader terms than the Regulations as it stipulates that a victim is -

´(a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights-

[255] Act 35 of 1995. As prescribed by the President by regulation under section 40 of the Act.
[256] *Ibid.*
[257] South African Coalition for Transitional Justice (SACTJ) Comments on the Draft Regulations Published by the Department of Justice Dealing with Reparations for Apartheid Era Victims (2011).
[258] South African Coalition for Transitional Justice (SACTJ) Comments on the Draft Regulations Published by the Department of Justice Dealing with Reparations for Apartheid Era Victims (2011)
[259] *Ibid.*

(i) As a result of a gross violation of human rights; or

(ii) As a result of an act associated with a political objective for which amnesty has been granted;

(b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and

(c) Such relatives or dependants of victims as may be prescribed.'[260]

The Act recognises those people (as well as their dependants and relatives) who suffered harm either physical, emotional or mental, due to gross violations of human rights as well as political acts for which amnesty has been granted. The 65 000 victims who are excluded by the Regulations definitions fall into these categories and as such should have been entitled to relief and reparations.

If the closed list from the Regulations is the foundation on which victims are based, this means that 'those who received compensation earlier will receive medical and educational benefits while those who were previously omitted will again be excluded'. [261] This has been a major point of contention and tension in South Africa.

The tension stems from the fact that the Promotion of National Unity Act does not contain any provisions that support a closed list of victims eligible for reparations. Instead, it stipulates the type of harm that a person must have suffered in order to be considered a victim. This then supports the idea that the closed list policy conflicts with the purpose of the Act, which seeks to rehabilitate and restore the human and civil dignity of victims.[262] Further, the closed list is contrary to the provisions of the Constitution which promote social, economic and community rights and is committed to healing the divisions of the past and establishing a society based on social justice. The preamble to the Constitution recognizes 'the injustices of our past' and honours 'those who suffered for justice and freedom in our land.' It commits to healing 'the

[260] Act 35 of 1995.
[261] *Ibid* (Note 194 above).
[262] South African Coalition for Transitional Justice (SACTJ) Comments on the Draft Regulations Published by the Department of Justice Dealing with Reparations for Apartheid Era Victims (2011) 1.

divisions of the past and establish a society based on democratic values, social justice and fundamental human rights' as per the Constitutional provisions.

Having testified at a truth commission or publicly acknowledging one's suffering, should not be the basis on which eligibility for receiving reparations is based. The exclusionary nature of the definition of victim continues to cause as much harm to the victims and survivors as did the actual human rights violations. Restricting reparations to those on a closed list does not serve the true intentions of the Act. It does nothing to recognize the injustices sustained by many who did not make it onto the closed list by virtue of not having testified at the TRC hearings. Such a policy stands as a stark rejection of many who, although not on the list, made great sacrifices for the liberation of South Africa. In the struggle for justice, people lost their lives, others lost their livelihoods, parents lost their children and vice versa, yet they did not testify at the TRC hearings for a myriad of reasons. Policy that excludes them on that basis fails to acknowledge the truth of their stories. It is a denial of social justice. In South Africa, 'there is no evidence that the state's obligation to provide reparations to all victims of gross human rights violation was ever seriously considered'.[263]

'Instead of relying on a very limited victim registration period the government ought to have reached out to as many victims as possible'.[264] This could have been done through radio and TV broadcasting in all the official languages, posters explaining in detail and in indigenous languages the processes to be taken, the steps to be followed as well as having community based leaders to reach out to the victims and their dependants as well as relatives. Considering the high levels of illiteracy in rural areas, more effort should have been made to ensure that the reparations message reached them so that they are not excluded yet again. The establishment of ongoing registration mechanisms would have halted the limited application of the narrow definition of who a victim is and in turn would not have necessitated the enforcement of a closed list.

It was inherent in the TRC Act that the benefits afforded to the perpetrators in the South African context, surpassed those afforded to the victims as Section 20(7) of the TRC act creates this imbalance in its amnesty clause.[265] The perpetrators were afforded 'a generous offer of

[263] SACTJ Submissions (2011)12
[264] *Ibid.*
[265] Act 34 of 1995 Section 20(7) (a) - (c).

conditional amnesty. The cut -off date for the committal of political offences was extended, further the amnesty committee was extended by some 5 years to ensure that each and every last matter before it was properly handled. Further, a misguided prosecution policy that provided for a backdoor amnesty for those who had not applied for amnesty was established'[266]. Moreover, a special dispensation for political pardons was created for the benefit of those who did not make use of the TRC process; and 'by an effective blanket amnesty through simply not prosecuting those perpetrators who were denied amnesty or who did not apply for it.'[267] The same provisions were not extended to the victims of apartheid who were not able to make use of the TRC process, instead they were simply excluded from the TRC benefits for example, claiming civil claims from the perpetrators, or getting an extension to apply and register for reparations after the closing date. It is on these very contrasting provisions that national reconciliation and unity is compromised as the build-up of the created tension has not descended.[268]

'There ought to have been an appropriate balance struck between the benefits afforded to perpetrators and those afforded to victims. This much has been recognized by the Constitutional Court, which has repeatedly stressed the delicate interplay of benefit and disadvantage that underlies the Act's provisions as well as their effect and intent.'[269]

The above demonstrates that the objectives of the TRC were too broad and implementation was lacking on part of the government. The TRC's failure to establish fair and effective mechanisms that applied to both the amnesty beneficiaries and the reparations and rehabilitation beneficiaries raises several questions about the TRC's drafters' real intention. Was the intention to recognise the harm suffered by Black people and to correct that suffering or was the real intention to give the image of forgiveness at the expense of Black people while the White minority retained their power and without any punishment through the amnesty commission?

2.3 Focus on the perpetrator

[266] SACTJ Submissions (2011) 15.
[267] SACTJ Submissions (2011)15
[268] SACTJ Submissions (2011) 15.
[269] *Ibid, 1996 (4)672.*

Outsiders would be justified in believing Gibson's understanding[270], however, in South Africa, the notion *umuntu ngumuntu ngabantu* which loosely translates into 'I am who I am because of who you are'[271] would negate this. This is premised on the idea that in African tradition, relationships are of the utmost importance. The community understands each person's role in relation the people around them. It is on this basis that reconciliation is preferred over retribution and not because the oppressed understood the oppressor's positionality or cultural difference.

Moving from an egregious violent past requires that there be a commitment from the government to human rights and a dedication to the rule of law. However, there is often conflict between the aims of achieving reconciliation and the resources available to deal with the past. Criminal trials are one way in which the facts of past abuses may be established. [272]

The required commitment further supports the idea that justice cannot be solely retributive if the goal is to establish peace in a sustainable and comprehensive manner.[273] This means focus cannot be placed solely on the perpetrator. Rather, a victim-centred approach is necessary because by acknowledging the pain and suffering that victims went through, as well as providing reparations, one allows for reconciliation and provide closure to the victims, reducing the chances of them feeling that justice was not served and thus reducing the chances of conflict re-emerging.[274]

The need for prosecution which would involve including imprisonment as punishment for the perpetrators of Apartheid in South Africa would undo all that has been achieved so far because reconciliation has proven to be preferred over retribution. Massive human rights violations are often perpetrated by a great number of people as in the case of Rwanda.[275] Far from fostering stability and reconciliation, prosecution of every single perpetrator may be 'politically destabilizing, socially divisive, and logistically and economically untenable'.[276] This is an accurate analysis because focus on prosecution, in under resourced states would further push

[270] Gibson stated that the truth exposed atrocities, which, may have made some people less likely to reconcile as well as the realisation that the TRC documented atrocities by all parties in the struggle against apartheid and forced people to acknowledge that the 'other side' was also 'unfairly victimized' J L Gibson 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 411-413.
[271] https://www.theguardian.com What does Ubuntu really mean? [Accessed 06 September 2021].
[272] J Sarkin 'The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the GACACA Courts in Dealing with the Genocide' (2001) 143.
[273] *Ibid.*
[274] Y Sooka 'Dealing with the past and transitional justice' (2006) 321.
[275] Bolocan: Rwandan Gacaca 2004 360.
[276] Bolocan: Rwandan Gacaca 2004 360.

away reconciliation measures. It is no doubt that the tension between reconciliation and 'recrimination, and between forgiveness and revenge, was severely strained as it appeared that the process would degenerate into a quagmire of scepticism and cynicism from the public'[277]. However, 'what the TRC demonstrated was that reconciliation requires the interaction of several processes' such as the creation of dialogue, intervention, reparations, rehabilitation and truth-telling. 'The TRC was just one'.[278]

The fact that there is no on-going armed conflict in South Africa demonstrates that some elements of the TRC such as the promotion of tolerance and encouraging dialogue are working. However, this does not mean there should be complacency on the part of law-makers' and human rights advocates as much more still needs to be done. The current models like the individual or community reparations need to be revised in a way that will cater for the victims' needs which had been neglected. Regarding any future prosecutions the National Prosecuting Authority might pursue, it is important to consider that the above models, were established as a way to decrease the overpopulation in prisons. Putting imprisonment back on the table would be counterproductive. Instead, new advancements need to focus on improving the victims' lives by way of reparations.

When designing reparations programmes, it is imperative to first establish who falls under the definition of "victim" and is meant to benefit from the programmes. Oftentimes, the term is defined narrowly and restricted to a certain category of people. With this however, the exclusion of some people may give rise to feelings of marginalisation and injustice and in turn result in social tension. This is a necessary restriction however because if the definition is too wide it may result in vague perceptions and ultimately lead to unrealistic expectations and ambiguous conceptions of who falls within the victim category.[279]

The TRC Act defined victims persons who (a) suffered physical, mental or emotional harm or pecuniary loss as a result of gross human rights violations, (2) were indirectly affected as a result of intervening to assist direct victims and (3) were relatives or dependants of victims as mentioned previously[280] They further closed the list of potential victims by stating that only those who had made statements to the TRC or had been mentioned in someone else's statement

[277] PE. Andrews 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 1175.
[278] PE. Andrews 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 1175.
[279] The Right to a Remedy and Reparation for Gross Human Rights Violations (2018) 303.
[280] Act 34 of 1995, Section 1.

would be entitles to reparations. This has been a major point of contention in recent years, as stated above.[281]

Going forward, the South African government will do well to ensure that the definition of 'victim' for purposes of future reparations is clear, and unambiguous, is not exclusionary of certain people who would otherwise be eligible for reparations, is forward looking, is communicated effectively to all people and most importantly, is victim focused. It is worth noting that, under the regulations, this would require the TRC to declare that there were other individuals to whom the regulations should apply and it would prolong the process to even longer periods and it is unlikely to happen.

2.4 Reparations for sexual violence in South Africa

In various countries, in times of conflict, acts of sexual violence are used as weapon of war as evidenced in the case of Rwanda in Chapter 3. Over the past years, there has been a concerted effort to recognise the need for specific attention on conflict-related sexual violence. Women, girls and boys are subjected to sexual violence in extremely devastating ways. The international community recognises these crimes and has taken a firm stand against them. International human rights law does not adequately protect men from sexual violence but international humanitarian law offers more protection in this regard.[282] Article 27 of the Geneva Convention IV of 1949 explicitly prohibits rape, enforced prostitution, and indecent assault. Article 147 however, omits rape and sexual assault from the list of grave breaches although it recognises inhuman treatment.[283] Despite this recognition, sexual violence against men in armed conflict is an issue that is generally overlooked, this is because evidence has suggested that women and girls are the primary victims and although men and boys are targeted too, it is always to a far lesser extent.[284]

[281] South African Coalition for Transitional Justice (SACTJ) Comments on the Draft Regulations Published by the Department of Justice Dealing with Reparations for Apartheid Era Victims (2011) 1.
[282] D A. Lewis "unrecognised victims: sexual violence against men in conflict settings under international law" (2009) 17.
[283] Geneva Convention IV Article 27 and Article 147.
[284] Lara Stemple, 'Male Rape and Human Rights" (2009) 605.

In South Africa, apartheid was a crime against humanity[285] where men were primarily on the front lines (not to disregard the role played by women in the apartheid struggle) and as such, men were particularly vulnerable to sexual violence when in detention or when forcibly exiled[286]. Although international law provisions such as the definition of sexual violence in the Rome Statute are gender neutral, their application is often intended to protect women and children from sexual violence[287] it should be noted that this does not preclude the application to men, but it did demonstrate that for a long time, sexual violence against men was a taboo subject. [288] In South Africa, for instance, the common law definition for rape was inadequate and unsatisfactory in that it was gendered and previously limited to vaginal sex. The Criminal Law (Sexual Offence and Related Matters) Amendment Act[289] expanded the definition of rape and included all non-consensual penetration under the definition of sexual violence as well as made it gender neutral.[290] This previous insufficiency stemmed from the fact that the law did not prohibit sexual violence against men expressly but did so in the protection of women and girls.

The South African TRC, following international law did not include sexual violations on the list of violations, the Promotion of National Unity and Reconciliation Act[291] governing the work of the TRC required the TRC to investigate 'gross violations of human rights' which were defined as 'killing, abduction, torture or severe ill-treatment' emanating from 'conflicts of the past'.[292] The fourth volume of the TRC report implies that assault to genitals and breasts, rape and sexual abuse can be found under the Commission's understandings of ‘torture and severe ill-treatment’ although not explicit.[293] Out of the 446 cases of sexual violence, 140 of these cases mention rape explicitly.[294] This supports the idea that the definition of sexual violence has to be wide enough to include the different forms of sexual violence and abuse perpetuated against women and girls as well as men and boys. Reparations programs have to explicitly

[285] Article 7(2) (h) of the Rome Statue "The crime of apartheid" means inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”
[286] S Mouthaan “Sexual Violence against Men and International Law - Criminalising the Unmentionable” (2013) 665.
[287] *Ibid.*
[288] S Mouthaan “Sexual Violence against Men and International Law” (2013) 665.
[289] Act 32 of 2007
[290] Act 32 of 2007, Section 1 and 3.
[291] Act 34 of 1995.
[292] Act 34 of 1995 Section 1 Definitions and Interpretations.
[293] Volume four Truth and Reconciliation Commission South Africa, Chapter 10 page 287-288.
[294] Volume four Truth and Reconciliation Commission South Africa, Chapter 10 page 297-298.

name these and cater for the many violations that can be undertaken by addressing each violation and taking cognisance of the effects it has on the victims.

Regarding the sexual violations perpetrated against women, testimonies of women who had been subjected to abuse and brutalisation during apartheid were heard by a special committee of the TRC in 1997 by process of oral performance.[295] Being 1997, these testimonies were not taken as seriously as they would be in this day.[296] This then gave rise to special hearings were women were called upon 'to speak as actors, as active participants and direct survivors of the violation of human rights, not as relatives, not as spouses, not as wives, but as themselves, those that directly suffered'[297] The testimonies which were told in IsiZulu, IsiXhosa, and Sesotho are not available in their original language and were later transcribed into English and the meaning, emotion and intensity was lost in translation and transcription.[298] Further, due to diffidence and women already occupying a secondary status, they tended not to consider speaking of private experiences within a political realm as something important enough to testify about.

These TRC hearings further exacerbated the powerlessness of Black women during Apartheid. Women had to renegotiate their power as they vindicated their rights and status, and requested that their perspective be taken into account, after having being denied their identity and their voices silenced.[299] These hearings failed to give women the proper forum to express themselves and detail all that had happened and been done to them. The failure of the TRC to adopt a 'gendered analytical framework' continued the marginalisation of Black women In South Africa.[300]

Authors Beth and Sheila believed that the hidden sides of the violence against women had implications not only on the understanding of our South African history but also on the current attempts to heal South Africa and that past and present violence against women is located on a

[295]Volume four TRC Report, A Oboe "The TRC Women's Hearings as Performance and Protest in the New South Africa" (2007) 60.

[296] A Oboe "The TRC Women's Hearings as Performance and Protest in the New South Africa" (2007) 60.

[297] Volume four TRC Report, A Oboe "The TRC Women's Hearings as Performance and Protest in the New South Africa" (2007) 61.

[298] *Ibid.*

[299] A Oboe "The TRC Women's Hearings as Performance and Protest in the New South Africa" (2007) 64.

[300] B Goldbath and S Meintjes "Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission"(1998) 7-18

continuum. [301] This is a worthwhile observation because the initial failure to recognise the gendered exclusion meant women had no base or foundation to start dealing with their past abuses, it meant the law did not develop at the time when it was supposed to and the abuses kept happening and little protection was afforded to women. Speaking at the special hearings, a woman noted that oftentimes, instead of undertaking specific actions to deal with issues affecting women, the experiences of men "become the yardstick by which judgements are made."[302] This is reflected in how little effort was made by the TRC to consider a gendered perspective as well as to cater for it.

With all the testimonies, depictions and retelling of sexual violence stories, no reparations programmes were put in place. The TRC's final report proposed four reparation and rehabilitation measures which were individual reparation grants, symbolic reparations, community rehabilitation programmes and institutional reform to prevent the recurrence of human rights violations. None of these recommendations came from a gendered perspective nor included reparations for sexual violence although volume four recognised the history of sexual violence on women. The detailed experiences of women in chapter 10 of Volume 4 depict the extent to which sexual violence was committed in South Africa during the time frame covered by the TRC. Women were silence about their rapes because they felt that they were to blame, they also felt that nothing could be done because focus was not paid to that aspect of apartheid violations. The former President Thabo Mbeki acknowledged that men had committed "gender-specific offences"[303] against woman and reported during the Report to the commission but neither the offences nor the punishment were described in detail. [304] In light of this, "the submission failed women".[305]

In the rare and difficult occasions where women detailed their sexual assaults and violations, gruesome accounts were detailed, some spoke about being gang raped by security officers, others detailed violations where they were the only survivors after being raped in groups and then shot at.[306] Others detailed about being chained and brutalised, insulted, poured with acid,

[301] B Goldbath and S Meintjes "Dealing with the aftermath:" (1998) 7-18.
[302] Volume four, TRC Report, Chapter 10, para 3, 284.
[303] Volume four, TRC reports, Chapter 10, 297
[304] Volume four, TRC reports, Chapter 10 297.
[305] *Ibid.*
[306] *Ibid.*

being electrocuted, harassed, assaulted, fondled while tied up and raped.[307] The TRC, unlike Gacaca courts failed to cater for the lived experiences of women as participants of the apartheid struggle and also men as sexual violence survivors.

2.5 Reparations as development

Viewing reparations as development in the South African context entails looking at the core areas of contention amongst the South African populace, for instance, land reform has been a widely contested area in law. When the African National Congress (ANC) government was elected into power in 1994, they set out to correct many of the injustices that had been committed by the apartheid government. One of the earliest challenges faced by the first democratically elected government was to ascertain how the unequal distribution of land in the country could be addressed. Section 25 of the Constitution, 1996, provides the legal basis for land restitution and is the foundation on which the government initiated a comprehensive land reform programme consisting of three pillars namely: restitution, land redistribution and land tenure security.[308]

The Constitutional basis for the land restitution programme is found in section 25(7) of the Constitution which stipulates that 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'

This constitutional provision resulted in the Restitution of Land Rights Act[309] which was established in Section 6 (1) (a) – (f) to empower the commission on restitution of land rights whose core function was to receive and acknowledge receipt of all land claims for the restitution of land rights. Secondly, to take reasonable steps to assist claimants and to advise claimants on the legal processes to be followed. Finally, it was established to further mediate and settle any disputes. [310]

[307] Volume four, TRC reports, Chapter 10, 298-301.
[308] HJ Kloppers and GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 677.
[309] Act 22 of 1994.
[310] Act 22 of 1994, Section 6 (1) (a) – (f).

Section 22 of the Act established the Land Claims Court which, according to section 22(1) (a) –(d), was tasked with determining rights , determining the appropriate parties to benefit from the land and finally, interpreting the Act. Under section 2 (1) (a)-(e) of this Act, people had to show they were individuals or communities who through themselves or their right bearers had rights to land they were dispossessed of.[311] Due to the formidable difficulty in proving the land claims, the Land Claims Court utilised the expertise and testimony of community elders, historians and anthropologists to determine whether land was communally owned especially where there were no written titles. The proposed remedies were to include full ownership, partial rights to land and compensation. Furthermore, section 25(5) of the Constitution introduced the second pillar of land reform, the land redistribution programme which places an obligation on the state to take 'reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'.

Land redistribution is a constitutionally mandated obligation and function of the government. At its core, land redistribution was a provision to foster improved livelihoods and quality of life for previously disadvantaged individuals and communities through their acquiring commercial farmland. This would entail negotiations, state subsidies, market assisted acquisitions, and community-based mechanisms for acquiring farms collectively.[312] The targeted groups were defined as the landless, labour tenants and farm workers, 'women and the rural poor', as well as 'emerging farmers', all of whom were subject to a means test to establish their eligibility as beneficiaries of the land redistribution programme. This approach corresponded with the 'willing-buyer-willing-seller' approach whereby the owners were under no compulsion to sell.[313] However, the provisions of Section 25(3) favour the approach of 'just and equitable' mechanisms and the willing Buyer- Willing Seller approach was abandoned.

The meaning of section 25(5) has not in the past been interpreted judicially; whereas other provisions, such as the right to restitution in Section 25(7) and to secure tenure in section 25(6), have been extensively challenged and adjudicated in the courts.[314] It remains unclear what

[311] Act 22 of 1994, Section 2 (1) (a) – (e).
[312] T Kepe and R Hall 'Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa' (2016).
[313] T Kepe and R Hall 'Commissioned report for High Level Panel' (2016)7.
[314] *Graham Robert Herbert N.O v Senqu Municipality* [2019] zacc31.

exactly constitutes adequate measures to 'enable citizens to gain access to land on an equitable basis' as per section 25(5) provisions.[315] Finally, Section 25 (6) addresses security of land tenure as it states that '(a) person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

After twenty six years of democracy, not only has land reform fallen far short of both official government targets and the public expectations but its focus, criteria and *modus operandi* have also undergone several significant shifts.[316] As part of this obligation, the South African government took on an ambitious land reform programme which aimed to redistribute 30% of White-owned commercial agricultural land by 2014 to Black South Africans and also planned to settle all claims for redistribution by the early 2000's to form its reconstruction development program. To date, almost three decades into the new democratic dispensation, all land claims have still not been settled and only a mere 7% of the redistribution target has been achieved by the state.[317]

Land segregation was made legal and possible by legislation such as the Natives Land Act[318], the Native Trust and Land Act[319] and the Group Areas Act.[320] At the start of the new democracy, the Abolition of Racially Based Land Measures Act [321] repealed the segregationist laws that had previously operated. What became apparent was that no amount of repealing laws would prove effective without the proper government intervention and commitment to bringing meaningful change. Social groups and organisations, as well as some political parties and the general public have demonstrated their disapproval with the slow progress of the ANC government in redistributing land back to the Black majority. [322]These laws, although repealed, left behind a legacy of apartheid which has been difficult to undo. South Africa currently has

[315] T Kepe and R Hall 'Commissioned report for High Level Panel' (2016) 11.

[316] T Kepe and R Hall 'Commissioned report for High Level Panel' (2016) 15.
[317] T Kepe and R Hall 'Commissioned report for High Level Panel' (2016) 15.
[318] Act 27 of 1913.
[319] Act 18 of 1936.
[320] Act *41 of 1950*.
[321] Act 108 of 1991.
[322] HJ Kloppers and GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 696.

extremely skewed land ownership and land use patterns that historically disadvantage Black South Africans who do not own the majority of the productive agricultural land.[323]

The failures and slow progress of government present a gloomy picture about the success of land redistribution and its limited impact on various aspects of poor people's livelihoods. It has been established that land redistribution, when it happens in its entirety will make a difference to the lives of the beneficiaries. There is no denying that the symbolic aspects of land redistribution likely yield positive impact on poor people's livelihoods.[324] This disapproval and dissatisfaction from social groups and organisations has led to discussions around the need for further legislative interventions, such as forced expropriations which are assumed will drive the process of land reform and land redistribution further and with hopefully better results than have been achieved thus far. However, in order to enable forced expropriations, an amendment to the Constitution will be required, and it remains to be seen whether the current political regime will choose to change the constitutionally protected property clause of section 25 that was central to the negotiations that lead to the current political dispensation.[325]

The Land reform question is not unique to South Africa. It is in fact common in Southern Africa, in countries such as Namibia, Zimbabwe and Botswana. It is common for countries who were previously colonised by the West to have land redistribution or land reform initiatives after gaining their independence.[326] In this dissertation, Zimbabwe and Namibia will be used as points of reference for the examples that South Africa should or not follow in the direction of. This will be done by way of examining the 'land reform' initiatives in these countries as well as the similarities and differences that arise.

The comparison between South Africa and Zimbabwe is justified because the similarities are striking. South Africa has unique historical and contemporary characteristics, but nevertheless shares structural, social, political and policy aspects which are similar to Zimbabwe and are of relevance to the land question.[327] Both countries have a history of race-based colonial land dispossession which resulted in White farmers dominating commercial farming while the rural

[323] HJ Kloppers and GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 696.
[324]T Kepe and R Hall 'Commissioned report for High Level Panel' (2016) 56.
[325] *Ibid.*
[326] A Goebel "Is Zimbabwe the future of South Africa? The implications for land reform in Southern Africa" (2005) 348.
[327] A Goebel "Is Zimbabwe the future of South Africa? The implications for land reform in Southern Africa" (2005) 348.

areas remained underdeveloped and Black Africans remaining impoverished.[328] Post-conflict and post-independence, both countries were faced with the question of land reform which had to be tackled with redistributive justice and economic development.[329] Further, both countries suffer comparable land inequalities with the White minority owning majority of the land, both countries have had a very slow land redistribution processes.[330]

In 1980, when Zimbabwe gained its independence from Britain, 39% of the land was owned by White large-scale commercial farmers in the agro-ecological regions and 42% of land was owned by Black farmers and by 1997 not much had changed.[331] The situation was and still is much dire in South Africa, were only 7 per cent of the land was allocated to Black people during apartheid, and today with only 13 percent owned by Black people. The question of land reform has been particularly difficult to resolve in both countries because for both countries, independence and liberation came at a cost, in the form of compromising negotiations.[332] For Zimbabwe, it was with the Lancaster House constitutional conference[333], which was in effect from 1980 to 1990 and for South Africa it was between the 1990 to 1994 period of 'historic compromises' of transition.[334]

Despite the similarities between the two countries, South Africa is unlikely to follow the route of Zimbabwe despite the insistence of the Economic Freedom Fighters (EFF) opposition party that land grabs or land expropriation without compensation should be followed.[335] In Zimbabwe, land grabs which emphasised poverty alleviation and redistribution of land to the landless and the support the emergence of a black commercial farming class further marginalised the rural poor. It is casually assumed that the agriculture in Zimbabwe was destroyed due to the land grabs and fast track process and that this also resulted in 'humanitarian (food) crises[336]. The 'fast track' process disadvantaged some of the poorest rural people, including many former commercial farmworkers who lost their livelihoods in the process. This is because the poor are the least equipped to move into farming as they lack labour, capital and skill and hence will require significant state support in order to benefit from

[328] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 345
[329] A Goebel "Is Zimbabwe the future of South Africa? (2005) 345.
[330] N H Thomas "Land reform in Zimbabwe" (2003) 691.
[331] *Ibid.*
[332] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 350.
[333] Which operated from 1980- 1990 and was similar to the South African TRC in its negotiations and compromises. A Goebel "Is Zimbabwe the future of South Africa?" (2005) 350.
[334] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 351.
[335] https://effonline.org/ uploads 26th Mar 2020 FAQ .
[336] Moyo S "Three decades of agrarian reform in Zimbabwe" (2011) 494.

land reform. Where land is redistributed to black small-scale farming schemes, there was and continues to be inadequate state support for infrastructural development, market access, inputs and other crucial supports to assist resource poor farmers to make a start.[337]

Similarly, the willing seller/willing buyer approach to land transfer has been challenging in both countries with the white farmers unwilling to sell. In Zimbabwe, this approach was a requirement of the Lancaster House Agreement which stated that "white farmers must be willing to sell their land to government, and receive a fair market price for that land".[338] In South Africa, commitment to a willing-seller/willing-buyer approach to land reform was based on the protection of private property rights in the Constitution. The Constitution makes expropriating land without compensation unlawful except in extraordinary circumstances or in the public interest. Where the state land through purchase or expropriation, the state is obliged by the constitution to pay "just and equitable" compensation which means undue capital gains at the expense of the public profiteering or will not be permitted.[339]

The differences between the two countries lies primarily on the economic role of agriculture. While Zimbabwe relies heavily on the agricultural element for the economy, as agriculture and forestry, as well as tobacco and horticultural production make the biggest contribution to the economic growth[340], in South Africa, agriculture plays an economically minor role. Another notable difference is the early focus on restitution in South Africa through the restitution programme which forms part of the three areas of South Africa's land reform programme, redistribution, restitution, and tenure reform.[341] Zimbabwe did not pay early attention to restitution and instead, "prioritised people's claims as war veterans, landless people and those with proven agricultural skill and equipment".[342] Finally, South Africa still maintains ties to the west whereas Zimbabwe is untrusting of colonial powers and associate the west with bad governance. The west has isolated Zimbabwe and viewed Zimbabwe's hostility as a hated legacy of colonialism which was overcome with the land occupations and evictions of white farmers.[343]

[337] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 352.
[338] *Ibid.*
[339] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 354.
[340] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 359.
[341] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 360.
[342] *Ibid.*
[343] *Ibid.*

While South Africa and Zimbabwe share significant structural similarities of history and land distribution, South Africa is unlikely to follow the Zimbabwe route because of the minor economic role of agriculture in South Africa, the early focus on restitution as well as the benefits for rural people of land reform, and finally, South Africa's sensitivity to international approval[344] and Constitutional obligations. The South African government is downplaying the urgency of the land reform issue and are working at a snails' pace. In recent years however, more attention has been brought to the subject and all considerations are being given to the situation in order to avoid the Zimbabwe outcome.

Much like South Africa which was colonised by the British, Namibia has a history of colonisation by German and South African colonists. Similar to South Africa too, some 30 years after gaining independence in 1990, land distribution still resembles exploitation and oppression. When Namibia gained its independence, 6 percent of the population, white commercial farmers owned 52 percent of the land while the majority, 94 percent of the Black population shared only 48 percent of the agricultural land.[345] Unlike South Africa, Namibia gained its independence not by violence or revolution but, rather, by way of a "controlled change of system and an internally and externally negotiated settlement"[346]. Unfortunately for Namibia, the constitutional principles relied on for the settlement and compromise resembles the South African compromise which is the cause of the land redistribution difficulty, in that the Namibian Constitution legally entitles landowners to their private property,[347] much like section 25(1) of the SA Constitution.

The challenges to the land reform question in Namibia are namely, the "differing land rights within the country, the use of commercial land almost exclusively for extensive stock-farming, the way possible beneficiaries of the land redistribution process are selected and qualified , the financing of land reform, the relatively minor implications of land reform within the private sector for the economic and social development of the nation as a whole, and, the political interest and opportunities available to the Government".[348]

Similar to South Africa, land reform in Namibia took form in three ways, redistributive land reform, an Affirmative Action Loan Scheme, and the development of resettlement projects in

[344] A Goebel "Is Zimbabwe the future of South Africa?" (2005) 364.
[345] J Hunter "Who should own the land? Analyses and view on Land Reform and the Land Question in Namibia and Southern Africa (2004) 1.
[346] J Hunter "Who should own the land? (2004) 2.
[347] Article 16 of the Constitution of the Republic of Namibia 1990.
[348] J Hunter "Who should own the land? (2004) 2.

communal areas.[349] Further, like both South Africa and Zimbabwe, Namibia adopted the "willing seller – willing buyer" approach with regard to commercial land and the Government reserves preferential rights in the purchase of land that comes onto the market.[350]

Majority of the population understands that land reform is important, and as such should be undertaken in an orderly and effective way within the rule of law[351], unlike the strategy followed in Zimbabwe. Namibia then dealt with their land question in the following way: although committed to land reform, the Namibian Constitution provided for the payment of just compensation for any private land to be acquired.[352]

The initial and most important agenda of land reform was the resettling of small-scale farmers as well as establishing a scheme for new black farmers in order that they to acquire large-scale farms.[353] In 1995, the Agricultural (Commercial) Land Reform Act[354], was passed to enable the government to acquire ranches for the resettlement plan and this accelerated the resettlement.[355] The Namibian government was soon faced with the difficulty of settling small scale farmers because the cost of settling families with small herds and flocks on individual farms 'with reasonable standards of social and economic infrastructure' proved high with very little economic return.[356] Namibia has struggled with handling this challenge and devising technical solutions to problems arising from the high costs of resettling has proven difficult. This scheme has been criticised for its lack of criteria for resettlement, the lack of grazing management systems in place as well as the lack of access to sustainable water supplies. Further, the low levels of literacy and education amongst the beneficiaries, coupled with the lack of skills had an adverse effect on productivity and, essentially the success of the schemes.[357]

Namibia substantiated its resettlement plans with the Affirmative Action (AA) Loan Scheme which was created with the intention to loan subsidies of between N$400,000 and N$500,000

[349] J Hunter "Who should own the land? (2004) 2.
[350] *Ibid.*
[351] J Hunter "Who should own the land? (2004) 4.
[352] L M Sachikonye "Land Reform in Namibia and Zimbabwe: A comparative perspective" (2004) in J Hunter 71.
[353] L M Sachikonye "Land Reform in Namibia and Zimbabwe: A comparative perspective" (2004) in J Hunter 72.
[354] 1995 (No. 6 of 1995).
[355] *Ibid.*
[356] *Ibid.*
[357] L M Sachikonye "Land Reform in Namibia and Zimbabwe: A comparative perspective" (2004) in J Hunter 74.

to Black farmer and would be repayable over 25 years, with an initial grace period of 3 years.[358] This was well received and well supported[359] because it was seen as a way to rectify the unequal ownership of land based on race and encouraged the emergence of African entrepreneurs. Unlike Zimbabwe, Namibians honoured and committed to the scheme.[360]

Namibia, much like South Africa has been slow in land reform, this is not necessarily a bad situation when compared with the haste of Zimbabwe's fast track process and the ramifications thereof. Zimbabwe is an example of what not to do and it provides insight into all that could go wrong and have adverse consequences on the economies of the two countries. The violent and chaotic route undertaken by Zimbabwe not only affected the Zimbabwean population, but its effects were felt by neighbouring countries such as Botswana and South Africa because the amount of immigrants and refugees fleeing Zimbabwe for the latter countries kept increasing. Based on the Zimbabwe consequences such as instability and the negative impact on international investment the latter countries continue to seek to distance themselves from the economic consequences of these land occupations and instead are seeking legitimate ways to conduct their land redistribution.

2.5 Reparations as community services

Premised on the idea that after mass human rights violations there is a larger social reconstruction agenda than reparations, there have to be measures in place that go beyond prosecutions, truth-telling (where there are disclosures of the nature, pattern, extent and consequences of the violations) as well as structural changes to avoid repetition of past harms and commemoration of the fallen heroes. [361] Reparations as community service prove most effective in areas where the survivors have to live together with their perpetrators and where traditional court prosecutions and traditional individualised reparations would be equally impossible or inadequate.

[358] *Ibid.*
[359] *Ibid*.
[360] L M Sachikonye "Land Reform in Namibia and Zimbabwe: A comparative perspective" (2004) in J Hunter 72-73.
[360] *Ibid.*
[361] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 192.

In South Africa, the inequality levels were exacerbated by the apartheid laws, which intentionally divided Black and White people along racial lines to ensure that interaction like intimate relationships between the two races could be criminalised for example, the Prohibition of Mixed Marriages Act[362]. The 'Whites only' signs which were put up nationwide reserved all the prominent areas and for White people and left the least developed and destitute areas and lowest paying jobs for the Black majority. This reality is still prevalent as South Africa is still the world's most unequal country according to the World Bank.[363] This reality means the perpetrators and victims have not occupied the same work or residential spaces for there to be a possibility of them working together to bridge the racial divide. Reparations as community service would not be possible in South Africa because firstly, the political and economic power disparities between White and Black people are enormous and, secondly, while they have to co-exist in work and social environments, do not have to co-exist in townships and rural areas where these reparations would be most beneficial. Furthermore, community service as a means of reparations would be more effective in rural areas than urban areas[364]. Almost no population of White people (besides farmers) live in rural areas, so again, this route is not ideal in the South African diaspora.

2.6 Reparations as preferential access

Another way to correct the marginalisation and ostracism of the victims of mass human rights violations such as apartheid is by acknowledging the wrongs previously done by granting preferential access to the victims in order to restore the victim's position as worthy members in society.

Section 9 of the Constitution of the Republic of South Africa, provides all people in South Africa the right to equality and fulfils the formal element of equality by creating a basis for equal treatment. Despite the right to equality, the majority of the population in South Africa is not equal in almost all aspects of life due to the history of South Africa which resulted in an

[362] Act 55 of 1949.
[363] https:// www.worldbank.org/country South Africa Overview, World Bank names South Africa as the country with the greatest wealth inequality www.npr.org (2018). [Accessed 27 August 2020].
[364] N Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004)197.

economic and opportunities disparity based on race and has resulted in many Black people in South Africa not enjoying the same substantive equality to the remainder of South Africa.

Preferential access, which can be looked at as a form of equality, played itself out through affirmative action measures in South Africa, which was at the forefront of the definition and implementation of affirmative action and the international community can take perspectives from South Africa on how to overcome past injustices. [365] The way Affirmative Action was implemented in South Africa differed from the way it was initially applied, in that it set out clear guidelines to be followed. [366]

Despite having moved to a democracy, large disparities between Black and White people were still prevalent in terms of employment. Section 9(2) states that measures have to be implemented to advance or protect people's rights that were adversely affected by unfair discrimination. In order for the measures mentioned in S 9(2) to pass the non-discriminatory test, the measures have to, firstly, be targeted at people or categories of persons who were previously unfairly discriminated against. Secondly, the measures must be designed to protect and advance those people instead of being seen as a revenge tactic. Finally, the measures have to promote equality.[367] Section 9(4) also states that no person should be unfairly discriminated against, either directly or indirectly. The distinction between fair and unfair discrimination sometimes come into play. Fair discrimination would justify the exclusion of certain categories, such as White men, in order to benefit Black women. This would discrimination, but justified, making it fair and permitted in law. Section 14(1) of the Equality Act [368]states that it is not unfair discrimination to place measures that advance the rights of people or a category of people who previously disadvantaged. This means, that affirmative action forms part of the equality clause and thus fair discrimination.

Despite the repeal of many discriminatory laws in employment[369], such as the reservation of jobs for White people, many high-profile jobs are still occupied by White people and they still

[365] G S Bosch 'Restitution or discrimination: Lessons on Affirmative Action from South Africa Employment Law' (2007).

[366] *Ibid.*

[367] G S Bosch 'Restitution or discrimination: Lessons on Affirmative Action from South Africa Employment Law' (2007).

[368] Act 4 of 2000.

[369] The Industrial Conciliation Act of 1924 excluded Black people from the definition of employee.

get higher salaries.[370] It is on this basis that the preferential access is granted to Black people in terms of the Employment Equity Act.[371] Section 2(a) and (b) of the Employment Equity Act states that it aims to promote equal opportunity in the workplace by implementing affirmative action to redress the past injustices experienced by designated people and groups. Designated people are Black people, women and people with disabilities. Most South African businesses are expected to comply[372] with the affirmative action provisions and submit annual reports that track their compliance and the efficacy of the implementation.[373] The concept of affirmative action thus envisages that remedial action be taken.

The drawbacks of these provisions are that they create racial tokenism and gender stereotyping.[374] Affirmative action is limited to members of groups who are identified by objective characteristics. The methods of classification of the apartheid era are still prevalent, giving effect to inherently racist categorisations which enforce racial differences instead of getting rid of them. Regardless of this drawback, past injustices have to be remedied and in order for this to be done, the designated groups have to be identified clearly. South Africa saw first-hand the resentment and victimisation that was created by the preference-based approach when those who are not the beneficiaries of preferences protested against the approach.[375] More importantly, affirmative action schemes focus primarily on reaching numerical targets rather than promoting opportunities for Black people to compete equally for high level jobs.

Moreover, due to the lack of enforcement mechanisms, if businesses ignore the affirmative action obligations, they can easily pay fines which they could consider as a calculated business risk and keep their employment composition unreflective of the South African population. This would keep economic power in the hands of the White minority as is presently the case in South Africa.[376] Often, affirmative action is mistaken as meaning unqualified Black people are given opportunities or positions, they are not suited for. This has resulted in the successes of Black people being reduced to nothing more than hand outs and this in turn leads to the

[370] R Burger and RJafta 'Affirmative action in South Africa: An empirical assessment of the impact on labour market outcomes' (2010) 1.
[371] Act 55 of 1998.
[372] Excluding small businesses such as sole proprietors.
[373] R Burger and RJafta 'Affirmative action in South Africa' (2010)5.
[374] *Ibid.*
[375] *Ibid.*
[376] G S Bosch 'Restitution or discrimination: Lessons on Affirmative Action 9.

rejection of affirmative action by Black people, for fear of being labelled as unqualified or being seen as tokens.

Moreover, the fact that there is a lack of guidelines, and not sufficient mechanisms to enforce affirmative actions, as well as failure of the supporting institutions to encourage the application of affirmative action measures adversely affect their effectiveness and curtails its potential.[377] It is the governments' duty to lead businesses to structure or position affirmative action as it was intended and to educate employees and employers about the purpose and intention of it so as to remove the stigma it attaches to the beneficiaries. Social change must be directed by a liberating force that does not leave it to big business to make a mockery of AA as it happened in the early days of Affirmative Action in South Africa Finally, amending the Employment Equity Act to include more specific measures of enforcing compliance such as including a clause stipulating closing businesses until compliance is observed would be a step in the right direction. These amendments would be better suited in chapter 5 of the Employment Equity Act[378] under part A which deals with monitoring and enforcement by including this specific clause in the undertaking to comply or the compliance order as per sections 36 and 37 of the Act.[379]

These are principle areas that need to be observed and corrected, in order for affirmative action to act as a long-term balancing mechanism designed to achieve an egalitarian society that corrects the persistent imbalances of the past. The new mechanism should be designed to correct the direction the society is taking to renew and reconcile as a nation. [380] Further, preferential access in the South African context would involve government intervention programmes in which the Black majority is uplifted by being granted equal opportunities together with their White counterparts. The aim would be to address the racial inequality produced by the apartheid regime by the creation of a more representative distribution of wealth and opportunity amongst the various racial groups.[381] Further, this initiative would have to promote the achievement of the constitutional right to equality, increase broad-based and

[377] R Burger and RJafta 'Affirmative action in South Africa' (2010) 14.
[378] Act 55 of 1998.
[379] Act 55 of 1998.
[380] R Burger and RJafta 'Affirmative action in South Africa' (2010)15.
[381] *Ibid.*

effective participation of Black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution. [382]

That was the initial idea behind the creation and implementation of Broad-based Black Economic Empowerment (BEE)[383] and its amendment, the Broad-Based Black Economic Empowerment Amendment Act[*384*] which is a government legislation which aims to bridge the gap between formal and substantive equality. The aim is to ensure that all people in South Africa fully enjoy the right to equality while advancing economic transformation and enhancing the economic participation of Black people in the South African economy. The Act seeks to 'reallocate wealth across a broader continuum of society in South Africa to influence change in all sectors of life. BEE is aimed at transforming the economy to be fully representative of the demographic make-up of the country. To this end, BEE provides a meaningful contribution to the economic lives of Black people'.[385] 'The three core components of BEE comprise: direct empowerment through ownership and control of businesses and assets; human resource development; and indirect empowerment by means of preferential procurement, enterprise development and profit- and contract-sharing by black enterprises'.[386]

The creation of BEE could be said to be, in some way, an example of reparations as preferential access to the Black majority in South Africa. It served as a viable economic empowerment of all Black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies,

According to the definition of BBE in section 1(c) of the Act, the purpose was inclusive of, but 'not limited to (a) increasing the number of black people that manage, own and control enterprises and productive assets facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises; (b) human resource and skills development; (c) achieving equitable representation in all occupational categories and levels in the workforce; (d) preferential procurement from enterprises that are owned or managed by black people; and (e) investment in enterprises that are owned or managed by black people'.[387]

---

[382] *Ibid.*
[383] Act 53 of 2003.
[384] Act 46 of 2013.
[385] E Shava 'Black Economic Empowerment in South Africa: Challenges and Prospects' (2016)1.
[386] R Burger and R Jafta 'Affirmative action in South Africa' (2010).
[387] Act 46 of 2013.

The BEE policy was aimed at the promotion of cooperative development, human resource and skills development, these factors were then intended to provide equal opportunities for Black people to be employed in jobs and practising preferential procurement of black owned enterprises. The idea behind BEE was to move Black people to the front of the line after being pushed aside and neglected by government and all its institutions. BEE is however not the first programme to be initiated in this regard, there were initial and voluntary plans set up by the private sector such as the work of the Labour Market Commission and the Green Paper on Employment, which informed the Employment Equity Act to address these issues. However, these mechanisms were fragmented and did not have much of an impact required to satisfy the expectations of a majority population denied access to many aspects of the South African economy for years.[388] Taking massive remedial action was thus the foundation of the concept of affirmative action.[389]

In its operation in the workplace, affirmative action requires employers to consult with their employees and representative trade unions, in order to undertake an audit of employment policies and practices in the workplace. Upon gathering the information, an analysis is conducted, to identify underrepresentation of designated groups, to further assist in developing demographic profiles of the work force and finally to identify barriers to the employment or advancement of designated groups. This information then can be used by the employer to prepare employment equity plans with definitive timelines and fixed durations that set numerical targets and measures to identify and eliminate discriminatory barriers and promote workplace diversity.[390]

The Department of Labour requires employers to report progress on the implementation of their employment equity plans and the findings are captured in the Employment Equity Registry. The findings are then used by the Commission for Employment Equity which is a statutory a body created under the terms of the EE Act which is responsible for compiling annual reports on the progress with respect to employment equity and then makes these findings and reports public knowledge. The Employment Equity Act affords the Department

[388] E Shava 'Black Economic Empowerment in South Africa' (2016)
[389] *Ibid.*
[390] E Shava 'Black Economic Empowerment in South Africa' (2016)6.

of Labour, the right to send inspectors to visit the designated employers[391] to compare the situation on site against the reports filed and issue out sanctions for non-compliance.[392] Further, there are added requirements for the employment of Black women within the Gender Recognition Adjustment incentive and firms can be punished for scoring low in in this area.[393]

This recognition that Black people were unfairly excluded from acquiring wealth and being contributing members of society would have been a legitimate way of remedying the historic legacy of exclusion had it been implemented in a successful way. However, due to the abuse, manipulation and corruption of state officials, BEE in South Africa has failed to ignite the much-needed black economic transformation which made the public lose confidence in the government's policy.[394] Further, in the local context, BEE has been flawed as a result of scarce capital, lack of skills, high level bureaucracy and inexperienced entrepreneurial minds. Despite its implementation, BEE policies have not made South Africa a fairer or more prosperous country and Black people are still without the skills, opportunities, nor equalities it sought to restore.[395]

Both the Employment Equality Act and the Broad-Based Black Economic Empowerment Act can be viewed as examples of how South Africa implemented reparations as preferential access in order to combat firstly, the obstacle of access to employment and appointment within the labour sector, and secondly, racial disparities within the larger labour market. [396] The legal frameworks that have been or were employed, were intended to effectively dismantle racial discrimination and promote affirmative action. The success stories of these mechanisms are still questionable because the economic disparities between White and Black people are still vast.

[391] Act 55 0f 1998-Those who employ more than 50 people or where employees less than 50 but the annual turnover is above or equal to that of a small business.
[392] E Shava 'Black Economic Empowerment in South Africa' (2016)7.
[393] *Ibid.*
[394] E Shava 'Black Economic Empowerment in South Africa' (2016) 161.
[395] E Shava 'Black Economic Empowerment in South Africa: Challenges and Prospects' (2016) 161.
[396] R Burger and R Jafta 'Affirmative action in South Africa' (2010) 14.

The TRC definition of 'victims'[397] when considered in the employment setting as well as the designated employees targeted by the preferential access of the Employment Equity Act[398] as well as Land Reform and the Broad-based Black Economic Empowerment (BEE)[399] provisions discussed in detail above, supports the application of these measures because the targeted groups suffered harm and a substantial impairment of their human rights which adversely affected the trajectory of their lives.

Having looked at reparations in general in chapter 1, then assessing its application in the South African context, it can be deduced that justice for apartheid crimes should have entailed more than reconciliation methods. This is because reconciliation methods clearly prioritised granting amnesty to the perpetrators of apartheid and ensuring that the least possible accountability was had, as well as sustaining their positions of power in terms of wealth, land and social benefits over delivering justice for the victims. The granting of amnesty worked contrary to justice for the victims and survivors who did not get back what they were dispossessed of, including their land and their dignity.

Reparations as development would have worked to equalise a society that is the prime example of what a government's failure to prioritise equality looks like on the world scale. The fact that places like the Cape Town suburbs exist directly opposite to townships like iKhayelitsha demonstrate not only the government's incompetence and failures[400], but also the lack of strategic planning in ensuring that justice was served. The power and wealth disparities amongst Black and White people in South Africa, together with the government's failure to deliver basic services, as well as the continued wealth of those in power, and the continued suffering of the Black majority are the reasons that the divide along racial lines are still prevalent today.

[397] Section 1''individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as a result of a gross violation of human rights; or as a result of an act associated with a political objective for which amnesty has been granted; as well as persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons who were in distress or to prevent victimization of such persons; and such relatives or dependants of victims as may be prescribed'.
[398] Act 55 of 1998.
[399] Act 53 of 2003.
[400] Of providing adequate housing, service delivery, education and healthcare.

The TRC, instead of metaphorically cutting open the injured and infested wound, opted to instead plaster it with a bright rainbow nation bandage and call it miraculously healed when in fact, the infection infiltrated the blood stream and poisoned the rest of the body. This analogy is only to emphasise that South Africa's problems are deep rooted and too far spread, not to be dealt with at the root of the problem. The apartheid government created the inequality, while the ANC government through the TRC and the various government institutions perpetuated it by failing to prioritise the issues that rose from it. Resolving these issues requires out- of- the-box strategies and competent bodies to be dedicated to the enforcement of reparative programmes that, although too huge a task, will start to level the playing field.

Other than the Individual Reparation Grants, the South African Government has opted for largely collective reparations in order to cater for large groups of victims. The South African Social Security Agency which operations nationwide to assist with Child support grants and ran by the Department of Social Development pays R400 per child to South African citizens who are primary caregivers are permanent resident or refugees who reside in South Africa. This amount of R400 barely scratches the surface for a living monthly amount in South Africa. It barely covers daily expenses and it makes little to no difference to the lives of those affected and desperate enough to apply for the grants. About 18 million South Africans who live in poverty received state support or social grants from the government. As of 2019, out of the population, 16 047 people were Black, 1470 were Coloured, 213 were Indian and 324 were White.[401] It is no coincidence that majority of the population in need of government assistance are Black. This is the direct result of Apartheid and the inequality born from it. The value of these social grants is not appropriate to the cost of living in South Africa. The amounts were increased from R380 to R410 in 2018. The R30 increase is welcome but government should be doing more and providing more.

Other collective reparations in South Africa are observed in public services such as education. Based on the definition of victim of apartheid as defined by the TRC, qualifying TRC victims and their qualifying relatives and dependants were called upon by the Department of Justice and Constitutional Development to apply for financial assistance for basic education as well as higher education and training. The regulations in relation to financial assistance came into operation on 7 November 2014 and would cater for victims in Grades R to 12. This would

[401] https://www.statista.com/stastics/population-recieving-social-grants-in-South-africa-by-population-group/ [accessed 08/08/2020].

include school fees, transport and school uniforms. At tertiary level, the assistance would cover tuition fees in full, house and boarding, text books, meal allowances and transport as well as once off device and students with disabilities would be catered for according to their specific needs. [402]

In order to qualify for Basic education assistance, the person identified by the TRC as a victim has to come from a household not earning more than R209 468 00 gross income per year, they have to be enrolled in a public school and they have to be a member of a vulnerable household[403]. A vulnerable household is defined as that which consists of 4 or more members where either the majority is over 65 years, if they receive social assistance, are mentally or physically disabled or if a member is younger than 18 years and has to work or only one family member is working.[404] Similarly, in order to qualify for Higher Education and training assistance, the applicant has to be from a household earning less than R 315 201 00 gross income per year , they have to be enrolled in a public University/ TVET College and be an undergrad student as well as be a member of a vulnerable household as defined above. [405] These regulations flow from the TRC's recommendations to the President on granting reparations to the victims of apartheid. They were a step in the right direction in terms of developing the members of the communities deeply affected by apartheid as well as repairing the injustices they suffered.

The collective reparations in the workplace in the form of Affirmative Action and Broad Based Black Economic Empowerment as discussed above were meant to operate as means to balance the playing field in the workplace by catering for the designated groups as mentioned in Section 1 of the Employment Equality Act[406] in order that they enjoyed the benefits and opportunities provided for in the Constitution. These designated groups were defined as Black people, women and people with disabilities who are citizens in South Africa. This definition only excludes white men, but white women are catered for under 'women'. This raises concern because if the aim was to work as reparations for apartheid, white women do not fall under the definition of victim as per the TRC definition i.e. those who suffered physical, mental, or emotional injury,' 'and who either testified before or registered with the TRC prior to the

[402] https://www.justice.gov.za [accessed 08/08/2020].
[403] Amendment of Regulations relating to assistance to victims in respect of higher education and training: Promotion of National Unity and Reconciliation Act, 1995. Regulation 16.
[404] https://www.justice.gov.za [accessed 08/08/2020].
[405] Amendment of Regulations relating to assistance to victims in respect of higher education and training: Promotion of National Unity and Reconciliation Act, 1995.
[406] Act 55 of 1998.

release of its report in 2003'. [407] White women are beneficiaries of the employment reparations but they are not victims of apartheid. They continue to benefit from these reparative measures and also benefited from apartheid. This is a problem area.

Finally, regarding the collective reparations in the land issue, as of August 2021, three communities in South Africa, which had applied for land claims before the 1998 cut-off date for restitution are a step closure to restitution with the Public Works and Infrastructure Minister signing off on the claims and the North West Regional Land Claim confirming the claims validity. These communities are Mpumalanga and North West communities which were forcibly removed from the properties under the Native Land Act of 1913 as well as a Western Cape community which they had been dispossessed of under the Group Areas Act. Unfortunately for the Western Cape family, the area is not available for restoration, but R2.9 Million will be transferred to the family instead. The final step of these transfers will be completed by the Department of Rural Development and Land Reform and the Department intends on expediting other claims as well. This is a step in the right direction and we hope to see more claims being approved and confirmed. [408]

It has been deduced that South Africa would have benefited substantially from the proper and effective implementation of reparations as development as well as reparations as preferential access as these two mechanisms strike the core of the kind of reparations to be employed in South Africa. The following chapter will look at how effective Gacaca courts were in Rwanda and to what extent reparations, if any, were granted to the victims of the armed conflict.

[407] South African Coalition for Transitional Justice (SACTJ) Comments on the Draft Regulations Published by the Department of Justice Dealing with Reparations for Apartheid Era Victims (2011)
[408] J Evans "Three Land restitution claims a step closure to finalisation, redressing imbalances of unjust past'" News 24 [Accessed on 04 August 2021].

CHAPTER THREE

RWANDA: GACACA COURTS AND REPARATIONS

In the discussion of Gacaca courts, it is common to find that the operation of Gacaca is disregarded as a viable justice mechanism because of factors such its failure to unite the citizens, its failure to meet fair trial standards such as legal representation, rules of evidence, and the way it operated. However, these factors used against it are based on the parameters of western systems of law and this makes the critiques fundamentally flawed because the creation of Gacaca was not accidental, nor was it meant to replicate the operation of the west, instead, it was used as an alternative to prosecution model of the International Criminal Tribunal for Rwanda (ICTR). As an alternative mechanism then, it introduced its own way of operating and it should be viewed in relation to that instead of measuring against other systems of justice.

South African legal scholars like Fanie du Toit have conducted studies where they conceptualised the notion of reconciliation as a result of transitional justice. They also analysed and evaluated the implications and consequences of Gacaca Courts.[409] Du Toit scrutinizes the claims by the South African TRC that truth-telling often obviates the motivation to seek revenge after conflict. Although the TRC is mentioned in passing, the majority of the analysis is based on Gacaca Courts as a case study for transitional justice. This literature advances the need for reconciliation and stresses that through reconciliation from the Rwandan framework, peace can be attained, but it also observes that potential threats exist from Gacaca Courts.

An American scholar, Megan Westberg looked at how transitional justice was employed in Rwanda' by conducting a comparative study of the 'strengths and weaknesses of Gacaca Courts and the International Criminal Tribunal of Rwanda'.[410] She advances that although both systems had an impact on the Rwandan populace, the Gacaca was more effective in delivering the justice needed by the people of Rwanda. The focus was on the economic, psychological, sociological, and cultural considerations of Gacaca. She notes that the economic benefits of Gacaca are found firstly when examining the cost of trials. Due to trials being held literally at the grassroots levels, they operated in areas where the crimes had taken place. This means transportation, housing, and litigation costs that were needed in traditional litigation were excluded. Further, judges were initially not remunerated but were subsequently paid low

[409] F du Toit Reconciliation and Transitional Justice: The case of Rwanda's Gacaca Courts (2011) 1.
[410] M Westberg 'Rwanda's Use of Transitional Justice after Genocide: The Gacaca Courts and the ICTR' (2010) 332-333.

salaries. This can be the basis for critiquing the effectiveness of Gacaca Courts. This is because judges would prefer working on their fields instead of presiding over Gacaca Courts, further, this places the government in a position where they did not have to 'pay high salaries to judges or individuals with a high degree of legal training'.[411] Moreover, the fact that there is no need to pay for legal representation for the accused reduces the costs of Gacaca because the number of legal representatives that would be needed for all the perpetrators would set back the process. It is important to note that this lack of legal representation should not be looked at as a negative factor as it would be in western society. The creation of Gacaca was not based on a western philosophy, rather, it was based on the knowledge that the Rwandan people were recovering from 'crimes of catastrophic proportions'[412] and reconciliation instead of retribution was needed.[413]

Further, it has been mentioned that Gacaca came as an alternative method to the prison system. Economically, the large numbers of inmates who needed food and housing were draining the economy. Gacaca then provided a timely manner to deal with cases. A powerful example of the Gacaca system was the reduced sentence that allowed for the perpetrators to finish out their sentences through community services to be rehabilitated as productive members of their communities. [414]

The social benefits as found by Westberg are premised on the remorse that had been demonstrated by the perpetrators. She mentions that they do not present killer mentalities, instead, they are conformists who do everything they are told and who want to be integrated back into society. [415] Further, the Rwandan Constitution [416]no longer recognises the ethnic labels of Hutu and Tutsi, instead, everyone should identify as Rwandan as a way to bring collective unity and to strive for a more inclusive, non-discriminatory society.

Finally, the psychological benefits to be gained from Gacaca Courts are an understanding that these abhorrent crimes are never to be repeated. The open discussion of crimes by perpetrators coupled with witness testimonies serves as a deterrent which ensures that the same crimes are

[411] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 347.
[412] *Ibid*.
[413] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 348.
[414] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 348.
[415] *Ibid.*
[416] Rwanda: Constitution of the Republic of Rwanda and its amendments of 2 December 2003 and of 8 December 2015.

not repeated out of fear of having to admit to these crimes in front of the families of perpetrators and victims, and the community. The process also shapes the next generation because confessing is the first step to building trust amongst community members and ensures that hatred and mistrust are not carried over to the next generation. [417]The re-integration of the wrongdoers into society, although difficult, is a necessary step and one that requires each person to work on themselves to find forgiveness. If the younger generation witnesses a forward-looking approach of forgiveness and tolerance from their elders, they too can forgive and reconcile.

Charlotte Clapman understands that compensation for victims can be empowering and she briefly stated her support that the failure to compensate the survivors hindered the reparative qualities of Gacaca Courts and it instead caused further harm instead of undoing the damage caused.[418] To the extent that the Gacaca process failed to meet the victims' needs by offering compensation meant that the reparative aspect of Gacaca was severely undermined.[419] Beyond this, nothing more was discussed about what these reparations should have entailed or how they were to be funded. The above-mentioned authors looked at the overall system of Gacaca. Specifically how and why it was formulated, and whether it was a success. However, not much attention was paid to the concept of reparations as a viable mechanism to achieve justice.

A plethora of countries transitioning from periods of human rights violations, strife or dictatorship have faced challenges in criminal prosecutions as criminal trials were not adequately able to effectively deal with the large number of crimes committed in order to promote the countries need for reconciliation by delivering justice to the victims and holding the perpetrators of the crimes accountable.[420] This is the premise on which alternative justice mechanisms such as Gacaca courts were created.[421]

As conducted in chapter 2, in order to mention the areas of Gacaca that could benefit from revision and correction, it is imperative to first look at the shortcomings or weaknesses of the system. Despite its varied success, the vast collection of research conducted revealed that the success of Gacaca Courts was not expected by all citizens. This resulted in “more than 10,000

[417] M Westberg ‘Rwanda’s Use of Transitional Justice after Genocide’ (2010) 349.
[418] C Clapham ‘Gacaca: A Successful Experiment in Restorative Justice?’ (2012) 3
[419] *Ibid.*
[420] C J Le Mon ‘Rwanda’s Troubled Gacaca Courts.’ (2007) 1.
[421]C J Le Mon ‘Rwanda’s Troubled Gacaca Courts.’ (2007) 1.

Rwandans fleeing the country due to fears of false accusations and unfair trials"[422]which were shortly realized.[423] Reports also observed an "increase in violence toward genocide survivors who are called as witnesses in Gacaca court trials, and toward Gacaca court officials themselves"[424]

Several witnesses and Gacaca court officials across the country have been killed in a brutal manner, representing the same hatred and violence that marked the 1994 Genocide in Rwanda.[425] Further, harassment, intimidation and lack of physical security have been observed. These attacks were aimed at 'discouraging or punishing testimony before the Gacaca courts'.[426] Threats of violence adversely affect witness testimony and hinder the Courts ability 'to establish a historical record of the genocide and to signal an end to impunity'.[427]

The 'government of Rwanda, through the National Service of Gacaca Courts, encountered procedural difficulties in the information-collection phase'.[428] This was due to the wilful destruction of data as well as the informal storage of said data. Recollecting has proven to be futile and a waste of already strained resources as some of this data is unavailable and cannot be recovered because of the inability to replicate the exact findings.[429]

Societal reconciliation, which is another of the Gacaca Courts goal has proved elusive. The operation of the Gacaca courts, which aimed at healing the division between Hutus and Tutsis did not completely succeed. Instead, it 'threatened to reinforce it by affirming group personas of victim and perpetrator, innocent and guilty'. This was because some people believed that the structure of Gacaca pits people against perpetrators, making reconciliation harder to attain.[430] Moreover, Thomson argues that both international and national actors alike are oblivious to the power dynamics that exist in the operation of Gacaca courts, she further stated that when a clear analysis of the structures of Gacaca is illustrated, a less rosy picture is

[422] CJ Le Mon 'Rwanda's Troubled Gacaca Courts' (2007) 17.
[423] C J Le Mon 'Rwanda's Troubled Gacaca Courts' (2007) 17.
[424] C J Le Mon 'Rwanda's Troubled Gacaca Courts' (2007) 18.
[425] *Ibid.*
[426] S Baguma 'the New Times (Kigali), 'Genocide Survivor Boycotts Gacaca, Cites Harassment,' (2006).
[427] S Baguma 'the New Times (Kigali), 'Genocide Survivor Boycotts Gacaca, Cites Harassment,' (2006).
[428] *See* Nat'l Serv. of Gacaca Courts, *Report on Data Collection*, INKIKO GACACA, http://www.inkiko-gacaca.gov.rw/pdf
[429] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 353.
[430] C J Le Mon 'Rwanda's Troubled Gacaca Courts' (2007) 17- 18

obtained.[431] Gacaca courts' success relied on mass participation, however, this participation was not voluntary, and instead, it was obtained by the use of fear and the threat of sanctions.[432] It is because of this reason that for many ordinary citizens, Gacaca is seen as an 'oppressive form of state power'[433] rather than a mechanism to be used voluntarily.[434]

Further, ordinary citizens who question why members of the Rwandan Patriotic Front (who took part in the genocide) have never been tried, are subjected to forced exile, disappearance, and death. [435] The question of Tutsi having played any role in the Genocide is not one which can be entertained in private spaces, not to mention public spaces like Gacaca Courts. [436]

Other shortcomings of Gacaca include the issue of 'persons going into exile allegedly because they feared how Gacaca Courts would operate whereas [sic] they actually flee justice'[437] and 'persons who moved from areas where they used to live during the genocide in [an] attempt to avoid being made accountable for the crimes they committed there.'[438] Many of the alleged perpetrators of the genocide have not been 'tried' and this has resulted in the mishandling of justice. However, the willingness of other countries to extradite perpetrators or suspects who have been identified located to face trial has to an extent, remedied the problem.[439]

Further, as Clapham observed, any legal process is readily compromised if the administrators lack legal expertise. The 'distinct lack of legal expertise within Gacaca's structure has been the source of much criticism regarding its success'.[440] The legitimacy issues experienced with the Gacaca courts were that the heads of Gacaca had no legal training to uphold the law beyond the operation. Most devastating are findings that some of the elected leaders themselves had participated in the carrying out of the genocide and that further exacerbated the legitimacy issues.[441]

Many believe that Gacaca has failed to create a 'one Rwanda for all Rwandans' as the stated policy. Instead, it has been used as a governmental mechanism to consolidate its hold over the

---

[431] S Thomson 'The darker side of transitional justice: The power dynamics behind Rwanda's Gacaca Courts' (2011) 380.

[432] S Thomson 'The darker side of transitional justice' (2011)380
[433] *Ibid.*
[434]S Thomson 'The darker side of transitional justice' (2011)
[435] S Thomson 'The darker side of transitional justice' (2011)384
[436] *Ibid.*
[437] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 354.
[438] *Ibid.*
[439] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 354.
[440] *Ibid.*
[441] M Westberg 'Rwanda's Use of Transitional Justice after Genocide' (2010) 355.

country. Due to this, the relations in the country between Hutu and Tutsi groups are unstable an unreliable. The Gacaca court system which has been said to be filled with corruption and violence, has neither achieved justice nor reconciliation, yet the Rwandan government seems unlikely to make changes to the operation of these courts despite the observed deficiencies. [442]Failure to meet the goals of justice and reconciliation may result in Rwandans living their lives with the risk that another tragic massacre may eventuate.

3.1 Legal Framework for Rwanda's Justice Mechanism

The rationale behind the creation of Gacaca Courts was to address the needs of the victims of Genocide, as well as the victims of other international crimes committed, to ensure that the truth about Genocide does not stay hidden, instead, to create open dialogue and encourage peacebuilding by moving past a tumultuous past to a more positive future. However, advancing the myth of truth-telling as healing may prove to be dangerous as there is a risk that governments who believe in said myth may fail to both provide the necessary treatment and appreciate the victim's needs.[443]

Further, the rationale for the creation of Gacaca Courts was to quickly sort through the 'huge backlog of cases; to substantially reduce and limit the prison population; to heal the community while promoting social cohesion as well as contribute to reconciliation'.[444] The ultimate goal of Gacaca Courts was to reach a settlement that both parties involved in the dispute would accept as well as restoring peace and harmony within the community. [445] Gacaca, therefore, was an opportunity for ordinary Rwandans to 'recall, narrate and record their individual and communal accounts of the Genocide'.[446] Within the Gacaca Courts, it was important to take not of all the different experiences between the Tutsis and Hutus because amongst themselves, they carry historical frameworks, and experiences and memories that have to be considered.[447]

Amongst the various purposes of Gacaca courts 'they aimed to punish crimes including those which were committed during the Genocide, in order for this to happen, a truthful telling of the

[442] *Ibid.*
[443] K Brouneus 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) 61.
[444] Rwandan Reconciliation Process: Outcome Analysis of Gacaca Courts.
[445] C J Le Mon 'Rwanda's Troubled Gacaca Courts.' (2007)
[446] *Ibid.*
[447] F du Toit 'Reconciliation and Transitional Justice' (2011) 20.

past events had to happen in order to reconcile Rwandans with each other.'[448] Therefore, Gacaca courts, had five primary objectives. The first objective was the truth telling aspect which involved revealing all the events of the Genocide. Secondly, Gacaca courts aimed to quickly try the large number of Genocide crimes. The third and fourth aim were to eradicate the culture of impunity and to reconcile Rwanda and building community ties respectively. Finally, the government wanted to demonstrate Rwanda's capability of problem solving without outside intervention or direction.[449]

The fact that Gacaca courts lacks judicial rigour in not employing legally qualified judges but employing regular citizens who were in good standing with the law had been the main reason for its criticism. Critics had also predicted that 'Gacaca would fail to deliver justice'[450] and would actively undermine any post-genocide reconciliation that had taken place and ultimately threaten to worsen ethnic relations.[451]

From the above, it can be deduced that because of its twin goals, reconciliation and retribution, Gacaca courts 'cannot fully operate as either a court or a customary dispute resolution mechanism'.[452] Scholars have been reluctant in referring to Gacaca as a court as it lacks the due process protections provided by courts [453] The Rwandan government however, labels Gacaca a court because it possesses the power to imprison individuals and it functions like a court. Sosnov argues that, in order for Gacaca to operate as a court, the due process requirements of a court as enumerated in domestic, regional and international treaties to which Rwanda subscribes have to be followed. A 'failure to do that weakens Gacaca in the eyes of the local populace and the international community'.[454] This critique by Sosnov, treats Gacaca as a body of law meant to replicate the western system of criminal justice, whereas it was not, nor was it intended to operate as such.

The first function of the Gacaca Courts was truth telling and the women who participated in the Gacaca proceedings were active in this regard. However, as far as justice goes, much still needs to be done. Safety and security, which remains one of the biggest concerns have to be addressed in a way that will ensure that peace and justice are regarded as compatible concepts.

[448] *Ibid*.
[449] C Kavuro 'Rwandan Reconciliation Process: Outcome Analysis of Gacaca' (2011).
[450] F du Toit 'Reconciliation and Transitional Justice' (2011) 20.
[451] F du Toit 'Reconciliation and Transitional Justice' (2011) 20.
[452] M Sosnov 'The adjudication of Genocide: Gacaca and the road to reconciliation in Rwanda' (2008) 126.
[453] M Sosnov 'The adjudication of Genocide (2008) 147.
[454] *Ibid.*

These women have disclosed their concerns about living with the people responsible for their abuses as neighbours and how this causes re-traumatisation and psychological problems.[455] Safety and security should take precedence in these proceedings. Gacaca Courts and the Rwandan government had to work together to find alternative ways of achieving reconciliation between perpetrators and victims who lived together in a densely populated territory, that way not only is justice served, but peace is maintained.

Gacaca courts have, however, 'developed a capacity currently not replicated in any other format in Rwanda, to facilitate 'communal dialogue and cooperation, which are crucial to fostering reconciliation after the genocide'‘.[456] The truth telling aspect of Gacaca Courts should be commended the strides it made in providing information about the happenings of the Genocide. The impact of these dialogues can be observed through Rwanda's national unity and reconciliation of Hutu and Tutsi groups as one Rwanda.

3.2 Focus on the perpetrator

The question then is centred on holding the oppressors accountable for their criminal acts and whether it would be possible in cases of the armed conflict in Rwanda. Jallow opines that 'criminal trials play an important role in expressing public denunciation of criminal behaviour'[457]. Criminal trials operate as a way of directly holding the perpetrators of crimes accountable, while also delivering justice and satisfaction for victims.[458] It is in this light that the deterrent effect is observed. Once a perpetrator has been held accountable and punished, it encourages non-repetition and places the culture of impunity with that of accountability.[459] At the international or national level, pursuing accountability and justice through prosecution individualizes 'guilt in order to prevent collective accusations that imply an entire population was responsible for the conflict'[460] and this aids in attaining sustainable peace.[461]

[455]K Brouneus 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) 57.
[456] F du Toit 'Reconciliation and Transitional Justice' (2011) 16.
[457] H Jallow 'Justice and the Rule of Law' (2009) 78.
[458] H Jallow 'Justice and the Rule of Law' (2009) 78.
[459] H Jallow 'Justice and the Rule of Law' (2009) 78.
[460] *Ibid.*
[461] H Jallow 'Justice and the Rule of Law' (2009) 78.

Any changes to be made to the operation of Gacaca Courts will have to be retroactively applied because many of the suspected perpetrators have been tried in Gacaca. Sosnov argues that those who were found guilty in Gacaca and are currently serving sentences should instead have their sentences converted to community service as this will advance the reconciliation efforts.[462] Taking note that perpetrators are currently serving or have served their sentences in prison, converting these sentences to community service would be most beneficial for the community as well as the changes in Gacaca. The responsible local Gacaca would then determine which service each individual should perform and also oversee this community service task.[463]

Sosnov further states that the release of these prisoners into society would have a 'positive effect on the economy because it will reduce Rwanda's prison costs and it will invigorate Rwanda's workforce'.[464] Further, the monies currently allocated to prisons could be diverted to community services and programmes that would benefit entire communities. [465] However, these statements are positive-looking regarding the Rwandan economy but fail to address the further psychological traumas experienced by the victims of Genocide. Rwandans cannot move forward unless their government addresses the physical, psychological, and social traumas that they suffered.[466] Failure to address these needs, support the claim that the present Gacaca system is not succeeding.[467] Once released from prison, what measures will be put in place to ensure that no further terrorising of victims persists? What efforts will be made to ensure that the safety of victims is not put into jeopardy for the greater good of society? These are matters worth looking into before any drastic changes to the operations are made.

The success of Gacaca Courts was often been doubted by Rwandan Citizens because rather than bringing the nation together, it was believed that it caused more division. Further, the violations of fair trial standards brings into question the ability to uphold domestic and international law standards because without this, the success is very limited.[468] This ties in with the recommendation of revising Gacaca operation in order to successfully reunite and rebuild the nation.[469] This is one such critique that uses the western criminal systems as a model of what works and it is substantially flawed to weigh Gacaca's operation against that of the

[462] M Sosnov 'The adjudication of Genocide (2008)153.
[463] M Sosnov 'The adjudication of Genocide (2008). 153.
[464] *Ibid*
[465] M Sosnov 'The adjudication of Genocide (2008) 151.
[466] *Ibid.*
[467] *Ibid*.
[468] M Sosnov 'The adjudication of Genocide'(2008) 153
[469] *Ibid*

West. Any critiques of Gacaca, should be based on its own merits. Keeping in mind that reconciliation is a slow moving process that could potentially take decades to achieve, it is imperative to note that Gacaca courts alone will not solve Rwanda's problems. It has however made drastic and commendable strides into brining about change to Rwandan citizens.

Whether Rwanda chooses to use national courts, Gacaca, amnesty, or some combination of these to tackle the problems associated with the Genocide, reconciliation requires more than addressing the question of what to do with the perpetrators.[470] African countries emerging from conflict took the path less travelled by favouring the reconciliation approach but failed to establish reparation programs to recognize the citizens' fundamental rights which had been violated. Sooka supports this statement by suggesting that reconciliation measures ought to be understood in the context of a set of objectives such as 'justice for victims, accountability of perpetrators, dealing with what gave rise to the conflict, eliminating the fear of living together, rebuilding trust in government and its institutions, and building social solidarity amongst citizens'.[471]

3.3 Reparations in Rwanda

In Rwanda, the idea of financial reparations became particularly challenging because of the limited resources available as already scant infrastructure had collapsed and vanished.[472] Further, 'financial resources may be likely limited concerning the very large community of potential beneficiaries'.[473] The Transitional Justice reparations in Rwanda, had to contend with responding to large victim populations which ensuring a balance of the available resources.[474] The priority was rebuilding the basics and, as such, financial compensation was, understandably, not prioritised. [475] In 1998, the Government created the 'only government fund for survivors Fonds d'Assistance aux Rescapes du Genocide (FARG), which is financed with

[470] M Sosnov 'The adjudication of Genocide (2008) 153.
[471]Y Sooka 'Dealing with the past and transitional justice: building peace through accountability' (2006) 321
[472] *Ibid.*
[473] Assessment of possible ways forward on reparations for victims of the 1994 genocide in Rwanda
[474] L Moffett "Transitional Justice and reparations: remedying the past?"(2017) 8.
[475] Assessment of possible ways forward on reparations for victims of the 1994 genocide in Rwanda

5% of the yearly tax revenues'[476] to assist with healthcare and education costs to the survivors who are most in need. However, FARG is 'not a compensation fund and cannot be accessed by the Gacaca'[477] or criminal courts to award survivors' reparations.[478] A new direction was needed in order to address this shortfall.

In 2001, the 1996 Genocide Law[479] called for the formulation of the 'Compensation Fund for Victims of the Genocide and Crimes against Humanity Bill however, it did not materialise.[480] Twenty-five years after the Genocide, the dialogue surrounding financial compensation is still absent from the political discourse. This is perhaps due to the practical difficulties of reparations or that the Rwandan government has immunized itself from civil liability for its role in the Genocide.[481] Further, it has been predicted by academics that financial reparations will negatively affect the social cohesion believed to have been created through reconciliation programmes such as the Gacaca courts. It was predicted that this would cause resentment amongst the Hutu majority community.[482] Inasmuch as these are valid points to be made, they do not necessarily have to manifest. This resentment could be halted by including, not only Tutsi victims, but every victim of crimes related to the Genocide. This would ensure that no exclusion is perpetuated; and the needs of all victims are met.

Despite the absence of a compensation fund, Gacaca courts have provided limited reparations to genocide survivors such as providing restitution for the loss of property. In other circumstances, symbolic reparations may be awarded to those who want to benefit from a reduced sentence on condition that they reveal the whereabouts of their victims as 'what genocide survivors want most is to find the remains of their loved ones and to rebury them with dignity'.[483] Further, those who cannot repay or return 'stolen or destroyed goods are often required to work off their debt through unpaid labour for the survivors'.[484]

---

[476] M Sosnov 'The adjudication of Genocide: Gacaca and the road to reconciliation in Rwanda' (2008) 152.
[477] *Ibid.*
[478] M Sosnov 'The adjudication of Genocide: Gacaca and the road to reconciliation in Rwanda' (2008) 152.
[479] Rwanda: Organic Law No. 08/1996 of 1996 on the organisation of Prosecutions for offences constituting the crime of Genocide.
[480] J P Mugiraneza Rwanda Genocide: Why compensation would help the healing (2014) theguardian.com.
[481] M Sosnov 'The adjudication of Genocide: Gacaca and the road to reconciliation in Rwanda' (2008).152
[482] *Ibid.*
[483] L Waldorf 'Transitional Justice and DDR: The Case of Rwanda' (2009)16
[484] L Waldorf 'Transitional Justice and DDR: The Case of Rwanda' (2009)16

It is evidenced from the above that the government has attempted and made provisions for other measures except financial compensation and compensation for sexual and reproductive violations. Perhaps the new direction has to include financial and sexual violations reparations in the dialogue to bring about peace and justice to the genocide survivors and their families. It seems no one method will solve the issues currently being faced in Rwanda. A mixture of both truth-telling, in the form of Gacaca Courts, as well as financial compensation in the form of reparations can be used as a stepping-stone to achieve true justice for the survivors and positive peace for the Rwandan populace.

The official discourse about Gacaca Courts was passionate, ambitious and optimistic and was 'highly lauded by the government and many outside observers as the solution to Rwanda's genocide'.[485] Perhaps the Gacaca courts functions should be revised to include the payment of compensation that way the government is forced to take off the rosy coloured glasses and sees the survivor's reality for what it is, traumatic, struggles in desperate need of government intervention. One could conclude that Justice has not been fully done due to the lack of reparations. The establishment of a compensation fund would significantly address these concerns. The 'challenge remains for the Government of Rwanda to make a significant contribution to the establishment of a Compensation Fund'.[486] Funding could come from donations from other countries, contributions from the UN and individuals, and the assets of convicted perpetrators.[487] To prevent the fund being perceived as ethnically divisive by only benefiting the survivors and no other victims of crimes committed during and after the genocide, the fund could be mandated to afford reparations, 'as appropriate, to all victims of genocide, crimes against humanity and war crimes committed in Rwanda between 1 October 1990 and 31 December 1994'.[488]

About sexual and reproductive violations, the notion of gender justice being incorporated in the reparations discussions has gained very little momentum over the years. The importance of this ideology is rooted in the reality that women experience conflict differently than their male counterparts. This is because of the 'serious and pervasive gender-based violence in conflict'.[489] Rape and other sexual violations were used as weapons of war in Rwanda[490] as it

[485] *Ibid*.
[486] No justice without reparation: recommendations for the reparation for survivors of the 1994 Genocide. 2012 Discussion Paper
[487] I*bid*
[488] *Ibid.*
[489] R Rubio-Marín and P de Greiff 'Women and reparations' (2007) 319.
[490] *The Prosecutor v Mikaeli Muhimana* Case No. ICTR-95-1B-T.

is in this breath that they cannot simply be ignored. Reparations have to be seen as a way to empower victims and survivors of conflict or Genocide so that they are able to rebuild their lives, where possible. Concerning the effectiveness of Gacaca Courts, the idea of reparations is one that still needs revision and attention. Due consideration has to be given, to 'ensure that the procedures chosen render reparations accessible to women or that the benefits are suited to women's specific needs'.[491]

Studies conducted around the Gacaca Courts testimony, from both men and women who suffered brutal losses of their loved ones demonstrate that mere truth-telling programs were not sufficient to bring about justice, the following testimonies support the idea of reparations as a means to justice. Rettig quotes a respondent who said that 'there is a difference between peace and security'[492]. What they have now is security due to the presence of authorities. Inasmuch as the country is nonviolent, there is no peace.[493] Other testimonies confirm that killings did in fact take place at roadblocks, fields, in house-to-house searches, and wooded areas. Women were often subjected to rape and sexual mutilation. 'Tutsi women often escaped death only because Hutu men took them as wives.'[494] 'Once families had been driven from their homes or killed, looters appropriated cattle, crops, and even sheet-metal roofs'.[495]

Another of Rettig's source stated that, 'Because of Gacaca, people in the community do not trust each other'. Further responses indicated that beyond separation and distrust, 'outright animosity remains in the community'.[496] Hutu themselves still hold feelings of separation with one woman quoted by Rettig, sharing that 'In their hearts, people know who they are, and they should keep their identity. They should know who to mix with'.[497] Moreover, the 'relationship between the people and the authorities is troubled due to the role of local and national authorities in directing the Genocide'.[498] Another woman revealed to Rettig that 'There is no reconciliation today because there are still conflicts. When we pass each other on the path, we do not even say hello to each other'.[499] Finally, the end of Gacaca was identified as the point whereby reconciliation and national unity would begin. Several people stated that, 'Maybe

[491] R Rubio-Marín and P de Greiff 'Women and reparations' (2007) 320.
[492] MRettig 'Gacaca: Truth, Justice and Reconciliation in Post -Conflict Rwanda?' (2008) 41.
[493] M Rettig 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 42.
[494] *Ibid.*
[495] M Rettig 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 34.
[496] M Rettig 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 43.
[497] *Ibid.*
[498] M Rettig 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 44.
[499] *Ibid.*

there can be reconciliation when Gacaca finishes'.[500] These sentiments are shared by a majority of the Rwandan population and are premised on the idea that Gacaca Courts have to be revised to address the society's rising needs more efficiently.

Thus far Gacaca Courts have served its initial function which was to reveal the truth about the events of the Genocide, from testimonies from victims, survivors and witnesses. Further, holding the perpetrators responsible for the crimes they committed was successful. Gacaca has been more effective in halting any further conflicts and doing this without outside intervention has been commendable this far. However, if more is to be achieved in terms of strengthening the unity of communities, outside intervention and or direction is to be welcomed by the Government. Amends are one such way to do this.

3.3.1 Procedural and substantive dimensions for the establishment of reparations

The UN's Basic Principles[501] assert that individuals have a right to reparations, however the implementation of such right is based on domestic policy and at the discretion of the national government. When reparations are owed to a large number of victims, like those of the Rwandan Genocide, it is usually necessary for the government to establish massive reparations programs. [502]This is because compensation for people within the same category will roughly be the same. These programs are aimed at compensating victims for rights violations and should enhance and promote those rights. [503]

Administrative programs for reparations obviate any issues associated with litigation, are time and cost-effective, and accessible to a larger group of victims.[504] Further, because these programs will be primarily victim-based, this ensures that the re-traumatization of victims is reduced. Moreover, maintaining the victim's confidentiality is easier in larger programs than it would be in litigated matters.[505] Another important factor worth considering in the reparation's

[500] *Ibid.*
[501] The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles) General Assembly resolution 60/147 of 16 December 2005.
[502] R Rubio-Marín and P de Greiff 'Women and reparations' (2007) 322.
[503] R Rubio-Marín and P de Greiff 'Women and reparations' (2007) 322.
[504] *Ibid.*
[505] R Rubio-Marín and P de Greiff 'Women and reparations' (2007) 323.

discussion is that of victim's participation, particularly women being given the platform to express their grievances, contributing to the establishment of these programs and being seen as not only victims but agents of change towards a transformed society.

The Genocide was targeted towards individuals and the killings in Rwanda were on a more intimate and individualised scale in terms of the weapons used, that is machetes instead of firearms. This means the harm can be attributed to individuals. With this in mind, the reparations cannot be a one size fits all model. Rather, they have to address the individual needs of the victims and survivors as far as possible. However, taking into consideration the limited resources available, and the large number of people seeking compensation, it is not possible to cater for each person's needs directly. Instead, the reparations to be advanced will have to take the form of schemes or any other grouping mechanism as discussed under procedural dimensions.

3.4 Reparations for sexual violence

In advancing the rights of women as separate entities from all other victims of genocide, it is important to address violations that have been primarily perpetuated against women and girls. These include sexual violence such as 'rape, sexual assault, sexual exploitation, enslavement, forced nudity, forced marital unions, and mutilation'[506]. The inclusion of reparations for sexual violence within the operation of Gacaca Courts will prove to be a significant victory in light of the past neglect for such violations. The issue of sexual violence, in the context of armed conflict, is complicated and with various dimensions whose victims are primarily women and girls. The experience of sexual violence is 'profoundly debilitating to its victims as it destroys physical and mental health, obliterates family and communal bonds, perpetrates long-term stigma and exclusion, and compounds social and economic inequalities'.[507] This then makes the reparations discourse essential in order to address the various harms and the aftermath of sexual violation.[508]

[506] *Ibid.*
[507] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 140.
[508] *Ibid.*

During the one hundred days of Genocide in Rwanda, it is 'estimated that between 250,000 and 500,000 girls and women were raped at that time and that many women were killed following the rape'.[509] Although the exact number of women who were subjected to sexual violence (including rape) cannot be known with certainty, it has been stated that all the women 'who survived the Genocide were direct victims of rape or other sexual violence or were profoundly affected by it'.[510] Statistics such as these are shocking and the fact that almost twenty-six years after the 1994 Genocide, there have hardly been talks of reparations for sexual violence, requires a closer look at both the national and international communities' efforts at delivering justice for women and girls. In 2004, the UN General Assembly passed a resolution entitled 'Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence'[511]. This resolution called on 'agencies, funds and programs of the United Nations system to ensure that assistance was being provided in the prioritized areas by the Government of Rwanda, however 25 years after the Genocide, the effect of the resolution continues to be awaited'.[512]

The United Nations Secretary-General has defined conflict-related sexual violence (CRSV) as 'sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself.' [513] CRSV includes manifestations of violence that may be used as war tactics, including the use of sexual violence against civilians in any conflict. [514] Within the definition of CRSV, violations included are 'rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, and forced nudity'.[515] Moreover, amongst those affected by armed conflicts, victims of CRSV are the most marginalized as they experience stigma and rejection from their families and the community while also battling mental and physical harm sustained during the conflict. Reparations that

[509] UN Commission on Human Rights, Report on the Situation of Human Rights in Rwanda Submitted by Mr Rene Degni-Segui Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/I of 25 May 1994, E/CN-4/1996/68, 29 January r996, para. r6.
[510] Organization of African Unity (OAU), International Panel of Eminent Personalities Report, *Rwanda: The Preventable Genocide* (2000), para. 16.20.
[511] A de Brouwer 'Reparation to Victims of sexual violence: Possibilities at the international Criminal Court and at the trust fund for victims and their families' (2007) 214.
[512] A de Brouwer 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families' (2007) 214.
[513] *Ibid.*
[514] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 97
[515] U.N. Action against Sexual Violence in Conflict, Analytical & Conceptual Framing of Conflict-Related Sexual Violence 1 (2011).

can be afforded to the victims of CRSV can typically fall under the headings of restitution, compensation, and satisfaction.

As history has demonstrated, issues of gendered human rights violations have not been addressed by states[516]. However, in recent developments, the challenges of CRSV reparations have been the subject matter at hand: an example of this is the Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence[517], which is a model that has been used to expand policy attention to CRSV matters. Further, 'the repeated mention of reparations within recent Security Council resolutions addressing women, peace, and security raises awareness about the importance and urgency of attending to gender-based human rights violations as well as the reparations to address them .[518] Moreover, the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') which both South Africa and Rwanda are party to obliges states to pursue all appropriate means and policies to end discrimination against women. This includes ensuring that reparations demonstrate gender sensitivity the promotion of women's rights. [519]

The attention mentioned above has intensified the urgency of CRSV matters however, there is still a disconnect between the awareness and implementation of policies to remedy the harms. More ignored or marginalised however, are the reparations for CRSV matters. Women' needs in law have been neglected. This marginalization of reparations is part of a consistent pattern of this neglect[520]. Without persistent efforts to ensure that social and economic benefits are meaningfully transferred to women, there will continue to be an ongoing gap between legal repair and material repair. Reparations have to form part of peace processes and institutional priorities in order that there be 'holistic responses to the experience of gendered harm for women and girls'.[521] Further, they have to be cognizant of the different country-specific variables and this would require a multidimensional approach to the formation as well as the application.

---

[516] U.N. Action against Sexual Violence in Conflict, Analytical & Conceptual Framing of Conflict-Related Sexual Violence 1 (2011).
[517] U.N. Secretary-General, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence (2014)2-3.
[518] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015)99
[519] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 100
[520] U.N. Secretary-General, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence (2014)10
[521]F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 103.

3.4.1 Limitations to CRSV-based reparations

CRSV cases have been defined as 'worst harm'[522] and 'fate worse than death'[523] and these claims can further exacerbate the 'stigma of sexual harm, rather than diminishing it'.[524] These claims have unintended consequences which may reinforce gendered ideals of 'purity, damaged goods, and spoiled virtue for women victims of sexual harm'[525]. This requires that in understanding CRSV cases, measures of private adjudication be sought out because public adjudication poses difficulties and may cause further harm. Moreover, we have to take cognisance of and be aware of compounding stereotypes and essentially invalidating women's experiences when responding to communal and group violations in either judicial or administrative reparations.[526]

Further, in 2015, there was not a 'single comprehensive administrative program encompassing substantive and adequate reparations for CRSV that had been initiated in any post-conflict setting'.[527] Thus far, no reparation program has catered for the needs of women, concerning reproductive violence which is inclusive of forced impregnation, abortion or sterilization. This can be attributed to the lack of visibility and recognition for such crimes. These crimes too, need a separate category in order to be recognised and given the necessary attention in order to increase the incentives to respond with proper reparations.[528] A matter of gross violations of human rights requires an intense implementation of immediate and pragmatic redress n order that these violations be dealt with on an urgent basis. In finding new ways to conjure up reparations for women, we should not look at this new move as one that will return women to the *status quo ante* as this will return women to an unequal society, contrary to the broader intentions of human rights organisations. [529] A clear standard, and operational framework is required for the delivery of comprehensive reparations and the establishment of an integrated response to victims.[530]

---

[522] *Ibid*
[523] *Ibid.*
[524] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015)112.
[525] Ibid.
[526] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015)112.
[527] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 126.
[528] R Rubio-Marín and P de Greiff 'Women and reparations' (2007) 328.
[529] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015)113.
[530] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 131

However, sexual violence and sexual reproduction violations including all its sub categories are not the only violation of rights women endure during armed conflict and political repression.[531] Women face other threats and dangers such as being 'killed wounded, tortured, mutilated, disabled, terrorized, forced to relocate or emigrate, and stranded in refugee camps'.[532] They also lose their means of production, homes, land, income and families.[533] 'The violence and harms suffered by women in the context of armed conflict and political repression are many and are often linked'.[534]

Moving forward, the 'Compensation Fund for Victims of the Genocide and Crimes against Humanity' should include a category designated as sexual violations in its various forms as well as sexual reproduction violations which include sterilisations and forced abortions. Further, it needs to be organised in a way that addresses housing which can synonymous to security. The violations endured give rise to fears and security is one way to address these fears. Further, economic activities to be included too, they would be inclusive or both crops and cattle as a way for the beneficiaries to sustain their livelihood. When people are empowered, they empower others. If the survivors are given the necessities to sustain themselves and those around them, for instance, land, crops or seeds, they would be able to work together as a community towards a mutually beneficial goal. This would work to strengthen the communities' trusts in each other and possibly remove any fears they may have about one another. [535]

States have to strike a balance between material and symbolic reparations for sexual violence and sexual reproduction-related cases. Material reparations are usually centred on financial compensation or rehabilitative services which are primarily used to positively impact the immediate situation. Material reparations can be inclusive of educational benefits, land and housing matters or medical services. Symbolic reparations are typically those that acknowledge what has happened and the impact on the civilians. These include public apologies as well as monuments or statues. Governments have to strive for both material and symbolic reparations to create a meaningful engagement with the victimised members of society. However, it is worth noting that due to financial and resource limitations there is bound to be persistent trade

[531] M U Walker 'Gender and Violence in Focus' (2009) 19.
[532] *Ibid.*
[533] M U Walker 'Gender and Violence in Focus' (2009) 19.
[534] M U Walker 'Gender and Violence in Focus' (2009) 20.
[535] F Ni Aolain, C O' Rourke & A Swaine 'Transforming Reparations' (2015) 140.

-off between the two.[536] In some instances, material reparations may not be available to reach far and beyond, however symbolic reparations may be able to. In this instance, the trade-off would be choosing one over the other.

A rights-based approach recognises reparations as human rights belonging to the right holder and as such, it is imperative that states recognise their obligations to the citizens and fulfils their responsibility to the victims in this regard. It is also imperative to acknowledge the responsibility of perpetrators to the victim, as well as the overall community.[537] While the violence affected all citizens, some individuals suffered more than others and should be compensated accordingly.[538]

There is a common thread between South Africa and Rwanda, especially regarding how sexual violence was handled by their respective truth commissions. Both countries acknowledged sexual violence during the hearings, however in Gacaca it was dealt with more explicitly, because there was an understanding of the extent and the viciousness of these attacks, whereas the TRC did so in passing and only mentioned sexual violence in the 4th report, in chapter 10.[539] Moreover, although the extent of the violence seemingly differed in its use as a weapon of war or as a political act (as far as we know) in the case of Rwanda, it was nonetheless used to further the other side's agenda. Finally, both countries failed at catering for reparations to deal with sexual violence to any extent and the very visible need to address it.

3.5 Reparations as development

In transitional justice, reparations are often represented as a political project which concerns itself with the promotion of wider goals such as reconciliation, peace or economic development, instead of justice.[540] In matters such as these, the primary aim is to remedy past violations and prevent future victimisation in order to 'contribute to the reconstitution or the constitution of a new political community'.[541] Further, in stark contrast to when victims were

[536] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 140.
[537] F Ni Aolain, C O'Rourke & A Swaine 'Transforming Reparations' (2015) 141-142.
[538] L Moffett "Transitional Justice and reparations: remedying the past?"(2017) 13.
[539] Volume four, TRC reports, Chapter 10, 298-301.
[540] L Moffett "Transitional Justice and reparations: remedying the past?"(2017) 7.
[541] Pablo de Greiff, Justice and Reparations, in P. de Greiff (ed.), Handbook of Reparations, (OUP 2006) 454.

dehumanised and targeted, reparations as a political project[542] or as development can serve to build civic trust in the state as well as other citizens while also reaffirming their dignity as citizens worthy of protection and stability.

In an effort to do this, the Rwandan government could designate pieces of land in which housing for the destitute and displaced survivors could be built. These will provide a sense of security and safety for them. Concerns may arise with the government only prioritising Tutsi's with the housing scheme, in order to address this, housing should not only be limited to Tutsi women, but the whole population, with the victims constituting the majority of the beneficiaries. The monies from various donors contributed towards such schemes as compensation for the losses endured.

FARG already aids healthcare and education costs to the neediest survivors.[543] Following from this, the Compensation Fund could also add education and healthcare to the survivors. Studies demonstrate that educational provisions for both primary school and secondary school enrolment has improved. In a country where boys' education was previously prioritised, it is impressive to realise that in recent developments there have been a higher number of girls enrolled in schools than that of boys. This supports the idea that the gender parity index has exceeded 1.0 since 2011.[544]

A focus on education has the potential to drive economic activities from primary to secondary and even tertiary activities which will have a further impact on the Rwandan economy, perhaps resulting in an increase in the national income which remains low at its absolute level.[545] Further, the public health arena has also demonstrated improvements. The mortality rates have decreased, and the life expectancy has increased[546] by 32 years between 1990 and 2016 and reportedly the fastest gain of any African country.[547] Statistics in this regard are impressive, however we have to tread with caution as to how far they are to be relied on reports could be presented by people with their own agendas. [548]

---

[542] L Moffett "Transitional Justice and reparations: remedying the past?"(2017)
[543] M Sosnov 'The adjudication of Genocide: Gacaca and the road to reconciliation in Rwanda' (2008) 152.
[544] S Takeuchi 'Development and Developmentalism in Post-genocide Rwanda' (2019) 123.
[545] S Takeuchi 'Development and Developmentalism in Post-genocide Rwanda' (2019) 123.
[546] Ibid.
[547] S Newey 'From horror to health: How Rwanda rebuilt itself to become one of Africa's brightest stars' (2019)
[548] S Takeuchi 'Development and Developmentalism in Post-genocide Rwanda' (2019) 123 footnote.

Rwanda has demonstrated substantial growth and although subsistence farming is the predominant area for growth, Rwanda enjoys a mixed economic system including centralized economic planning and government regulation.[549] It has been reported, although varying accounts that in the past two decades Rwanda's economic growth had been the fastest of any country in the world.[550] Rwanda is often held up as a remarkable story of success within the African Continent. The transition from genocide to a peaceful transformed society is one to not only be celebrated but used a lesson for other African countries. These statistics demonstrate that proactive measures and a willingness to invest in development from either government or other institutions will result in the country reaping the rewards of their investment. The problems experienced by the direct victims of genocide on the grass root levels cannot be neglected or overlooked simply because there have been success stories in other areas. Judicially, there still is a need to revisit and revise models such as Gacaca Courts to ensure that the past crimes are paid for as far as possible and as far as the resources available can provide.

By following the lead of FARG, a Governmental fund which ensures the rehabilitation of Genocide survivors, a reparations programme could replicate the success in broader areas including sexual violence. FARG operates along five main lines: firstly, to provide medical care to the sick; secondly, to offer direct assistance to the most vulnerable. Thirdly, to prioritize education for orphaned children; fourthly, to provide housing for the homeless. Finally, to offer assistance in creating income-generating activities.

Reparations can be paid to the survivors in a way that not only acknowledges the past, but also creates possibilities for a better tomorrow. Adopting a reparation as development approach allows for the government to address the previous government's problems that fuelled many of the intolerances and injustices that stemmed from structural and systematic inequalities between groups and which ultimately led to the conflict. This allows for the redress of harm as well as the creation 'of access to opportunities for economic and political power which, in some way, contributed to conflict' as well.[551]

The criticism and disapproval of many, regarding the operations of FARG such as corruption, building shoddy buildings which are not meant to last, benefiting those who are not catered for,

[549] S Takeuchi 'Development and Developmentalism in Post-genocide Rwanda' (2019) 123.
[550] S Newey 'From horror to health: How Rwanda rebuilt itself to become one of Africa's brightest stars' (2019)
[551] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) 186.

embezzlement and malpractice[552] are some of the areas where special attention would have to be paid to in the proposed reparations programmes in order to halt it before it begins. Further, reparations should be viewed as a right rather than a favour to be granted. For justice to be rendered in full, reparations, including symbolic reparations are a necessary step to achieving justice and positive peace in Rwanda and other African countries transitioning from a tumultuous past.

Other scholars as well as victims have critiqued Gacaca Courts for its 'failure to put on trial members of the Rwandan Patriotic Front (RPF) who committed revenge killings'[553]. A failure to recognise these killings results in a failure to provide justice for all the victims, as it limits the potential of Gacaca to foster sustainable reconciliation in Rwanda as noted by a report of the Human Rights Watch.[554] Perhaps since Gacaca Courts are a political compromise, much like the TRC in South Africa, internal forces were reluctant to prosecute members or victims of the genocide, the Tutsi forming part of the RPF after they themselves had suffered as much as they had. Transitional justice reparation schemes are usually state-centric, and instead of capturing the lived realities of those who suffer collective violence committed by private individuals or corporations, focus of the overall picture.[555] This can be observed too in Gacaca's failure to prosecute the RPF. This in no way makes the Gacaca operation proper exercise of power and perhaps they too should have been held to account under Gacaca Courts.

Despite its shortcomings, some scholars argue that from these hearings significant benefits which will 'have an enduring impact on every level of Rwandan society' have been delivered. [556] Be that as it may, there can be no justice without reparations. While the Gacaca courts have provided for a much-needed truth telling and processing opportunity, as well as reconciliation and attempts at living together, these efforts simply were not enough to erase the stain of the Genocide in Rwanda. This acknowledgment supports the call for reparations from the Compensation Fund for Victims of the Genocide and Crimes against Humanity which now, more than ever had to be formulated, revised and enacted.

---

[552] *Ibid.*

[553] J Baptiste Kayigamba 'Gacaca Courts legacy' https://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy (2012.)

[554]J Baptiste Kayigamba 'Gacaca Courts legacy' https://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy (2012).

[555] L Moffett "Transitional Justice and reparations: remedying the past?"(2017) 6.

[556]J Baptiste Kayigamba 'Gacaca Courts legacy' https://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy (2012).

To draw on Clapham's support for reparations as a necessary step, Gacaca's failure to offer compensation hindered the extent of its success. While truth-telling can be viewed as cathartic for victims, in order that they engage with their perpetrators, they needed to be empowered to rebuild themselves and their lives by granting compensation. Adequate compensation would serve to avoid re-traumatization because at the very least, the compensation would assist the victims in feeling empowered and in control of their stories. Failure to provide such positive means hindered the reparative qualities of Gacaca Courts. 'For many, the process failed to ameliorate the damage caused by the crime and instead caused further harm'.[557] This then supports the idea that without reparations justice has not been served.

The granting of 'reparations is an internationally recognized method of restoring victims of serious crimes to their financial, physical, or psychological position before suffering the harm in question'.[558] As discussed above, 'compensation, rehabilitation, guarantees of non-repetition'[559] as well as programs that address sexual and reproductive violations could be the various forms in which reparations are made to the victims. Imperative to the reparations programmes is meaningful response to the violations that took place, as well as the urgency of satisfying the needs and priorities of the victims while holding the wrongdoers accountable.[560] The success and transformative potential of reparations is largely dependent rests on how well they prioritise victim's needs and address the "underlying structural inequalities that precipitated or compounded violence".[561]

3.6 Reparations as community services

After the Rwandan Genocide, the government was faced with an almost insurmountable task of finding the appropriate legal response. The kind of response which would not be located on a continuum between vengeance and forgiving, instead one rooted on the reconciliation and reparation of communal ties and civil trust on the government.[562] The important factors to be considered were firstly that the victims and perpetrators shared, out of free will the same

[557] C Clapham 'Gacaca: A Successful Experiment in Restorative Justice?' (2012)3.
[558] P R Williams 'The peace vs Justice Puzzle and the Syrian crisis' (2018) 447.
[559] *Ibid.*
[560] P R Williams 'The peace vs Justice Puzzle and the Syrian crisis' (2018) 447.
[561] L Moffett "Transitional Justice and reparations: remedying the past?"(2017) 9.
[562] A Brannigan and NA Jones 'Genocide and the Legal Process in Rwanda from Genocide Amnesty to the New Rule of Law' (2009) 198.

political and social spaces, as segregation of the communities would not be possible, and also as it was not encouraged for the overall, long term goal of reconciliation, coexisting in harmony and tolerance. Secondly, the problem of addressing the long-standing culture of impunity was an important consideration because it was 'seen as the key instrument of rendering justice, which is an essential precondition for reconciliation in Rwanda'.[563]

The law creating Gacaca courts envisioned a *sui generis* process which have been detailed in full above. The alternatives of imprisonment and criminal prosecution under Gacaca were public truth-telling and confession of the crimes committed by the perpetrators. If the accused made full and detailed confessions, half of their sentences would be converted to a community service order, while for lesser offenders, the full sentence would be converted to community service orders. Community orders involved working to replace the institutions and buildings which were destroyed during armed conflict, such as medical and health facilities, schools and church buildings, as well as carrying out maintenance work on roads, buildings and crops. Further, they were tasked with the duty to cultivate crops for prison feeding schemes as well as training in first aid, educational and motivational activities. This mechanism of replacing punishment with developing the community benefited both the victims as well the perpetrators by integrating them back into society and in turn, encouraged the reconstruction of community life.[564]

The obvious drawbacks are that, while labour is free, the materials needed to carry out the work had to come from somewhere. Rwanda had already been financially and economically destitute and it was not clear whether adequate resources would be available to carry out the tasks. [565] Further, there are other issues which may adversely impact moral or material reparations such as the idea that in certain parts of the country, there very few survivors and a high percentage of the community participated in the slaughters. In areas like these, it is understood that that may be reluctance to work with majority of the population responsible for wiping put one's entire kin.[566] In the same breath, in some areas, communities are no longer there as they had to move away during the conflicts, and even after the conflicts for some. Other draw backs in Rwanda came about through concerns of the judge's participation in the slaughters and

[563] A Brannigan and NA Jones 'Genocide and the Legal Process' (2009) 198.
[564] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) 195.
[565] *Ibid.*
[566] *Ibid.*

particularly concerns around finding judges who did not partake in any crime to participate and ensure that these activities are carried out effectively. Moreover, voluntary participation could be hindered by the community's demand for daily survival.[567] This is because community members have to sustain themselves and their families by doing to their prospective jobs. In some instances, they would then choose those jobs instead of attending Gacaca Courts.

3.7 Reparation as preferential access

Granting people preferential access to services works best when there is a limited number of victims. An example of these reparations in operation can be clearly witnessed in the United States of America (USA) with reference to the veterans being rewarded for their services to their country. In the USA, about 2.7 million U.S. veterans receive disability compensation or pension from the U.S. Veterans Administration, as do over half a million surviving spouses and children. [568]Veterans are given access to free or low-cost education and training, unemployment assistance and housing. Veteran's hospitals provide access to free or low-cost medical care according to a schedule of 'priority groups,' while 'Vet Centres' provide psychological counselling for war-related trauma.[569] This is an example of how to get people to the front of the line as a way to (in this case, thank them for their services) ensure that justice is seen to be done. This would be difficult to replicate in Rwanda because the number of victims to be catered for would make this kind of operation pointless.

In the context of Rwanda, where majority of the population fell victim to the social ills based on ethnic discrimination leading to the Genocide, it is unclear as to how these preferential access reparations would work. However, it can be concluded that the challenges of this approach, as mentioned in chapter one would be further exaggerated in this context, essentially making it near impossible to bring into operation. The shortcomings such as the failure to move the victims to the front of the line would defeat the purpose of catering for them before everyone else because they would all find themselves in the same situation and prioritising would be counterproductive because of such large numbers of victims. Secondly, the lack of guidelines as to the duration of these programs would make it difficult to track progress in the

[567] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) 195.
[568] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) 198.
[569] *Ibid.*.

Rwanda Context, as would the lack of administrative measures needed to carry out reparations of this kind.

Perhaps most challenging would be the reluctance of mostly Tutsi victims to publicly benefit from the harm they suffered at the hands of Hutu perpetrators. Further, the resentments which would be fuelled by the Hutus who are not beneficiaries of the preference-based approach would pose a challenge to this operation especially because the reconciliation measures have strived to make coexisting possible in all Rwandan communities. [570]

From the above it is clear that there would be more challenges in implementing reparations on a preferential access basis. However, reparations as development as well as reparations as community service has so far sufficed, and with a number of amendments and revisions, would serve to better transform the society as well as the government's efforts at creating a more tolerant and civil society.

[570] *Ibid.*

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

It is commendable that South Africa and Rwanda were able to creatively come up with alternative mechanisms to deal with the failed or inept judicial systems to try perpetrators in the case of Gacaca Courts in Rwanda and to rebuild national unity in the case of the South African TRC. As indicated in the previous chapters, these alternatives did not operate as silver bullets that would miraculously solve all the issues presented by the colonialist, segregationist regime rooted in deep hatred and differentiation on either racial or ethnic lines. However, the immediacy of these situations required immediate solutions, and this resulted in these mechanisms failing to yield the overall best results for the adversely affected populace. This dissertation aimed to ascertain not only the success stories, but the shortcomings and failures of these alternate mechanisms. Further, it aimed to look at the practical employment of reparations as transitional justice mechanism in post conflict countries.

This paper was aimed at answering the questions below:

4.1 How do reparations play out in transitional justice for post conflict societies?

4.2 What is the legal framework for reparations in South Africa?

4.2.1 In practice, which form of reparations have been employed in South Africa and their success thereof?

4.3 What is the legal framework for reparations in Rwanda?

4.3.1 In practice, which form of reparations have been employed in Rwanda and their success thereof?

Moreover, recommendations for both South Africa and for Rwanda are made in sections 4.4 and 4.5 respectively. The last section, 4.6 looks at the contributions of this study and why it was beneficial and/ or necessary.

4.1 How do reparations play out in transitional justice post conflict societies?

It has been argued in chapter 1 that the peace v justice dichotomy is imperative in any discussion involving transitional justice because peace advocates and the justice or accountability advocates are on opposite ends of which one takes priority in matters of gross human rights violations. On the one hand, in the urgency of the situation, the longer the justice and accountability negotiations take, the longer the conflict persists and the more harm is caused, while, reaching agreements for peace sake will negate any later efforts for justice and without justice there can be no sustainable peace.

Both positive peace which is the all-inclusive strategy of employing mechanisms to drive forward reconciliation of societies, as well as negative peace which is the perceived absence of violence have to be applied together with justice which is taken to mean improving and implementing laws and focuses on increasing the capacity of law institutions, such as the police and courts in order to improve access to justice. Applying these factors above simultaneously, annihilates the dichotomy and frames it as a 'false dichotomy' because both factors are imperative for reconciling, rehabilitating and creating transitional societies.

In times of war and strife, ending human suffering is imperative. This should be thought of not as something to be done now and forgotten about, rather there should be an understanding that the mechanisms used to halt the ongoing conflict should also cater for the long-term suffering that will ensue. This means peace and justice have to go hand in hand in peace negotiations. From the initial stages, the two factors have to be compounded rather than separated as mutually exclusive concepts. Instead of favouring a 'Justice first approach' or a 'peace first approach', negotiators have to favour the 'peace with justice approach'. Peace and justice are interdependent and have to be advanced as complementary objectives rather than one taking precedence over the other. The best way to enforce this approach is through transitional justice which is about unearthing the true events that lead to the conflict while at the same time seeking accountability from those who carried out the violations and simultaneously being cognisance of the victims needs heal, reconcile and repaired what they lost in order to transition to a better future.

For this approach to be effective in practice, the four elements of transitional justice have to present at all times. Firstly, the true events have to be disclosed out in the public and to the victims particularly. Secondly, justice should prevail because these crimes have to be punished and this is the state's responsibility, thirdly, reparations have to be granted in order to return

the victims back to the position they occupied before the violations. Finally, there has to be institutional reform which will ensure that the same power structures that allowed for the violations are dismantled. These are obligations of means however because the issue of reparations has proven to be difficult to carry out particularly in the countries used as case studies above. States, however, cannot choose one of these elements over the other based on convenience. Applying transitional justice mechanisms to conflict means applying both restorative means which strive to reconcile and unite the broken society as well as retributive mechanisms which should not only be dispensed through the courts, rather through the rebuilding and accessibility of health care facilities and educational facilities for those who have previously been excluded, marginalised and discriminated against. Any solution that does not explicitly mention achieving peace has to be rejected in order to achieve lasting peace and deliver high standards of justice.

The reparations discussion is one that falls squarely into the tenets of transitional justice and one needing more attention than it has received in the past. This dissertation in chapter 1, has discussed in length what reparations are, what forms they ought to take and how they were applied or should have been applied in the case study countries used above in chapter 2 and 3 respectively. The journal article by Roht-Arriaza provided great insight into how we should look at reparations and how they ought to be enforced within the African arena specifically in South Africa, as an attempt to overcome the legacy of apartheid and the Genocide Rwanda.

The notion of reparations stems from the idea that people have to be repaired for the violations and harms they suffered. Victims are at the centre of this transitional justice method which tries to morally correct past injustices by providing material or symbolic reparations to victims. What formed a major part of this discussion was the realisation that in most African countries resources are already scant even before the violations occur, the limited or unavailability of resources after the crimes against humanity poses a challenge for governments to fully cater to or reach the needs of those who desperately need them. Further, in operation, determining who the victim is meant to benefit from these reparations has proven to be source of contention because if the scope is to narrow, people are excluded from what should be rightfully theirs, whereas if the scope is too broad, it becomes impossible to attain. Moreover, the administration of reparations schemes is hindered by the need for evidence in individual claims and this in turn makes the process longer, but on the other hand, a denial of individual reparations is a denial of human dignity and social justice. Finally, reparations are not always possible for

either individuals or collectives, it is on this fact that other methods of reparations have to be sought after.

Roht-Arriaza, who was discussed in detail in chapter 1 and throughout the dissertation, mentions three forms that reparations are able to take, and based on these forms, each country can enforce the methods that most benefit the majority and puts little strain on the economy. Reparations can take the form of 'reparations as development', 'reparations as community service' and 'reparations as preferential accesses. These forms need not all be applied simultaneously because it depends on the climate of each country and what kind of reparations are a matter of urgency. Each form has its advantages and disadvantages which have to be weighed up against the other to determine if it will breed more benefits or failures and then applied accordingly.

4.2 What is the legal framework of reparations in South Africa?

It is incontrovertible from chapter two above that the South African Truth and Reconciliation Commission which had been internationally heralded as a theoretical success story failed to yield the benefits it had promised to the people on the ground. The Constitution of South Africa as an empowering provision made for the creation of the Promotion of National Unity Act which was the foundation on which the TRC was created. It had a wide scope of areas needing governmental intervention and attention, yet it had limited resources to see this through, and even lesser qualified statutory bodies to enforce its findings.

The three commissions created did not have equal power and so enjoyed varying degrees of respect and or success. The human rights and the amnesty commissions had their own budgets which could be used to meet its proposed goals, further, they enjoyed extensions to their time frames of operation whereas the reparation and reconciliation commission did not have the same qualities extended to it. This has been a source of debate as to the independence of the TRC from politics and has created contention regarding the TRC's real intention because how did it expect to reconcile the country when the preference of White people over Black people still persisted even from its operations of extending the deadlines for amnesty applications which only benefited White perpetrators but not extending the deadlines for reparations applications which would have benefited the Black majority.

4.2.1 In practice, which form of reparations have been employed in South Africa and how far did they succeed?

In South Africa, due to the inequality and segregation caused by the apartheid laws, Black and White people already did not interact, nor live within the same spaces, this meant they had different priorities. Reparations as community service would not have yielded much benefit for the country because at the end of the day, White people would go back to their comfortable suburbs while the Black majority stays behind in the squalor and abominable living conditions they inherited. If anything, this would have created more resentment than reconciliation. On the other hand, reparations as development were necessary to repair the harm caused. However, it was deduced that there is a thin line between development as a way of reparations and development as the fulfilment of the government obligations to its citizens and that this line should not be crossed and masked as reparations. The inequality in South Africa is the worst worldwide.

Development then is imperative to correct this default position that has been created by the apartheid laws effecting Black people. Firstly, the issue of Land reform is one of the main areas of development that needs immediate attention. Namibia and Zimbabwe were used as case studies to decipher if South Africa could take any lessons from the countries, it was concluded that although SA and Zimbabwe share similarities, SA would not be taking the Zimbabwe route of Land grabs. It was also established that Namibia's route was similar to that of South Africa as both countries are bound by sections of their respective constitutions. Land has to be distributed to benefit those who were marginalised, excluded and segregated. This obligation was created in section 25 of the South African Constitution and placed on the government. To say there has been a failure to fulfil this obligation would be an understatement. The failure has been dismal and detrimental. The government has been calloused and negligent in recognising the rights and needs of people. The disapproval and dissatisfaction from social organisations and the general public are warranted because of the ANC government's slow progress. Currently, major debate is centred on the amendment of section 25 and the possibility of that happening to allow land expropriation without compensation. The outcome of these discussions is yet to be seen.

Further, the issue of sexual violence during apartheid proved to be a challenging area to decipher in South Africa because the TRC did not have separate acknowledgment of these crimes nor the extent they were carried out in. they did however have a special hearing for women and chapter 10 of the forth volume details these violations, but it should be noted that men were not necessarily excluded from these hearings, but they were not included either and this affected the way the extent of sexual violence was looked at and even measured in South Africa.

Secondly, the South African government recognising that the legacy of apartheid is adversely affecting various areas of human life, including employment and the labour market, implemented section 9 policies to advance the recognition of equality and push forward preferential access as a way of reparations. Preferential access is about jumping certain groups or categories of people to the front of the line for either basic services or other necessary benefits. There are various ways in which preferential access plays out in different contexts, they will be summarised below. For instance, in the United States of America, preferential access can be observed largely in the treatment received by veterans. They have subsidised access to healthcare, education and other facilities. This is the governments way of recognising the role they play in national security and to thank them for their services. In South Africa, preferential access played itself out through affirmative action and Broad Based Black Economic Empowerment.

Affirmative action is provided for in S9(2) of the Constitution which provides that measures have to be put in place to target and benefit categories of people who were previously disadvantaged by legally enacted structures. The Employment equity Act grants affirmative action to Black employees on the basis of non-discrimination, rather as empowered by the equality clause in order to promote equal opportunity in the workplace. Any measure which excludes certain people, even fair and justified exclusion will not be well received by the non-beneficiaries and this is evidenced in South Africa with the resentment created in White non beneficiaries. Further, affirmative action has been difficult to implement because rather than to create opportunities for Black people, employees are only striving to reach numerical targets. When the aim is reaching numerical targets, it sends the message that Black people are only seat fillers, even qualified people are questioned as to their eligibility for certain posts because there is a lack of understanding of how affirmative action is to be enforced in the workplace without having negative stereotypes attached and attributed to the beneficiaries. Affirmative actions also perpetuate gender stereotypes and tokenism even more so because there is a lack

of application guidelines and support from institutions as to their enforcement. These are areas that have to be dealt with sooner rather than later if South Africa plans on achieving long term success in this regard.

Another way in which preferential access was granted as a way of reparations in South Africa was through Broad Based Black Economic Empowerment, or BBBEE in the business market. BBBEE was the government's way of recognising that the injustices carried out by the apartheid government were and still are prevalent and consistently exclusionary in the labour market. The idea behind this policy creation was to create opportunities for Black businesses to move to the front of line in terms of funding, preferential procurement, guidance and any other assistance needed. The intended outcome would be the creation of a well distributed economic participation that would ensure that there an increased growth rate as well as employment opportunities. The importance of reallocating a broader continuum which would affect various areas of human life cannot be denied as there is a need for the economy to reflect the demographic make-up of the country. It is to this end that BBBEE focuses on direct employment prioritising ownership and business control, as well as Human resources and skills development in advancing the rights of Black people within the business sector.

The BBBEE targeted groups or categories of people are Black people, women and the disabled, pushing them to the front of the line is giving them preferential access on justified and fair basis. This policy introduction is not without its drawbacks however, because corruption, greed and maladministration of funds dominate most government institutions. Further, high bureaucracy and inexperienced entrepreneurial minds coupled with scarce capital and lack of skills have not made the BBBEE process as successful as intended, nor has it made South Africa fairer.

Both the Employment Equality Act and the Broad-Based Black Economic Empowerment Act were used as demonstrations for preferential access in South Africa. It should be noted that the existence of these programs does not equate success. There is very little to be desired from the results and much more to be corrected. Overall, the most applicable reparations in South Africa would have to take form as reparations as development. The problem starts with inequality and in order to tackle it first-hand, land reform and land redistribution has to be prioritised and this is dependent on whether the land clause will be amended in the future or not.

As a country, South Africa has come a long way since 1994. The South African Constitution has been heralded as the most progressive one internationally, it contains a Bill of Rights that

affords rights which should be respected and promoted to anyone within the republic. It also places enforcement agencies and institutions in chapter 9. Further, majority of the Apartheid laws have been repealed, (excluding The Public gatherings Act and the Riotous Assemblies Act), government has enacted a plethora of laws in an attempt to level the playing field. A number of measures have been made to undo the legacy of apartheid but as it has been demonstrated, much more still needs to be done. The reality is, no amount of laws or measures will solve the inequality problem if structures giving effect and power to them are not dismantled and this was evidenced in the study of Zimbabwe as well as Namibia in Chapter 2. We have to wait and see whether the legislature will amend the land clause provision in the Constitution.

4.3 What is the legal framework for reparations in Rwanda?

As detailed above, South Africa is not the only country dealing with the effects of colonisation and occupation. At the time South Africa was holding its first democratic elections, in April of 1994, Rwanda too, was knee deep in an ethnically fuelled Genocide that started in April of 1994 and resulted in over 800 000. The legacy of the Genocide still persists and there is still a need for the Rwandan government to come up with means and methods to deal with the after-effects. It is on this basis that the Gacaca courts were selected as appropriate methods to get to the root of the problem and to also come up with solutions to reconcile and rebuild the country.

Rwanda, emerging from a period of mass human rights violations in the form of Genocide was in a position of desperate need to find alternative mechanisms to the prison system to hold the perpetrators accountable for their actions, while also working to unite the nation and reconcile the two ethnic groups at opposing ends of the Genocide. How the Genocide played out was neighbour turning against neighbour, friends becoming foe and the killings were intimate because they were carried out using weapons like knives and machetes, in roads, churches, homes and schools. Due to the large numbers of perpetrators, the prison system could not deal with the wide scope of the crimes committed, bring to justice the large number of perpetrators and rebuild unity.

The creation of an alternative mechanism to deal with this dire situation was without a doubt the best decision the new government took. Gacaca courts are ad hoc courts held at grassroots level by traditional leaders held to be of good standing with the community who would facilitate truth telling in public where the perpetrators, in front of their victims testified to the crimes they committed, revealed where the bodies of their loved ones were buried, showed

remorse and asked for forgiveness. The victims in turn would testify what they witnessed in public. It had to be based on an understanding that Hutu majority and Tutsi minority experienced the genocide differently and so they harboured different feelings. A safe space had to be created to allow for open and honest dialogue and Gacaca served as a unique opportunity for ordinary Rwandans, both victim, survivor, bystander and perpetrator to narrate and record their individual and communal accounts of the genocide with hopes that having the truth out in the open may be the starting point for national reconciliation.

The five objectives of the Gacaca Courts were firstly, to reveal the truth on the genocide events, this was done through public testimony. Secondly, the overwhelming number of crimes had to be tried quickly and in an effective way. Thirdly, to eradicate the culture of impunity; forth, to prioritise national unity by coming up with ways in which Hutu's and Tutsi's could live together without fear or a second wave of the Genocide being created and finally, to use African solutions for African problems.

Like the South African TRC, Gacaca courts created a confusion in terms of where it could be positioned as a judicial body with some scholars denying its position as a court of law due to the fact that it did not employ trained judges or even lawyers standing for the accused. It should be noted however that Gacaca courts were never intended to resemble a westernised system of law and so they should not be critiqued based on western standards. Further, Gacaca Courts have been critiqued for the intimidation and harassment experienced by witnesses and those who testify at the proceedings due to the lack of protective measures which would otherwise be offered by ordinary courts that Gacaca courts do not. It has also been noted that other people find that the Gacaca system reinforces group personas of victim and perpetrator, Hutu and Tutsi, innocent and guilty and this has thus threatened the operation of Gacaca Courts and the success of it. Further, the fact that Gacaca courts require mass participation through force, sanctions and threats instead of voluntary participation has made it seem like an oppressive form of power which makes people reluctant to freely operate. Additionally, within its truth-telling, some truths have never been addressed, for instance, the Rwandan Patriotic Front which was made up of Tutsi members has never been tried, nor have they been brought to justice for the role they played in the Genocide. Finally, Gacaca courts have been criticised for the corruption and violence that ensues especially in cases when the elected judges themselves are said to have had a part to play in the Genocide. Despite these shortcomings however, the success produced by the courts has not been replicated by any other mechanism. Rwanda has seen reconciliation between Hutu and Tutsi and although the images presented on paper does

not always reflect the true situation on the ground, it is trite that there is no ongoing conflict. It is important that we be cognisant of the information we receive because some organisations have a direct interest in the outcomes and so may be biased in their reporting.

It should be reiterated that peace and justice should go hand to hand, and we should not choose one over the other. Peace has been loosely achieved in Rwanda through truth telling and reconciliation which has seen Hutu and Tutsi members living as neighbours. However, this is not justice for the victims and survivors. What then is justice supposed to look like in Rwanda following the Genocide?

In Rwanda, dialogue surrounding reparations is still absent from discourse. In 1998, the government created FARG, a fund to assist with educational and medical priorities for the survivors, however it did not work as a compensation fund and Gacaca courts did not have access to it. In 2001, hope for reparations was raised with the discussion of the Compensation Fund for Victims of Genocide and Crime against Humanity, however the discussions never materialised, and the fund was never created. It has been argued that without reparations, justice cannot be said to be done. It has also been argued that reparations take various forms and they need not all be financial but there has to be recognition of the past harms and mechanisms enacted to restore people their dignity as well as their livelihood.

4.3.1 In practice, which form of reparations have been employed in Rwanda and how far did they succeed?

Thus far, Rwanda has provided limited reparations which have been symbolic such as restitution for lost property, they have further reduced sentences in exchange for the truth about where bodies were buried, and these bodies were exhumed and buried in a dignified manner, where families could lay their final respects. However, in terms of reparations for conflict-related sexual violence (CRSV), which was used as a weapon for war, very little has been done or achieved in delivering justice for the women, girls and boys who were sexually violated. The notion of gender justice has gained very little momentum over the years despite the reality of women and children experiencing war differently due to the use of gender-based violence in conflict. Sexual violence and reproduction crimes are usually perpetuated against women and girls and include rape, sexual assault, sexual exploitation, enslavement, forced nudity, forced marital unions, mutilation, forced pregnancy, forced sterilization, forced abortions etc.

in their nature, the completely debilitate women and destroy their physical and mental health, their family and communal bonds, perpetrates long-term stigma and exclusion, and compounds social and economic inequalities. Sexual violence then has multiple adverse effects and harms that have to be addressed through appropriate reparations. The failure to expand reparations to crimes of sexual violence means there has been a failure in the part of government to bring justice to the victims and survivors of sexual violence who are usually women, thus perpetuating the exclusionary nature of harms against woman and children in discourse. [571]

In Rwanda especially, because sexual violence was used as a weapon to weaken the Tutsi minority, to strip them of their dignity and prove the men and women powerless, the constant marginalization of reparations in these cases forms part of a persistent pattern of disjunctive responses by law to the rights and needs of women. The continued gap between legal repair and material repair stems from the failure to fully recognise and repair women their social and economic benefits. When dealing with CRSV cases, we have to be cognisant and critical of the language used because often times, phases such as 'fate worse than death' are thrown around and this perpetuates the stigma of sexual harm and this reinforces gendered tropes of purity and the presumed spoiled virtue of women. The language has to ensure that the importance and urgency of reparations is clear, but in doing so, no further victimisation and stigmatisation is perpetuated. Any reparations program intending to meaningfully address the harms of the Genocide had to include within it, a special category designated to sexual violations in its various forms as well as sexual reproduction violations.

Following the breakdown structure provided by Roht-Arriaza, it is important to look at which form of reparations Rwanda prioritized, its success thereof and which form would be better suited to deal with the current problems facing the Rwandan Government. [572]

The first form entails, adopting a reparation as development approach as it places the government in a position to address the previous government's backward-looking problems which were the source of the conflict due to structural and systematic inequalities between groups at opposing ends of the conflict. In Rwanda, buildings and infrastructure were debilitated, governmental structures were damaged, and the personnel make up of government was wiped out, educational and medical facilities were destroyed, crops and cattle were stolen, and some killed. This meant that at its inception, the new Rwandan government had to deal

[571] R Rubio-Marín and P de Greiff "Women and reparations" (2007) 322.
[572] N Roht-Arriaza, 'Reparations, Decisions and Dilemmas' (2004) 186.

with developing the country as that called for immediate action. The biggest challenges with these reparations is the question of who will benefit because simply benefiting the Tutsi minority will cause more problems than solutions, so instead, any measures enacted have to benefit all victims of Genocide, crimes against humanity and war crimes committed in Rwanda between 1 October 1990 and 31 December 1994. This would ensure that all victims are catered for and this will in turn reduce any further resentment which may be created by the exclusion.

The impact FARG has had on the educational end medical arena cannot be denied. Education wise, Rwanda previously prioritised the education of boys over girls, however, reports demonstrate that there are now more girls than boys enrolled in schools. This is impressive because focusing on education is a sure way to invest in the youth and in turn the economy. Further, the health benefits have been observed, the mortality rate have been decreased and the life expectancy has increased by 32 years, said to be the most improved in any African country.

Reparations as development have to be looked at as a right rather than a favour from the government. It is of paramount importance to provide reparations, even symbolic to the victims and survivors of the Genocide in order that there is a recognition and acceptance of the past, but also a way to move beyond the past and into more positive terrain for the country.

The most effective way of applying reparations to Rwanda was proven through reparations as community services as the second form. Community service was viewed as a way to reduce the prison sentences of low-level perpetrators by getting them to work for the benefit of the communities they harmed and also as a way to reintegrate them back into the community. The driving force for this mechanism was the idea that victims and perpetrators occupied the same social and economic spaces, segregation was not possible and not ideal and further because the power disparities between the Hutu majority and the Tutsi minority were not vast, there had to be a way to get them to live together again without the fear of repetition, no vengeance and no fear of being outcast. Reparations as community services served this benefit.

The tasks bestowed by the Gacaca Courts order varied between restoring damaged buildings and institutions such as medical care facilities, school and church buildings, as well as maintaining roads, community gardens and also partaking in prison feeding schemes. The benefits of community service as development instead of the prison system were that the offenders were given a chance to show remorse and for the victimised people to see them working to rebuild the community as well as their broken relationships, in the literal sense may help with the progression of the unity.

Finally, the third form reparation could take in Rwanda were reparations as preferential access. This would not have been possible because for preferential access to work effectively the number of beneficiaries has to be very limited. In Rwanda, the Genocide produced a large number of victims and survivors to the point that moving them to the front of the reparations line would prove futile since majority of them needed the same assistance on an urgent basis. This meant that preferential access would not have served any benefits for Rwanda, hence it was not considered. Some would argue however, that the provisions offered by FARG worked on a preferential basis in terms of education and medical facilities for the survivors, however, considering that the beneficiary list was still very long, it was almost impossible to choose who would benefit. For this reason, that argument fails. [573]

There is no one size fits all element to the application of reparations. Each mechanism adopted has to be country specific in order to meets its own needs. The failure of the Rwandan government to account and cater for crimes related to sexual violence and reproduction reinforces the argument made that without reparations there can be no true justice. Excluding sexual violence crimes from the dialogue is a failure of Gacaca courts as well. Despite this, as far as reparations go, Rwanda operated within the reparations as development and the reparations as community service arena in the most basic of senses. This then calls for a revision in the operations of Gacaca courts, it also calls for enforcement mechanisms from the state to ensure that the proposed reparation fund finally materialise' and justice can then be said to be done.

It has been established that reparations have to be country specific because the countries need differ, the victims are not in similar situations and what is urgent in one country, will not be urgent in another. For instance, the South African Truth and Reconciliation Committee did not have to urgently and on a large scale deal with matters involving crimes related to sexual violence, the way that it has become apparent that the Gacaca courts had to, albeit failed to address them. Another example of this is that Rwanda did not have to deal with the segregation issues and the land redistribution issues that South Africa is still struggling with today. Further, reparations have to cater to the immediate needs of each country hence the different forms of reparations. Both South Africa and Rwanda benefited from symbolic reparations which commemorated the deceased by putting up monuments, statutes, renaming streets and preserving national holidays to honour and remember them. Both countries also pledged non

[573] *Ibid.*

repetition because there is a national understanding of how detrimental the past events have been. South Africa would benefit from revised reparations as development as well as reparations as preferential access. Rwanda would benefit from reparations as development and reparations as community service.

Be that as it may, with the varying differences in the country's needs, the different forms of reparations for application and the difficulties experienced by each country, discourse surrounding reparations is paramount to any discussion about justice for countries immerging from conflict. Transitional justice which prioritises reconciliation and truth-telling, which also necessitates the peace vs justice debate has to include in its paradigm the reparations talk as a way for it to gain legitimacy in not only academia but in legislative measures too.

RECOMMENDATIONS

In this dissertation, it was clearly established that reconciliation alone is not sufficient to bring unity to countries immerging from gross human rights. For justice to be fully attained, reparations have to form part of the discourse. The fact that both South Africa and Rwanda faced the past and made a conscientious decision specific to each country, to create alternative mechanisms to reconcile and transform the countries, was in itself an achievement. The difficulties, challenges and obstacles in execution did not and will not negate the positive attributes that have been noted from each mechanism. For more effective operation, more success stories going forward, it is necessary to make recommendations to the various areas with errors detrimental to the transformation and reconciliation of these post conflict societies.

4.5 Recommendations for South Africa

The TRC shortcomings as detailed extensively in chapter 2, were detrimental to long term peace and justice. It was explained how the TRC was seen as the ANC governments way of winning over White people, at the expense of the Black majority who needed it more. Further, the various shortcoming of the TRC, as well as the effects thereof were detailed. As a response to this, three recommendations for South Africa are made in this dissertation. It is recommended that the registration period for survivors of apartheid be re-opened, further, it is recommended that government deals with the land reform issues on an urgent basis and finally, it is recommended that future studies be conducted in this area of law.

4.5.1 Extension/ re- opening of the closed list

This was evidenced in how the amnesty commission had more extensions to benefit the perpetrators than the reparations committee which would benefit the apartheid victims and survivors. It is recommended that the closed list currently being operated on, be open to allow for more victims who were previously excluded to register for the reparations.

Further, the President Fund as established by s42 of the Promotion of National Unity Act which had R1.19 Billion in 2014 to be designated to help apartheid victims rebuild their shattered lives has to be disbursed to benefit traumatised communities. This fund should not be misused by the government. While community reparations are just as urgent, the individual reparations only benefited 16 000 people who all got a once off payment of R30 000 instead of the proposed R21 000 each year for 6 years. What about the other victims who were initially excluded from the first intake? This fund should then be used to correct the first exclusion.

The new regulations centred on community reparations have not garnered much support because it appears that the government intends on using this fund to carry out obligations already bestowed onto them, but under the guise of community reparations. For instance, the TRC identified 128 communities needing reparations, yet the new regulations only mention 30 communities who will be benefited. This again raises the question: what about the other communities who fell victim to the apartheid regime? The government is keen on bragging about the success of the TRC, yet it constantly fails the real and direct victims of apartheid. The regulations need to be revised to reflect the direction of the majority instead of political bodies. The benefits to be gained are that large numbers of excluded victims will now be included and recognised on a legal level and acknowledged for the pain and suffering they endured.

4.5.2 Land Reform

Land reform and land redistribution are the two barriers standing in the way of equality, justice and reconciliation. This has resulted in poverty, illiteracy and unemployment for majority of

the Black population. The segregation created by the apartheid government from 1948 to1994 is still persistent in 2020. This a failure on the ANC government to effectively cater for the needs of its citizens. A failure to uphold the Bill of Rights Constitutional provisions and a dismal failure to execute the ambitious plans of the TRC. The government has to finally decide if the land clause provision contained in the Constitution will be amended, and if it is not amended how they will go about reforming and redistributing land equally. The benefits of this decision are that it promises to close, or at the very least narrow the power disparities between Black and White people, it will also be the driving force to tackle the vast inequality in South Africa.

4.5.3 Future studies

There is an overwhelming lack of literature focusing on reparations as a method of transitional justice. There is further, little to no studies of the various forms, reparations ought to take in post conflict societies in the African diaspora. This is discouraging because this is a discussion needing urgent attention as it is the key to a lot of changes. Without the literature, case studies and in-depth research into the various overlapping legal arenas, the gap in knowledge and execution is expounded, making resolving the challenges an even bigger task. Social groups have to keep up the pressure, activists and advocates have to keep fighting, and finally, we, in academia have to constantly question within our research topics, the direction the government is taking as well as the slow pace they are going. The benefits of this proposed research are that it would raise awareness of the key areas, government is supposed to focus on to make meaningful and long-lasting change. Further, it would give direction to the legislator as to the possibilities they can consider when drafting new legislation in this regard. Finally, the controversial points raised cause traction, which in turn creates dialogue and public discussions amongst the beneficiaries and law makers.

4.6 Recommendations for Rwanda

4.6.1 Holding the Rwandan Patriotic Front accountable

The Rwandan Patriotic Front which is currently the ruling party in Rwanda that defeated former regime and won the civil war, needs to be held accountable for their role in the Genocide. The government cannot simply turn a blind eye to what happened because from that standpoint, Rwanda cannot successfully move forward. The RPF took part in the genocide by routing out Hutu extremists who were responsible for killing Tutsis and carrying massacres against Hutu civilians. Yet they have managed to evade justice for so many years. The revenge killings were done in secret, yet they had been documented by many organisations such as the Human Rights commission, Amnesty International, and the United Nations. These killings deserved more outcry from the world and even more justice for the victims. To remedy the hostility of the situation, the RPF has to be held accountable as much as the Hutu perpetrators were. They too have to part take in community service should their sentences be reduced, they too have to publicly stand and own up to their actions, reveal where the bodies are buried, ask for forgiveness, show remorse then work to restore community ties.

The challenge in this instance becomes that the RPF is currently in power, surely Gacaca courts would not be the fitting route to handle these extreme cases due to the power disparities between the community leaders and the government leaders. What then would be the best African way to bring these leaders to justice? This paper does not provide the answer, but the question should nonetheless be raised.

4.6.2 Establishing the compensation fund for victims

The problem in Rwanda, as already established above is that victims and survivors of the Genocide are still living in inhumane conditions and without the most basic of services. The Rwandan government attempted to remedy the situation by creating FARG, a financial programme which assisted with medical and health expenses for the victims, however this was not a reparations programme, it was instead the government's obligations to its citizens being met. It is recommended that a reparations fund called the Compensation Fund for Victims and Survivors of Genocide be established and enforced in order to address, specifically, and head-on the challenges and problems brought on by the Genocide. This fund would be constructed in a way that allows the victims to claim not only material or financial reparations but psychological and mental health reparations as well. There has to be an understanding that the

effects of Genocide went beyond the physical and social disturbances, but that mental health was severely affected as well. Further, the children of the deceased will need special recognition and attention from the fund. This can be in the form of identity document recovery from Home Affairs, further educational assistance, monetary provisions to sustain themselves, trauma counselling, and preferential access to basic services. From this fund and these provisions, people can start to heal and rebuild themselves, national unity can be strengthened too.

4.6.3 Reparations for crimes for sexual and reproduction violence

In Rwanda, rape and sexual torture against women and girls was used a weapon to weaken the Tutsi minorities. Sexual violence was one of the most egregious crimes to be used as a way to defeat a population. In Rwanda, it has been reported that almost all survivors suffered sexual violence or personally know someone who suffered this violation. This resulted in high HIV infections, a high number of forced pregnancies and births in the following years. Further, this increased the number of orphaned or neglected children. It is trite that crimes of sexual and reproduction violence needed special attention, yet there was none.

Crimes related to sexual violence and reproduction have to be on equal footing as other crimes committed and being remedied as we can no longer afford to exclude women from justice. Victims of sexual violence deserve separate attention in the reparations discourse. It is recommended that medical and psychological care be prioritised on an urgent basis during and after Genocide because the mental and sexual trauma is interlinked and without it, the victims will cease to exist. Further, women's second-class status in Rwanda and everywhere else in the world means they are often excluded from policy making. The absence of reparations for sexual and reproduction violence after all these years reflects the absence of women in decision making. Women have to be in the room, the make-up of decision makers in government has to reflect the make-up of the population, which is majority female. That way, issues which have been previously neglected will now be given the attention it deserves. It is recommended that female leaders take up space, demand to be heard and voice their voices without fear, in this breath it is recommended that government create leadership roles

4.7CONTRIBUTIONS OF THE STUDY

This was an exploratory case study which was aimed at analysing the implementation of reparations in two post conflict societies which share certain similar attributes. A description was made of the shared similarities in history and the various factors giving effect to the conflict. Further, it undertook a look at the successes and failures of the alternative justice mechanisms employed in each country. Further, recommendations were made as to how these mechanisms ought to be improved in order to deliver true justice and peace.

The study also exposed a gap in the available literature regarding reparations as a way of delivering justice within transitional justice mechanisms. The gap poses a challenge for future studies, but it should also be viewed as encouragement for further studies in order that the literary gap starts to close.

Further, the study provided different ways in which reparations could be looked at and enforced by governments. This was done first by looking at how they previously applied and the shortcomings thereof, then finally, recommendations were made to improve these pitfalls. These recommendations were aimed at benefitting the victims and survivors of apartheid and the genocide respectively.

Bibliography

Legislation and case law

Albutt v *Centre for the Study of Violence and Reconciliation (CSVR*) *2010* (3) SA 293 (CC).

Azanian People Organisation and Others v The President of the Republic of South Africa and Others 1996 (4) 672).

Graham Robert Herbert N.O v Senqu Municipality [2019] zacc31.

The Citizen v McBride 2010 (4) SA 148 (SCA)

The Prosecutor v Mikaeli Muhimana Case No. ICTR-95-1B-T

Agricultural (Commercial) Land Reform Act 1995 (No. 6 of 1995).

Amendment of Regulations relating to assistance to victims in respect of higher education and training: Promotion of National Unity and Reconciliation Act, 1995. Regulation 16.

The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles) General Assembly resolution 60/147 of 16 December 2005.

Broad-based Black Economic Empowerment (BEE) Act 53 of 2003.

Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.

The Criminal Law (Sexual Offence and Related Matters) Amendment Act 32 of 2007.

Constitution of the Republic of Namibia 1990.

Employment Equity Act 55 of 1998.

Equality Act 4 of 2000.

Geneva Conventions of 12 August 1949.

Group Areas Act *41 of 1950.*

Land Measures Act 108 of 1991.

International Covenant on Civil and Political Rights adopted by the United Nations General Assembly Resolution 2200A on 16 December 1966.

The Industrial Conciliation Act of 1924

Natives Land Act 27 of 1913.

Native Trust and Land Act 18 of 1936.
Promotion of National Unity and Reconciliation Act 34 of 1995.

Promotion of National Unity Act t 87 of 1995.

Promotion of National Unity and Reconciliation Act 34 of 1995: Regulations regarding reparation to victims (2003) No.R1660.

Prohibition of Mixed Marriages Act 55 of 1949.

Rome Statute of the International Criminal Court (Last amended 2010), 17 July 1998.

Restitution of Land Rights Act 22 of 1994.

Truth and Reconciliation Commission South Africa Report, Volume 4.

The 1985 UN Declaration of Basic Principles for Victims of Crime and Abuse of Power General Assembly resolution 40/34 of 29 November 1985.

The Universal Declaration of Human Rights 1948.

UN Security Council, Statute of the International Tribunal for Rwanda (as last amended 13 October 2006) 8 November 1994. Statute of the International Tribunal for Rwanda

The Right to a Remedy and Reparation for Gross Human Rights Violations (2018)

Rwanda: Constitution of the Republic of Rwanda and its amendments of 2 December 2003 and of 8 December 2015.

Journal Articles

Andrews PE 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004), 53 DePaul L. Rev. 1155 Available at: https://via.library.depaul.edu/law-review/vol53/iss3/9.

Aolain F Ni, C O'Rourke & A Swaine 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' 20th ed (2015), 28 Harv. Hum. Rts. J. 97

Brouneus K 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) Department of Peace and Conflict Research, Uppsala University, Sweden.

Bosch GS 'Restitution or discrimination: Lessons on Affirmative Action from South Africa Employment Law' (2007).

Bennett W and T Wheeler T 'Justice and peace go hand in hand – you can't have one without the other' (2015).

Bolocan: Rwandan Gacaca 2004 https://scholarship.law.missouri.edu/jdr/vol2004/iss2/2
Bassiouni MC 'Justice and Peace' (2003) 35 Case W. Res. J. Int'l L.

Brannigan A and NA Jones 'Genocide and the Legal Process in Rwanda from Genocide Amnesty to the New Rule of Law' (2009) International Criminal Justice Review http://icj.sagepub.com/content/19/2/192

Clark J N 'Reconciliation via Truth? A Study of South Africa's TRC' (2012) Journal of Human Rights Volume 11, 2012-Issue 2.

Carranza R "The series of reparations programs in Chile" (2006)

Cliffe L, J Alexander, B Cousins & R Gaidzanwa (2011) An overview of Fast Track Land Reform in Zimbabwe: editorial introduction, Journal of Peasant Studies, 38:5, 907-938

Clark J 'The three Rs: retributive justice, restorative justice, and reconciliation'(2008), Contemporary Justice Review, 11/4: 331 – 350

Clapham C 'Gacaca: A Successful Experiment in Restorative Justice?' (2012) https://www.e-ir.info/2012/07/30/gacaca-a-successful-experiment-in-restorative-justice-2/

De Brouwer A ‘Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families’ (2007) 20 LJIL 207

Dyzenhaus D ‘Debating South Africa's Truth and Reconciliation Commission’ 49 U. TOR. **L.J.** 311, 313 (1999).

Fernandez L ‘Reparations policy in South Africa for the victims of apartheid’ (2009).

Gibson J L ‘The Contributions of Truth to Reconciliation: Lessons from South Africa’ (2006) The Journal of Conflict Resolution, Vol. 50, No. 3, Transitional Justice (Jun., 2006), pp. 409-432.rzv

A Goebel (2005) Is Zimbabwe the future of South Africa? The implications for land reform in Southern Africa, Journal of African Cultural Studies, 23:3, and 345-370

Graybill LS ‘Truth and reconciliation in South Africa: miracle or model?’ (2002) Lynne Rienner Publishers, Boulder, Colorado.

Haberstock L ‘An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda,’ (2014)

Hauschildt T ‘Gacaca Courts and Restorative Justice in Rwanda’ (2012) https://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/.

Jallow H. (2009). ‘Justice and the Rule of Law: A Global Perspective’, The International Lawyer, 43(1), 77-81.

Jardine V ‘The Truth and Reconciliation Commission: success or failure?’ (2008) University of Pretoria.

Kavuro ‘Rwandan Reconciliation Process: Outcome Analysis of Gacaca’ (2011).

Kane-Berman J Foreword, in A Jeffery ‘The Truth about the Truth Commission’ (1999) South African Institute of Race Relations, Johannesburg.

Kloppers HJ and GJ Pienaar ‘The historical context of land reform in South Africa and early policies’ (2014) http://dx.doi.org/10.4314/pelj.v17i2.03.

Kepe T and Hall R ‘Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa’ (2016).

Krzan B International *Criminal Court Facing the Peace vs. Justice Dilemma*, 2 INT'L COMP. JURIS. 81, 81 (2016).

Le Mon CJ 'Rwanda's Troubled Gacaca Courts.' Human Rights Brief 14, no. 2 (2007): 16-20.

Le Roux W "The Democratic turn and (the limits of) Constitutional Patriotism after the truth and Reconciliation Commission : Albutt V CSVR" University of the Western Cape.

Lewis D A "Unrecognised victims: sexual Violence against men in conflict setting under international Law" (2009) Harvard University. 27 Wis. Int'l L.J. 1 http://nrs.harvard.edu/urn-3:HUL.InstRepos:9823975

Langer J 'Peace vs. Justice: The Perceived and Real Contradictions of Conflict Resolution and Human Rights.'(2015) https://www.researchgate.net/publication/291331192.

McCold P, J Llewellyn and D W. Van Ness 'Briefing Paper #1: An Introduction to Restorative Peacebuilding' (2007).

Moyo S "Three decades of agrarian reform in Zimbabwe" (2011) Journal of Peasant Studies, 38:3, 493-531, DOI: 10.1080/03066150.2011.583642.

Mansour K and L Riches 'Peace versus Justice: A False Dichotomy' (2017) Contemporary Issues in Conflict Resolution Spring/Summer.

Mugiraneza JP 'Rwanda Genocide: Why compensation would help the healing' (2014) theguardian.com

Mendez J 'Justice or Peace? Can We Have Both?' (2014) 7. McCulloch Centre for Global Initiatives (keynote)

Mkhize H 'Introductory Notes to the Presentation of the Truth and Reconciliation Commission's Proposed Reparation and Rehabilitation Policies' (1997).

Rettig M 'Gacaca: Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) African Studies Review, Volume 51, Number 3, pp. 25-50.

Moffett L "Transitional Justice and Reparations: Remedying the Past?"(2015) Research Handbook on Transitional Justice (Dov Jacobs's ed., Edward Elgar, forthcoming 2015)

D F. Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) The Yale Law Journal.

A Pradier, M Rubin & H van der Merwe (2018) Between transitional justice and politics: Reparations in South Africa, South African Journal of International Affairs, 25:3, 301-3 21

Rubio-Marín R and P de Greiff 'Women and reparations' (2007) The International Journal of Transitional Justice, Vol. 1, 2007, 318–337 319.

Sosnov M 'The adjudication of Genocide: Gacaca and the road to reconciliation in Rwanda' (2008).

Shava E 'Black Economic Empowerment in South Africa: Challenges and Prospects' (2016) Journal of Economics and Behavioural Studies (ISSN: 2220-6140) Vol. 8, No. 6, pp. 161-170.

Stein DJ et al 'The impact of the truth and reconciliation commission on psychological distress and forgiveness in South Africa.' (2008) Soc Psychiatry Psychiatr Epidemiol. 2008 Jun; 43(6): 462–468.

Suma M and C Correa "Report and Proposals of reparations in Sierra Leone" (2009). International Centre for Transitional Justice

Sooka Y 'Dealing with the past and transitional justice: building peace through accountability' (2006), International Review of the Red Cross. 88/862: 311 – 325.

Thomas NH (2003) Land reform in Zimbabwe, Third World Quarterly, 24:4, 691-712,

Takeuchi S 'Development and Developmentalism in Post-genocide Rwanda' (2019) Tomuschat C '' reparation in cases of Genocide' (2007) Journal of International Criminal Justice 5), 905-912.

Vora JA and Vora E 'The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans' (2004) Journal of Black Studies, Vol. 34, No. 3 pp. 301-322.

Waldorf L 'Transitional Justice and DDR: The Case of Rwanda' (2009) Research Unit International Center for Transitional Justice

Walker MU 'Gender and Violence in Focus: A Background for Gender Justice in Reparations' (2009) 19

Williams PR 'The peace vs Justice Puzzle and the Syrian crisis' (year) ILSA Journal of International & Comparative Law [Vol. 24:]

Wilson RA 'The politics of truth and reconciliation in South Africa: legitimizing the post-apartheid state' (2001). Cambridge University Press, New York.

Wilson C M "Argentina's Reparations Bonds: An Analysis of Continuing Obligations" (2004) Fordham International Law Journal Volume 28, Issue 3 Article 9

Wilson RA *Justice and Legitimacy in the South African Transition, in* THE POLITICS OF MEMORY 207 (Alexandra Barahona de Brito, et al. eds., 2001); Mahmood Mamdani, *Reconciliation Without Justice, in* 46 **SOUTHERN** AFRICAN REVIEW OF BOOKS (1996) (book review), available at <www.uni-ulm.de/-rturrell/antho3html/Mamdani.html>.

Welsh D '*The Rise and Fall of Apartheid' (2009)* Journal of International and Global Studies Johannesburg and Cape Town: Jonathan Ball Publishers.

Wouters J "The Obligation to prosecute international law crimes

Newspaper articles

S Baguma 'The New Times (Kigali), 'Genocide Survivor Boycotts Gacaca, Cites Harassment,' (2006).

M Adami International Judicial Bodies: Is Restorative Justice the Means to End the Peace v Justice dilemma? https://blogs.lse.ac.uk/internationaldevelopment/2017/12/15/international-judicial-bodies-is-restorative-justice-the-means-to-end-the-peace-v-justice-dilemma/ [Accessed 15 April 2020]

W Bennett and T Wheeler' Justice and peace go hand in hand – you can't have one without the other' (2015) https://www.theguardian.com/global-development/2015/oct/26/justice-peace-conflict-affected-societies [Accessed 15 April 2020]

https://www.theguardian.com what does Ubuntu really mean? [Accessed 06 September 2021].

https://businessmediamags.co.za A progressive Constitution [assessed 06 September 2021].

The Guardian _

S Newey ‘From horror to health: How Rwanda rebuilt itself to become one of Africa's brightest stars’ (2019) mews paper link insert [Accessed 22May 2020].

N Oko ‘ The Closing of the Gacaca Courts and the Implications for Access to Justice in Rwanda’ (20102) https://issafrica.org/iss-today/the-closing-of-the-gacaca-courts-and-the-implications-for-access-to-justice-in-rwanda [accessed 24 March 2020]

J B Kayigamba ‘Rwandas Gacaca Courts: A mixed legacy’ https://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy(2012) [accessed 24 March 2020]

E Ruvugiro ‘Rwandan Reparations fund breaks ground it’s still not enough’ (2012) https://www.justiceinfo.net/en/reparations/40610-rwandan-reparations-fund-breaks-ground-but-is-still-not-enough-say-victims.htmlhttps://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy [accessed 24 March 2020]

ICTJ (2009). ‘What is Transitional Justice?’ available at: https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pd

Conference papers

G O’Malley ‘Respecting Revenge: The Road to Reconciliation’ (1999) Paper presented to the Conference of the History Workshop and the Centre for the Study of Violence and Reconciliation: ‘The TRC: Commissioning the Past’. University of the Witwatersrand, Johannesburg, 11-14 June 1999.

F du Toit Reconciliation and Transitional Justice: the case of Rwanda’s Gacaca Courts (2011) Institute for justice and reconciliation Africa programme: occasional paper 2

No justice without reparation: recommendations for the reparation for survivors of the 1994 Genocide. 2012 Discussion Paper

Assessment of possible ways forward on reparations for victims of the 1994 genocide in Rwanda

Truth and Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President* at<www.doj.gov.za/trc/reparations/summary.htm> (visited 08 October 2020).

South Africa Restitution Act, *amended by* Land Restitution and Reform Laws Amendment Act 63 of 1997, available at <www.lawsoc.co.za/members/legal resources/usefulleg/landrestandreformlawsaamdact.htm> (visited Jan. 18, 2004).

Anonymous, Human Rights in Peace Negotiations, 18 HUM. RTS. Q. 249, 258 (1996) [hereinafter Human Rights in Peace Negotiations].

Statement, Secretary-General's Remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role, U.N. Statement S/PV4833 (Sept. 24, 2003).

UN Commission on Human Rights, Report on the Situation of Human Rights in Rwanda Submitted by Mr Rene Degni-Segui Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/I of 25 May 1994, E/CN-4/1996/68, 29 January r996, para. r6.

Human Rights Watch, 'Law and Reality: Progress in judicial reform in Rwanda' July 2008

Organization of African Unity (OAU), International Panel of Eminent Personalities Report, *Rwanda: The Preventable Genocide* (2000), para. 16.20.

Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making (2007) Clemens Nathan Research Centre and the Redress Trust (conference paper)

UN Commission on Human Rights, Report on the Situation of Human Rights in Rwanda Submitted by Mr Rene Degni-Segui Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/I of 25 May 1994, E/CN-4/1996/68, 29 January r996, para.