

Opinion

Transitional Justice: A Colonizing Field?

Stephanie Vieille*

Introduction

Transitional justice, as a recent field of study, is in transition itself.¹ Scholars are raising a number of contentious issues and it has become the subject of ongoing debates regarding how to best come to terms with the past in transitional societies. This usually involves, for instance, the creation of specific judicial institutions to carry out justice and hold individuals accountable in the aftermath of conflict or grave human rights violations. As noted by Thomson and Nagy, the field of transitional justice has only recently started to pay attention to “more localized, traditional mechanisms as a corrective to the shortcomings of internationalized, ‘one-size-fits-all’ approaches.”² In this article, I contend that the transitional justice literature is defined by a Western, legalistic approach to justice, which affects the field’s ability to account for indigenous and customary mechanisms of justice that do not espouse this legalistic lens. I will discuss two things here. First, I will examine how transitional justice scholars and practitioners favour the implementation and development of certain institutions to the detriment of others in transitional societies. These institutions are usually based on a neo-liberal democratic framework. This, in turn, leads to a discussion about how this preference for particular institutions and mechanisms reveals latent assumptions about the primacy of the rule of law. This article calls for caution in the blind promotion of the rule of law.³

I. Transitional Justice and the Rule of Law

Transitional justice is generally defined as a field of study that explores attempts to secure peace and justice,⁴ and that encompasses the “legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict.”⁵ As such it shares close ties with the literature on conflict resolution and peacebuilding, where the promotion of the rule

* Dr. Stephanie Vieille has pursued higher education in both Europe and Canada where she obtained a PhD in Political Science. She has conducted research and fieldwork on customary mechanisms of justice in Africa and New Zealand, and has recently been working as a human rights adviser and researcher for the Canadian Senate and the Government of Canada. She has published in internationally respected journals such as *Human Rights Review*, *the International Indigenous Policy Journal* and *Contemporary Justice Review*.

¹ C. Bell, C. Colm & F. Ní Aoláin, ‘Justice Discourses in Transition’, *Social and Legal Studies* 2004-3, p. 305.

² S. Thomson & R. Nagy, ‘Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda’s Gacaca Courts’, *The International Journal of Transitional Justice* 2011-5.

³ This paper purposely discusses the rule of law and its judicial mechanisms broadly, to permit a dialogue about this dimension of the ever-growing field of transitional justice. Elsewhere, I have already addressed the legalist paradigm that heavily defines the transitional justice discourse as well as its potential and practical implications for indigenous approaches to justice more in-depth: S. Vieille, *Rethinking Justice in Transitional Justice: An Examination of the Maori Conception and Customary Mechanism of Justice* (PhD Thesis), The University of Western Ontario 2011.

⁴ International Center for Transitional Justice ‘What is Transitional Justice?’ See: <http://www.ictj.org/en/> (accessed on 8 January 2009).

⁵ C. Bell, C. Campbell & F. Ní Aoláin, ‘Justice Discourses in Transition’ *Social and Legal Studies* 2004-3, p. 305.

of law is perceived as an essential element in sustaining peace and security. Thallinger, for instance, argues that transitional justice “forms an absolutely essential component in every post-conflict peacebuilding process.”⁶ In fact, it appears that a legalistic approach to justice has come to dominate the field of transitional justice.⁷ McEvoy, for instance, contends that “transitional justice has become over-dominated by a narrow legalistic lens which impedes both scholarship and praxis.”⁸ This is clearly visible in the sort of institutions favoured by transitional justice scholars and practitioners. The international push to do justice,⁹ or what Oomen calls “the judicialisation of international relations,”¹⁰ has led the international community to respond to the call for accountability by setting up major legal institutions, including the Tokyo and Nuremberg Tribunals, the ICTY and ICTR, and other, more recent, hybrid models such as the Special Court for Sierra Leone. The creation of the ICC is certainly the most significant illustration of this global move towards judicialisation. In recent years, the crimes committed in Sudan, the Democratic Republic of Congo, Uganda and the Central African Republic have been referred to the ICC.¹¹

This push to do justice is also visible outside of the prerogative of the ICC. In 2003, for instance, under pressure from the United States government, the Iraqi Special Tribunal for Crimes Against Humanity was set up to investigate crimes committed under the government of Saddam Hussein.¹² The creation of such judicial institutions, according to Amnesty International, is an “international responsibility,” which the international community must carry out.¹³ Today, the idea that persons who “commit international crimes are internationally accountable for them has now become an accepted part of international law.”¹⁴

Transitional justice strategies, however, have quickly expanded to encompass a range of activities that are not directly about doing justice *per se*, but rather encompass such things as the “institutional reform of judiciaries, training of judges, reformulation of military and other security doctrines...and institutions, which are indistinguishable from peacebuilding efforts.”¹⁵ The 2010 Annual Report of the International Center for Transitional Justice illustrates and confirms this tendency. The document lists security sector reforms and

⁶ G. Thallinger, ‘The UN Peacebuilding Commission and Transitional Justice’, *German Law Journal* 2007-7, p. 693. Also note that Thallinger uses the terms of ‘peacebuilding’ and ‘post conflict peacebuilding’ interchangeably.

⁷ For a more detailed discussion of the origin of transitional justice and its ties with the legalistic discourse, refer to A. Paige, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, *Human Rights Quarterly* 2009-2; J. Mendez, ‘In Defense of Transitional Justice’, in: *Transitional Justice and the Rule of Law in New Democracies* edited by A. James McAdams, Notre Dame: University of Notre Dame Press 1997; N. Roth-Arriaza, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, Cambridge: Cambridge University Press 2006.

⁸ K. McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’, *Journal of Law and Society* 2007-7, p. 16.

⁹ R. Nagy, ‘Transitional Justice as Global Project: Critical Reflections’, *Third World Quarterly* 2008-2, p. 275.

¹⁰ B. Oomen, ‘Donor-Driven Justice and Its Discontents: The Case of Rwanda’, *Development and Change* 2005-5, p. 893.

¹¹ International Criminal Court, *Situations and Cases*, at:

<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed on 24 January 2009).

¹² Government of Australia, ‘Iraq’s Special Tribunal for Crimes against Humanity’ edited by Department of Parliamentary Services, 2004.

¹³ Amnesty International, ‘Iraq: Iraqi Special Tribunal-Fair Trials Not Guaranteed’, at:

<http://www.amnesty.org/en/library/info/MDE14/007/2005> (accessed on 2 September 2012).

¹⁴ A. Watts, ‘The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers’, *Recueil des cours de l’Academie de droit international de La Haye* 1994, pp. 82-4.

¹⁵ C. Sriram, ‘Transitional Justice and the Liberal Peace’, in: E. Newman, R. Paris & O. Richmond (eds.), *New Perspectives on Liberal Peacemaking*, New York: UN University Press 2009, p. 120.

criminal justice reforms as part of the activities that comprise the field of transitional justice.¹⁶ These reforms include the restructuring of national security forces, intelligence, and the reorganisation of the justice sector, alongside measures to strengthen civil society.¹⁷ Transitional justice strategies have generally supported the development of institutional measures that are mapped onto a neo-liberal understanding of peace and peacebuilding. This is not entirely surprising, given that transitional justice is often considered a subset of peacebuilding.¹⁸ To a great extent, many officials equate transitional justice with the establishment of human rights and peacebuilding activities.¹⁹ Sriram contends that the fields of transitional justice and peacebuilding “share key assumptions about preferable institutional arrangements, and a faith that other key goods - democracy, free markets, ‘justice’ – can essentially stand in for, and create, peace.”²⁰ This belief has clear roots in the neo-liberal doctrine,²¹ which encourages the “opening up of political space, including improvement regarding contestations, participation and human rights.”²² Teitel adds that the “justice seeking phenomena... is intimately tied to the fashioning of a liberal political identity.”²³

The unquestioned and absolute promotion of the rule of law at the international level, however, creates challenges on two levels. Firstly, it raises questions on an ethical level vis-à-vis the ideological assumptions that ground the judicialisation of international relations. Secondly, it also brings up concerns vis-à-vis the practical level and the feasibility and applicability of this model to a variety of contexts. Both these issues are discussed in the following section.

I.1 Ethical Challenges

The fact that transitional justice scholarship is “steeped in western liberalism”²⁴ is problematic for a number of reasons. Firstly, this tendency renders scholars unable to account for mechanisms and approaches to justice that do not fit within its legalistic and individualistic framework. Indeed, liberalism conceives of the individual as the basic and irreducible unit of society, and finds it difficult to accommodate practices that do not correspond with this view. This liberal principle of individuation, although culturally and historically specific, serves to shape much of existing international humanitarian peacebuilding efforts in transitional societies.²⁵ Nagy, who is highly critical of what she refers to as the “global project,” accuses transitional justice of seeking to “produce subjects and truths that align with market democracy and are blind to gender and social justice.”²⁶ Lundy and McGovern, who denounce international efforts for promoting “a pattern of development determined by the

¹⁶ Idem, p. 3.

¹⁷ The International Centre for Transitional Justice, ‘Annual Report 2010’, p. 3.

¹⁸ Thallinger 2007, supra note 6.

¹⁹ H. Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, *Human Rights Quarterly* 2006-1, pp. 1-85.

²⁰ Sriram 2009, supra note 15, p. 12.

²¹ T. Paffenholz, *Civil Society and Peacebuilding: A Critical Assessment*, London: Lynne Rienner Publishers 2010, p. 43.

²² A. Jarstad, & T. Sisk, *From War to Democracy: The Dilemmas of Peacebuilding*, Cambridge: Cambridge University Press 2008, p.17.

²³ R. Teitel, *Transitional Justice*, Oxford: Oxford University Press 2000, p. 225.

²⁴ R. Nagy, *Transitional Justice as Global Project: Critical Reflections*, p. 275, at: <http://www.cpsa-acsp.ca/papers-2007/Nagy.pdf> (accessed on 21 August 2012).

²⁵ B. Parekh, ‘The Cultural Particularity of Liberal Democracy’ in: D. Held (ed.), *The Prospects for Democracy*, California: Stanford University Press 1993, p. 157.

²⁶ Nagy 2012, supra note 24.

dominant ideology of neo-liberalism,” echo Nagy’s concern.²⁷ Transitional justice, just like peacebuilding, with which it is often associated, is informed by a given “epistemic knowledge base and ontological view of the world” which influences the social, economic, political strategies employed.²⁸ Orford warns of the fact that the establishment of transitional justice institutions and mechanisms is informed by “powerful ideas of the international human rights movement, part of the forward march of liberal internationalism.”²⁹ Here, I want to draw attention to how transitional justice strategies are designed and channelled to fit a specific ontological view of society embodied in the liberal tradition. In fact, apart from a handful of scholars,³⁰ the transitional justice literature has remained silent on the issue.

This one-size-fits-all neoliberal approach has been most clearly visible through the uninhibited promotion of the rule of law and the institutional arrangements that support its development in transitional societies. The last couple of decades have seen a “surge in American and international efforts to promote the rule of law around the globe, especially in post-crisis and transitional societies.”³¹ European and North American foreign policies, as well as the UN, the World Bank, and a number of philanthropic foundations, have all engaged in the promotion of the rule of law, based on a given standardised understanding of it. In this research, I adopt the UN’s definition of the rule of law, which refers to:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³²

Therefore, it is clear that the rule of law is associated with certain institutions which embody and promote specific values, including respect for human rights, social responsibility and democratic governance, such as an independent judiciary.³³ The UN’s definition is representative of the definitions and rationale adopted by a number of other international institutions such as the Organisation for Security and Co-operation in Europe (OSCE)³⁴ and the Organisation of American States (OAS).³⁵ Both embrace a very similar and detailed understanding of the institutional and procedural elements of the rule of law, which they link, more or less openly, with peace and democratic governance. This corresponds to what Carothers calls the “Rule of Law Assistance Standard Menu,” which guides the work of the

²⁷ P. Lundy & M. McGovern, ‘The Role of Community in Participatory Transitional Justice’, in: K. McEvoy & L. McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Oxford: Hart Publishing 2008, p. 104.

²⁸ O. Richmond, ‘Beyond Liberal Peace? Responses to Backsliding’, in: E. Newman, R. Paris & O. Richmond (eds.), *New Perspectives on Liberal Peacemaking*, New York: UN University Press 2009, p. 69.

²⁹ A. Orford, ‘Commissioning the Truth’, *Journal of Gender and Law* 2006-3, p. 862.

³⁰ For instance, see: Nagy, *Transitional Justice as Global Project*; Sriram, *Transitional Justice and the Liberal Peace*; D. Hoogenboom & S. Vieille, ‘Transitional Justice and the Neoliberal Discourse’, Paper presented at the Canadian Political Science Association, Ottawa, May 2009.

³¹ R. E. Brooks, ‘The New Imperialism: Violence, Norms, and the “Rule of Law”’, *Michigan Law Review* 2003-7, p. 2276.

³² Report of the Secretary-General, *The Rule of Law and Transitional Justice*, 4.

³³ R. Fanthorpe, ‘On the Limits of Liberal Peace: Chiefs and Democratic Decentralization in Post-War Sierra Leone’, *African Affairs* 2005, pp. 27-8.

³⁴ Office for Democratic Institutions and Human Rights OSCE, ‘Rule of Law’, at: <http://www.osce.org/node/66395> (accessed on 21 August 2012).

³⁵ Organisation of American States, ‘Justice and the Rule of Law’, at: <http://www.summit-americas.org/sisca/justice.html>. (accessed on 21 August 2012).

international community in developing countries and transitional societies.³⁶ This international emphasis on the rule of law and legal institutions has become one of the main ways in which countries deal with one another.³⁷ Over the years, international efforts in transitional societies have increasingly focused on the building of courts, the punishment of human rights violations, and the writing of laws.³⁸ Justice has become one of the main areas of international assistance and cooperation.³⁹ In order to obtain funding, a number of non-western states have had to conform to donors' priorities and therefore adopt such a standardised practice and understanding of the rule of law, as in the case of the African Union (AU) and its leading members.⁴⁰

One of the striking elements of this globally unbridled promotion and adoption of the rule of law is the lack of critical evaluation of its underlying assumptions. The concept of the rule of law is "rarely examined or understood by key international decision makers."⁴¹ The rule of law and law itself is naively associated with order and a source of societal peace. It is also prescribed on the basis of being inherently good, coherent, and independent from society.⁴² The rule of law is perceived to exist "beyond culture," and is therefore thought to be easily applicable to different contexts through the creation of written laws and formal judicial structures.⁴³ Accordingly, law is considered a foundational element that precedes all other factors, including culture and religion. As a result, courts and legal texts are seen as the embodiment of this universal and impartial rationality. It is generally accepted that courts, as neutral instruments of the law, are well able to provide an "official version of reality to which a majority would subscribe."⁴⁴ In transitional societies, where abuses of power and violence were rampant, the advent of the rule of law not only symbolises a breakaway from a difficult past, but is most importantly seen as "capable to construct liberalising change."⁴⁵

The problem, therefore, does not lie with the rule of law itself but, rather, with the way it is presented and promoted. As Oomen writes, one of the reasons that justice and the rule of law have become a major area of international cooperation is that law is presented as "neutral, universal and apolitical."⁴⁶ This approach to law and justice, as apolitical and easily abstracted from its social context, is itself an exclusively Western and ethnocentric notion.⁴⁷ Seeing law as an unbiased and impartial instrument is highly problematic, for it fails to recognize the cultural contingency of legal practices and understandings. Yet, the concept of the rule of law continues to be used and remains unquestioned. International legal norms and theory are defined by this discourse, which informs language about what is 'right' or 'wrong,' or in other words what is legal and illegal. The main difficulty becomes how this understanding of law guides much of the ongoing international efforts to do justice and the kind of institutions transplanted into transitional societies, with no appreciation of the cultural embeddedness of such conception of law. I do not reject the rule of law, nor do I

³⁶ T. Carothers, *Aiding Democracy Abroad: The Learning Curve*, Washington: Carnegie Endowment for Peace 1999, p. 168.

³⁷ Oomen 2005, supra note 10, p. 890.

³⁸ Lundy & McGovern 2008, supra note 27, p. 99.

³⁹ Oomen 2005, supra note 10, p. 888.

⁴⁰ R. MacGinty, 'Indigenous Peace-Making vs Liberal Peace', *Journal of the Nordic International Studies Association* 2008-2, p.144.

⁴¹ Brooks 2003, supra note 31, p. 2283.

⁴² P. Ewick & S. Silbey, *The Common Place of Law: Stories from Everyday Life*, Chicago: University of Chicago Press 1998, p. 34.

⁴³ Brooks 2003, supra note 31, p. 2285.

⁴⁴ J. Malamud-Goti, *Game without End: State Terror and the Politics of Justice*, London: University of Oklahoma Press 1996, p. 184.

⁴⁵ Teitel 2000, supra note 23, p. 213.

⁴⁶ Oomen 2005, supra note 10, p. 893.

⁴⁷ J. Donovan & E. Anderson, *Anthropology and Law*, Oxford: Bergahn Books 2003, pp.175-189.

claim that legal institutions such as courts and tribunals are the wrong mechanisms to use in all situations. Rather, I want to draw attention to the fact that the rule of law is placed on a pedestal, and is typically considered a “heightened legal reference point.”⁴⁸ This narrow legal focus “produces a parochial perspective that limits the range of conceivable remedies.”⁴⁹ The crux of such a challenge, according to Nagy, is that “the West arrogates the universal to itself and then brings all others into its fold of humanity.”⁵⁰

Transitional justice is a field highly defined by legal norms.⁵¹ It is an active promoter of judicialisation and it is a prime site for this universalising tendency. Scholars in the field of transitional justice appear to remain unaware of the fact that the institutions and mechanisms the literature endorses in transitional societies are “held together by common concepts, practical aims, and distinctive claims for legitimacy,” embedded in a specific intellectual tradition.⁵² The field of study is driven by given norms and assumptions about the nature of law. The rule of law is viewed as a “set of benchmarks rather than a lived ethos within society.”⁵³ That is, the rule is seen as a value-free standard to be sought out and achieved. This, in itself, is contrary to a number of indigenous traditions that see law and justice as a lived experience, always reflecting the needs and preferences of those involved, as opposed to a rigid body of rules disconnected from local realities.⁵⁴ As a result, the field of transitional justice emerges as a “site where conflicting social rationalities test the limits of law order, guaranteeing peace and sustaining integrity.”⁵⁵

The western intellectual and legal tradition, rooted in an inherently universalising discourse of enlightenment rationalism, threatens different ways of knowing and doing justice. As argued by Bryan, “the rule of law’s guarantee of ensuring justice and justice for all collapses in on itself when the fact of its universality is exactly what ensures that all people are not treating equally.”⁵⁶ By claiming the universality of our conceptual knowledge, transitional justice scholars risk generating inaccurate accounts of the problems encountered in transitional societies, and, much worse, design solutions with little applicability. The irony, of course, is that, unconsciously, the Western rhetoric surrounding the rule of law and other transitional and development efforts “performs the same function of the imperialism it nominally scorns, relegating the non-European other to a less advanced stage of development.”⁵⁷ Other ways of interpreting justice are simply relegated to second place or

⁴⁸ C. Bell, C. Colm, & F. Ní Aoláin, ‘Justice Discourses in Transition’, *Social and Legal Studies* 2004-3, p. 307.

⁴⁹ C. Hiram, ‘Reforming Judicial Reforms Inspired by US Models’, *De Paul Law Review* 2003-351, p. 361.

⁵⁰ Nagy 2012, supra note 24.

⁵¹ P. Zumbansen, ‘Transitional Justice in a Transnational World: The Ambiguous Role of Law’, in: *CLPE Law Research Paper Series: Osgoode Hall Law School* 2008, pp. 8-9; C. Bell, ‘Transitional Justice, Interdisciplinarity and the State of the Field of Non-Field’, *The International Journal of International Justice* 3, 2009-1, p. 1.

⁵² P. Arthur, ‘How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice’, *Human Rights Quarterly* 2009-2, p. 324.

⁵³ R. Nagy, ‘Centralizing Legal Pluralism? Transitional Justice and Traditional Mechanisms’, Paper presented at the International Studies Association, New Orleans 2010, p. 13.

⁵⁴ See for instance: R. Ross, *Returning to the Teachings: Exploring Aboriginal Justice*, Canada: Penguin 2006; J. Tauri & A. Morris, ‘Re-Forming Justice: The Potential of Maori Processes’, in: E. McLaughlin, R. Fergusson, G. Hughes and L. Westmarland (eds.), *Restorative Justice: Critical Issues*, London: The Open University 2003, pp. 44-54; J. Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice*, London: Kingsley 2009.

⁵⁵ P. Zumbansen, *Transitional Justice in a Transnational World*, CLPE Research paper 2008-40, p. 1.

⁵⁶ B. Bryan, ‘Property as Ontology: An Aboriginal and English Understanding of Property’, *Canadian Journal of Law and Jurisprudence*, 2000-1, p. 30.

⁵⁷ N. Mansfield, *Subjectivity: Theories of the Self from Freud to Haraway*, New York: New York University Press 2000, p. 127.

absorbed within the existing corpus of knowledge and the corresponding conceptual framework.

The universalising undercurrent of the legalist paradigm that underlies the transitional justice scholarship has extended beyond the mere promotion of international criminal law through international institutions such as the ICC. It now seeks to incorporate the standardisation and transplantation of legal institutions and practices. This, evidently, has important implications for the range of activities undertaken in post-conflict, transitional societies.

I.2 Strategic Challenges

The assumed impartiality and universality of the rule of law is most visible in the transfer of certain legal practices and judicial institutions to transitional societies. This is referred to by Bell as a transitional justice “toolkit”, whereby a specific array of mechanisms is chosen and delivered to address the legacies of mass violations of human rights.⁵⁸ This usually includes the establishment of domestic criminal trials, truth-seeking bodies, and other hybrid or restorative mechanisms. Oomen also argues against the implementation of “prefabricated justice packages” dictating the appropriateness of specific criminal codes and procedures in countries emerging from a variety of situations.⁵⁹ This was the case, for instance, in Afghanistan, Iraq, and Liberia, where the international community intervened and pushed for the creation of specific judicial institutions that mirrored international legal preferences.⁶⁰

Again, transitional justice and peacebuilding efforts are blended together and bear the brunt of similar criticism vis-à-vis their use of “IKEA type, flat-pack peace made from standardised components.”⁶¹ So while, as discussed earlier, the ontological and ideological assumptions that underpin the rule of law remain largely unaddressed, the practice of the international community in promoting specific mechanisms and patterns is often disparaged. The sharing of information and best practices for dealing with grave violations of human rights is certainly to be encouraged. Yet, there is a very real danger that transitional justice interventions and practices become both non-reflexive and homogenised across the board.⁶² As noted by Duggan, transitional justice mechanisms are too often “transferred across settings with insufficient reflection given to contextual relevance and appropriateness.”⁶³ In this respect, they risk being ineffective, or, worse, detrimental to the societies where they are implemented.

The implementation of this one-size-fits-all approach lacks the social, historical and cultural connection to the people who are primarily affected by the transition. It is based on the faulty belief that what has worked in a few developed and industrialised countries will work elsewhere.⁶⁴ As a result, local ownership of these processes and engagement in the rebuilding

⁵⁸ C. Bell, ‘Transitional Justice, Interdisciplinarity and the state of the field of non-field’, *International Journal of Transitional Justice* 3-1, p. 22.

⁵⁹ Oomen 2005, supra note 10, p. 891.

⁶⁰ A. Henkin, *Honoring Human Rights under International Mandates: Lessons from Bosnia, Kosovo and East Timor. Recommendations to the United Nations*, Washington: The Aspen Institute 2003, p. 5; International Development Research Centre, ‘The Responsibility to Protect’, Ottawa 2001.

⁶¹ R. MacGinty, ‘Indigenous Peace-Making Versus the Liberal Peace’, *Cooperation and Conflict* 2008-43, p. 145.

⁶² See for instance A. Guelke, *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies*. Basingstoke: Palgrave 2004, pp.168-83; J. Darby, ‘Borrowing and Lending in Peace Processes’, in: R. MacGinty (ed.), *Contemporary Peacemaking: Conflict, Violence and Peace Processes*, Basingstoke: Palgrave 2003, pp. 245–255.

⁶³ C. Duggan, ‘Editorial Note’, *The International Journal of Transitional Justice* 2010-4, p. 317.

⁶⁴ A.H Somjee, ‘Non-Western Theories of Development: Critiques and Explorations’, in: H. Wiarda (ed.), *New Directions in Comparative Politics*, Boulder: Westview Press 1991, p. 135.

of a just society is not always optimal. This is troublesome, for it is well known that ignoring local needs and failing to engage local actors is likely to undermine the anchoring of a lasting peace.⁶⁵ Local actors and communities must be involved in the design and implementation of transitional efforts for the process to work at all,⁶⁶ which is not always the case with the top-down creation of judicial institutions. This is particularly needed in societies that have been scarred by deep social and cultural divides, such as in Rwanda.⁶⁷ Recreating dialogue between parties, via locally led and owned programs, is often the best way to bridge differences and restore trust.

Unfortunately, the international community continues to concentrate much of its efforts around the strengthening of state institutions.⁶⁸ Often, the kinds of judicial institutions and reforms promoted in transitional societies reflect a specific understanding of the source of law and order, as well as the role of the state in maintaining both. Typically, a majority of governmental and non-governmental donors target their funding towards a given array of programs that support the strengthening of state legislature.⁶⁹ The general tendency of the international community is to “see justice and justice delivery as quintessentially the business of the state or state-like institutions.”⁷⁰ The Belgian Development Agency, the United Kingdom’s Foreign and Commonwealth Office, and the Swedish International Development Cooperation Agency, for instance, partnered in a three year *Projet D’Appui Institutionnel et Operationel à la Justice* in Burundi, whereby 8.7 million Euros were devoted to the strengthening of the country’s judicial institutional capacities.⁷¹ Activities include things such as the establishment of a Judicial Training Institute, the publication of legal texts and documentation, the training of state lawyers, as well as the provision of material support and legal expertise to the Ministry of Justice.⁷² Similar projects have been launched by a number of countries including France, Germany and Canada, amongst others. The European Union, for instance, also requires and assists in the creation of stable institutions guaranteeing democracy, the rule of law and human rights, as a condition of accession in the European Union.⁷³

This one-size-fits-all approach effectively limits the space for alternative modes of doing justice and making peace. According to MacGinty, the “template style intervention” of western donors and the ensuing structural power that it endows them with contributes to the “marginalisation of traditional and indigenous approaches.”⁷⁴ Even though the international

⁶⁵ A. Austin, M. Fischer & N. Ropers, *Transforming Ethnopolitical Conflict: The Berghof Handbook*, Wiesbaden: Berghoff Research Center for Constructive Conflict Management 2004, p. 388.

⁶⁶ H. Reich, ‘Local Ownership’ in *Conflict Transformation Projects Partnership, Participation or Patronage?*, Wiesbaden: Berghof Research Center for Constructive Conflict Management 2006, p. 6; S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford: Oxford University Press 2004, p. 182.

⁶⁷ E. Oghogho, ‘Rwanda. The Importance of Local Ownership of the Post-Conflict Reconstruction Process’, *Conflict Trends, Journal of African Centre for Constructive Resolution of Disputes*, 2003-4, pp. 43-7.

⁶⁸ M. Matua, ‘Savage, Victims, Saviors: The Metaphor of Human Rights’, *Harvard International Law Journal* 2001-1, pp. 201-46.

⁶⁹ Oomen 2005, supra note 10, p. 899.

⁷⁰ K. McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’, *Journal of Law and Society*, 2007- 7, p. 28.

⁷¹ The Belgian Development Agency, ‘Renforcement a L’etat Du Droit Au Burundi’.

⁷² Ibid.

⁷³ This is currently the case for Turkey and Croatia, see The European Commission, ‘How does a Country Join the EU’, at:

http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm, (accessed on 17 October 2011).

⁷⁴ R. MacGinty, ‘Indigenous Peace-Making Versus the Liberal Peace’, *Cooperation and Conflict* 2008-43, p. 139.

community has adopted a discourse of accommodation of traditional and other non-state approaches, the standardising practices put in place often confine alternative processes within a legalistic framework.⁷⁵ This is the case in New Zealand where the government is actively trying to fit *tikanga* within its existing judicial framework and institutions. Some organisations, like the UK Department for International Development, believe that customary mechanisms can serve to complement formal judicial and state mechanisms, and continue to promote this idea in their development aid and programmes.⁷⁶ In fact, some even argue that international efforts have “simultaneously enabled and disabled attempts by indigenous people to gain greater control” over the policies and institutions that target them.⁷⁷ Yet, the international community’s position vis-à-vis customary justice mechanisms is clearly spelled out in the UN Secretary General’s Report on the Rule of Law and Transitional Justice. The document talks about *conforming* indigenous and traditional processes with international standards.⁷⁸ This means that customary mechanisms are to be tolerated so long as they can be judicialised to correspond to international legal norms and expectations. As MacGinty explains, the relationship between international law and local traditional justice practices is more often one of “co-option rather than a co-existence of equals.”⁷⁹

A quick look at the existing research on customary mechanisms of justice clearly illustrates this tendency.⁸⁰ Rwanda’s *gacaca* courts are a prime example of how the international interest and support of customary mechanisms led to their co-option. Drumbl, for instance, exposes the call for *gacaca* courts to become “as legal as possible” so as to emulate the trial model and thereby conform to the international law paradigm.⁸¹ The overall coordination and organisation of *gacaca* courts was in the hands of the Rwandan state and its Department of Gacaca Jurisdiction within the Ministry of Justice.⁸² The intervention of the state and the international community has, in fact, radically altered the traditional Rwandan process of doing justice,⁸³ removing the voluntary and grassroots aspects of the process. This has resulted in *gacaca* courts having little authenticity in the eyes of those who knew how these processes were traditionally (in the sense of pre-genocide) conducted.⁸⁴ In the research I conducted in New Zealand, I found that the New Zealand government’s ongoing attempt to include Maori practices within its judicial framework has produced, at best, mixed results.

⁷⁵ See for instance A. Hurwitz & K. Studdard, *Rule of Law Programs in Peace Operations*, New York: International Peace Academy 2005.

⁷⁶ DFID, ‘Non-state Justice and Security Systems’, 2004, at: <http://www.gsdrc.org/docs/open/SSAJ101.pdf> (accessed on 2 September 2012).

⁷⁷ L.T.A. Macdonald & P. Muldooni, ‘Globalisation, Neo-Liberalism and the Struggle for Indigenous Citizenship’, *Australian Journal of Political Science* 2006-2, pp. 209-210.

⁷⁸ See United Nations Security Council, ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, 2004, p. 12.

⁷⁹ MacGinty 2008, supra note 74, p. 158.

⁸⁰ While the case of Rwanda’s *gacaca* tribunals is one that has received much attention in the literature, scholars have also looked at similar mechanisms in Uganda, Somalia and Afghanistan to name a few. See for instance L. Huyse & M. Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, Stockholm: International Institute for Democracy and Electoral Assistance 2008; S. Schmeidl, ‘Successful Cooperation or Dangerous Liaison? Integrating Traditional and Modern Justice Mechanisms in Southeastern Afghanistan’, Paper presented at the Annual Convention of the International Studies Association, New York 2009; P. Van Tongeren, M. Brenk, M. Hellema & J. Verhoeven, *People Building Peace II: Successful Stories of Civil Societies*, London: Lynne Rienner Publishers 2005.

⁸¹ M. Drumbl, ‘Sclerosis: Retributive Justice and the Rwanda Genocide’, *Punishment and Society* 2000-3, p. 16.

⁸² Amnesty International, ‘Rwanda: Gacaca, a Question of Justice’, at: <http://www.amnesty.org/en/library/info/AFR47/007/2002> (accessed on 12 April 2011).

⁸³ F. Kerrigan, *Some Issues of Truth and Reconciliation in Genocide Trials*, Stockholm: Stockholm International Forum 2002, p. 3.

⁸⁴ Oomen 2005, supra note 10, p. 904.

To a large extent, many Maori remain suspicious of the government's attempts, which they view as mere tokenism.⁸⁵

I would argue that the unbridled promotion of the rule of law and its institutions contributes to a kind of "epistemic violence of commensurability," which seeks to silence other subaltern ways of knowing.⁸⁶ There is ample evidence across the African continent, Latin America, the Middle East as well as in Eastern Europe, of the homogenising, if not outright colonising, tendency of the legalist paradigm. Customary practices are tolerated only to the extent that they can imitate and adopt tenets of the legalist tradition. In his examination of the Aboriginal and English understandings of property, Bryan explains that "we enframe Aboriginal reality in a particular way in order to structure it according to the dictates of our own society."⁸⁷ In other words, we create space for the other - in this case, the Aboriginal way of knowing, *within* our conceptual framework and language. It seems that we are either unable or unwilling to envisage ways of knowing that surpass our own imagination.

Mbembe notes that the western philosophical and political tradition "has long denied the existence of any 'self' but its own."⁸⁸ As a result, and in response to this inability to see other ways of knowing in their entirety, we constantly seek to redefine them. According to Frantz Fanon, this is emblematic of colonialism, which "forces the people it dominates to ask themselves the question constantly: in reality, who am I?"⁸⁹ It relentlessly reminds them of their difference and the need to re-define themselves in opposition to the dominant society and against the backdrop of racial labelling and stereotyping. The colonised continuously has to redefine itself to reflect the dominant paradigm. This, in turn, contributes to its marginalisation and a form of identity crisis.

During his address at the 4th International Indigenous Conference on Traditional Knowledge in Auckland, Moana Jackson explained, "colonisation has damaged the wholeness of who we are."⁹⁰ In an exploration of Maori traditional knowledge and identity, Jackson discussed the constant challenge that is being brought against the wholeness of Maori identity, which has had to adapt itself in order to be "accepted" and understood by the settler society. This has also very clearly been the case with Maori customary mechanisms of justice, which have had to be redefined to absorb elements of the legalist paradigm in order to be tolerated.⁹¹

Conclusion

Judicial reform has become a hallmark of transitional justice, and an "enabling condition or precondition" of the field.⁹² There is no doubt that the unquestioned faith of transitional

⁸⁵ For further information, refer to S. Vieille, 'Māori Customary Law: A Relational Approach to Justice', *The International Indigenous Policy Journal*, 2012-1, at: <http://ir.lib.uwo.ca/iipj/vol3/iss1/4> (accessed 2 September 2012). And see for instance, M. Jackson, 'Justice and Political Power: Reasserting Maori Legal Processes', in: K. Hazelhurst (ed.), *Legal Pluralism and the Colonial Legacy*, Aldershot: Avebur 1995; M. Belgrave, *Maori Customary Law: From Extenuation to Enduring Recognition*, The New Zealand Law Commission Library 1996.

⁸⁶ D. Otto, *Subalternity and International Law: The Problem of Global Community Amd the Incommensurability of Difference*, USA: University of Michigan Press 1999, p. 167.

⁸⁷ B. Bryan, 'Property as Ontology: An Aboriginal and English Understanding of Property', *Canadian Journal of Law and Jurisprudence* 2000-1, p. 28.

⁸⁸ A. Mbembe, *On the Postcolony*, London: University of California Press 2001, p. 2.

⁸⁹ F. Fanon, *The Wretched of the Earth*, New York: Grove Press 1963, p. 203.

⁹⁰ M. Jackson, 'Power, Law and the Privilege of Difference', Paper Presented at the 4th International Indigenous Conference on Traditional Knowledge, Auckland 2010.

⁹¹ For further discussion on the topic, refer to S. Vieille, 'Frenemies: Restorative Justice and Customary Mechanisms of Justice', *Contemporary Justice Review* 2012-4 (forthcoming).

⁹² M. Ndulo & R. Duthie, 'The Role of Judicial Reform in Development and Transitional Justice', in: P.

justice scholarship and the international community in the rule of law influences the type of interventions performed in transitional societies. The nature and underlying assumptions of the rule of law are, however, rarely assessed. The kinds of institutions transplanted and the legal assistance provided to transitional societies are often based on a given, preconceived template borrowed from the European legal tradition. As a direct consequence of this clear preference for the rule of law and its state institutions, non-state, local and customary approaches are often marginalised, if not assimilated within the push for judicialisation. As noted by Nagy, tension between international norms and local context “is and will continue to be an increasing challenge for the project of transitional justice.”⁹³ The difficulty, therefore, lies in finding ways to accommodate differences, without one way of knowing being subservient to the other. There is a real danger that the field of transitional justice simply serves to promote, maybe even involuntarily, a biased approach to doing justice, which fails respond to local needs and realities. It is crucial, therefore, that transitional justice scholarship recognises that its promotion of a specific legal tradition and institutions is akin to a “form of unconscious eradication of alternative understandings of the world.”⁹⁴ We absolutely need to interrogate our own way of understanding law, if we are to even start to comprehend different ways of knowing.⁹⁵ Academia’s unquestioned preference for and promotion of the rule of law and its institutions, regardless of context, risks rendering the work carried out in the field grossly inapplicable and disconnected from a variety of other local realities. Worse yet, by continuing to blindly promote its own legal framework and institutions, transitional justice scholarship runs the risk of being perceived as illegitimate and dangerously homogenising.

De Greiff and R. Duthie (eds.), *Transitional Justice and Development: Making Connections*, New York: Social Science Research Council 2009, p. 263.

⁹³ R. Nagy, ‘Transitional Justice as Global Project: Critical Reflections’, *Third World Quarterly* 2008-2, p. 288.

⁹⁴ B. Bryan, ‘Property as Ontology: An Aboriginal and English Understanding of Property’, *Canadian Journal of Law and Jurisprudence* 2000-1, p. 29.

⁹⁵ A. Norrie, ‘From Law to Popular Justice: Beyond Antinomianism’, in: E.D. Smith & P. Fitzpatrick, *Laws of the Postcolonial*, USA: University of Michigan Press 1999, p. 249.