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Transitional justice and liberal post-conflict governance: Synergies and symmetries, frictions and contradictions

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**Part I: Transitional Justice and its Engagement
with “the Local”**

Chapter I: Addressing Dilemmas of the Global and the Local in Transitional Justice¹

The importance of “the local” (local ownership, local values, local practices, etc.) is an increasingly common trope in post-conflict peacebuilding and transitional justice discourse.² While transitional justice solutions have at times been imposed from the outside, it is now acknowledged that the United Nations (UN) must better support “local ownership” in matters of post-conflict justice and that “due regard” must be given to local justice and reconciliation traditions.³ Paeans to the value of the local in policy circles are paralleled by a growing body of scholarship on the topic that has sought to explore the complexities of bringing dimensions of the local from the periphery to the foreground of transitional justice work.⁴ Put succinctly, the current moment in transitional justice is marked by a veritable “fascination with locality.”⁵

While the reasons for this growing attention are complex, it could be said to reflect the commonsense understanding that peace processes and justice mechanisms not embraced by those who have to live with them are unlikely to be successful in the long term.⁶ Interventions perceived as being imposed “from the outside” may spark backlash and resentment that undermines both legitimacy and effectiveness.⁷ In that

¹ This dissertation chapter was originally published in the *Emory International Law Review* 29 (2014): 71-117.

² See, e.g., U.N. Secretary General, *Report of the Secretary General on Peacebuilding in the Immediate Aftermath of Conflict*, UN Doc. A/63/881-S/2009/304 (June 11, 2009), ¶ 7 (Observing that “[t]he imperative of national ownership is a central theme of the present report.”); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (Aug. 23, 2004), ¶¶ 16-17, 36 (arguing that the UN must “learn better how to respect and support local ownership, local leadership and a local constituency for reform.”); Simon Chesterman, “Walking Softly in Afghanistan: The Future of UN Statebuilding,” *Survival* 44 (2002): 41 (noting that “[e]very UN mission and development program now stresses the importance of local ‘ownership.’”).

³ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004), ¶¶ 16-17, 36; Chandra Lekha Sriram, “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,” *Global Society* 21, no. 4 (2007): 591.

⁴ See, e.g., Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington: USIP, 2011); Rosalind Shaw and Lars Waldorf, eds., *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford: Stanford University Press, 2010); Alexander Hinton, ed., *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Newark: Rutgers University Press, 2010); Erin Baines, “Spirits and Social Reconstruction After Mass Violence: Rethinking Transitional Justice,” *African Affairs* 109, no. 436 (2010): 409; Elizabeth Stanley, “Transitional Justice: From the Local to the International,” in *The Ashgate Research Companion to Ethics and International Relations*, ed. Patrick Hayden (Farnham, UK: Ashgate, 2009).

⁵ Rosalind Shaw and Lars Waldorf, “Introduction,” in *Localizing Transitional Justice*.

⁶ See Timothy Donais, “Haiti and the Dilemmas of Local Ownership,” *International Journal* 64 (2008-2009): 759.

⁷ See Andrea Talentino, “Perceptions of Peacebuilding: The Dynamic of Imposer and Imposed Upon,” *International Studies Review* 8, no. 2 (2007): 153.

sense, grappling with the dilemmas of the global and the local is not an option, but a profoundly pragmatic imperative.⁸ Yet despite the acknowledged centrality of the local, concepts like local ownership remain vague and poorly understood, being marshaled in different ways by different actors for different ends,⁹ often being associated more with aspirational rhetoric than concrete policy reality.¹⁰ Moreover, in the transitional justice context—a context permeated with international normative frameworks, institutions, donors, and technocratic expertise—the odds are often stacked against giving primacy to the local in a meaningful sense.¹¹ It is perhaps, therefore, unsurprising that transitional justice interventions have been and continue to be a frequent locus of tensions between the global and the local.¹²

Examined more deeply, the seeming consensus about the importance of the local masks a profound ambivalence.¹³ Building upon local ownership, priorities, practices, and values is often recognized as among the keys to the success in transitional justice interventions,¹⁴ and yet local practices and solutions can also lead to stark clashes with international human rights standards.¹⁵ The appeal to the local can

⁸ See U.N. Secretary General, *Report of the Secretary General on Peacebuilding in the Immediate Aftermath of Conflict*, ¶ 7 (Observing that “[t]he imperative of national ownership is a central theme of the present report.”)

⁹ See Daniel Bendix and Ruth Stanley, “Deconstructing Local Ownership of Security Sector Reform: A Review of the Literature,” *African Security Review* 17, no. 2 (2010): 101.

¹⁰ Timothy Donais, “Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes,” *Peace and Change* 34, no. 1 (2009): 5 (observing that in the broader field of peacebuilding, “local ownership has rarely moved beyond the level of rhetoric.”); Simon Chesterman, “Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations,” *Journal of Intervention and Statebuilding* 1, no. 1 (2007): 9 (noting that in the fields of post-conflict reconstruction and development, ownership “has frequently been of more rhetorical significance than anything else.”)

¹¹ See Jaya Ramji-Nogales, “Designing Bespoke Transitional Justice: A Pluralist Process Approach,” *Michigan Journal of International Law* 21 (2010-2011): 21 (noting that “[i]n transitional justice mechanisms to date, the international justice proponents’ concerns have generally been paramount, perhaps because they often provide much of the funding and technical support for transitional justice mechanisms in the developing world.”)

¹² See Alexander Hinton, “Introduction,” in *Transitional Justice: Global Mechanisms and Local Realities*, 9 (observing that “transitional justice mechanisms almost always have unexpected outcomes that emerge out of ‘frictions’ between . . . global mechanisms and local realities.”)

¹³ See Oliver Richmond, *A Post-Liberal Peace* (Milton Park: Routledge, 2011), 153.

¹⁴ In an oft-cited comment on the topic, Kofi Annan noted that “no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable.” U.N. Secretary-General, *The Rule of Law and Transitional Justice*, ¶ 17. Leopold von Carlowitz has observed that while policy-makers, academics and practitioners generally agree with this principle, local ownership has nevertheless proven difficult to operationalize in practice. *Local Ownership in Practice: Justice System Reform in Kosovo and Liberia*, Occasional Paper No. 23 (Geneva: DCAF, 2011), 1.

¹⁵ See Peter Uvin, “Difficult Choices in the New Post-Conflict Agenda: the International Community in Rwanda After the Genocide,” *Third World Quarterly* 22, no. 2 (2001): 185-86

also be used by local elites to reinforce oppressive power structures, some of which may have led to the conflict in the first place.¹⁶ For these and others reasons, there is a deep distrust of local agency in the post-conflict context.¹⁷ Ultimately, the dilemmas of the local therefore reflect a clash of normative commitments: between liberal internationalism and international human rights on the one hand, and principles of local sovereignty and autonomy on the other.¹⁸ The result of this ambivalence, as played out through global-local power disparities, has typically been accommodation of the local to the extent of conformity with the global, co-option and not co-existence.¹⁹

Conflicting commitments call for a complicated balancing act. In some contexts, too much local may be as problematic as too much global.²⁰ While it may be an all-but-impossible needle to thread,²¹ finding the right balance between global and local agency, priorities, practices, and values stands out as one of the key policy challenges of 21st century transitional justice.²² To this end, this article seeks to analyze and deconstruct the concept of the local in the transitional justice context, exploring its promises and pitfalls. In doing so, I attempt to make three key points.

First, a better understanding of the role of the local in transitional justice discourse and practice requires that we think carefully about why transitional justice should have so often become the locus for such vivid global-local tensions in the first place. While cautioning against unduly rigid notions path dependency, I offer the

(noting that “when internal or local solutions emerge, they often take forms that do not conform to Western ethnical ideals of international legal principles.”)

¹⁶ See Patricia Lundy, “Paradoxes and Challenges of Transitional Justice at the ‘Local’ Level: Historical Enquiries in Northern Ireland,” *Contemporary Social Science* 6, no. 1 (2011): 93 (reviewing arguments in the literature that “transitional justice can be used by elites for a variety of purposes and to serve or conceal other very different political agendas.”)

¹⁷ Florian Kuhn, “The Peace Prefix: Ambiguities of the Word ‘Peace’,” *International Peacekeeping* 19, no. 4 (2012): 402.

¹⁸ See Donais, “Haiti and the Dilemmas of Local Ownership,” 755-56. Global frictions arise in part due to a clash between universalism and particularism—a dynamic at the heart of the cultural relativism debate in human rights. Yet it is important to note here that values like participation, inclusion, and local agency are themselves often held out as universal values intended to trump others, and at times are even as a shield against local or traditional practices that might discriminate or otherwise fail to be fully inclusive. Thus, the clash of normative commitments I speak of here is much more complex than frictions between a cosmopolitan liberalism and vigorous localism, and could also be thought of a tension between different (purportedly universal) liberal commitments.

¹⁹ See Stephanie Vielle, “Transitional Justice: A Colonizing Field?,” *Amsterdam Law Forum* 4, no. 3 (2012): 66.

²⁰ See Donais, “Empowerment or Imposition?,” 21.

²¹ See Roland Paris and Timothy Sisk, *Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding* (International Peace Academy/Research Partnership on Postwar Statebuilding, 2007), 5 (suggesting that insofar as the dilemmas of postwar statebuilding stem from “compelling but mutually conflicting imperatives,” they may prove unresolvable).

²² I have elsewhere outlined this and other key dilemmas that characterize what I call “fourth generation transitional justice.” Dustin Sharp, “Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice,” *Harvard Human Rights Journal* 26 (2013): 149.

historical and ideological origins of transitional justice in Western liberalism and legalism as one partial explanation for the global-local “frictions” experienced today.²³ I also sketch the contours of several decades of transitional justice practice to highlight the continued relevance of those origins.

Second, because concepts like local ownership present a loose and often confusing theme in academic and policy discourse that subsumes a wide range of critiques and concerns, understanding global-local dilemmas requires one to unpack the concept, distinguishing concerns about actual *control* (agency, decision making, funding), *process* (bottom-up, participatory, homegrown), and *substance* (values, practices, priorities), even if those concerns are in practice highly related. Given the rise of transitional justice interventions in recent decades, tensions and conflict between global and local will inevitably continue for the foreseeable future. At the same time, approaches to post-conflict justice that take into account the need for a better global-local balance along the multiple axes of local ownership (control, process, and substance) may help to generate new and innovative approaches to trying to achieve peace with justice in the wake of mass atrocity that take us beyond the increasingly rote transitional justice “toolbox.”²⁴

Finally, I observe that breaking down concepts like local ownership tends to destabilize, deconstructing simple binary notions of global and local. In reality, transitional justice processes typically involve complicated interplay between multiple varied levels, resulting in a dialectic process where global and local are transformed by their encounter with each other.²⁵ This has led some scholars to question the value of the concept of the local, arguing instead for more complicated notions of “glocality,” “translocality,” and “local and larger local.”²⁶ Yet as an ideal, the concept of the local

²³ As Miller et al. have noted, the “frictions” concept helps to stress the unexpected, unintended, and extremely complex nature of what happens when global meets local. See Gearoid Millar, Jair Van Der Lijn, and Willemijn Verkoren, “Peacebuilding Plans and Local Reconfigurations: Frictions between Imported Processes and Indigenous Practices,” *International Peacekeeping* 20, no. 2 (2013): 139.

²⁴ The phrase “transitional justice toolbox” refers to the mechanisms and interventions most associated with the field: prosecutions, truth telling, reparations, vetting and dismissals, institutional reform, etc. The toolbox metaphor is increasingly critiqued as suggesting a set, one-size-fits-all template ignorant of context, and because the tool idea implies that transitional justice interventions are somehow neutral, acultural, and apolitical.

²⁵ See Sally Engle Merry, “Legal Pluralism and Transnational Culture: The Ka Ho’okolokolonui Kanaka Maoli Tribunal, Hawai’i, 1993,” in *Human Rights, Culture and Contest: Anthropological Perspectives*, ed. Richard Wilson (London: Pluto Press, 1997), 30 (arguing that “human rights is an open text, capable of appropriation and redefinition.”); Sally Engle Merry, “Global Human Rights and Local Social Movements in a Legally Plural World,” *Canadian Journal of Law and Society* 12 (1997): 249 (noting that “global rights discourses are appropriated in local communities [and] are themselves constructed out of local struggles.”)

²⁶ See Lundy, “Paradoxes and Challenges,” 93 (reviewing perspectives that seek to move beyond the “stark and mutually exclusive binary oppositions of ‘local’ and ‘global’ that tend to dominate transitional justice literature.”); Bruce Mazlish, “The Global and the Local,” *Current Sociology* 53, no. 1 (2005): 99 (discussing the idea of “local and larger local”).

continues to provide an important counterweight to the centralizing and universalizing tendencies of transitional justice and liberal international peacebuilding more generally. Concepts of local and global therefore retain utility for purposes of both analysis and policymaking, even if they do not accurately describe the full complexity of transitional justice processes.

This article consists of six sections. In Section II, I examine the ideological and historical origins of the field of transitional justice, with a view to how these origins have shaped some of the boundaries, tensions, and dilemmas of field. In Section III, I discuss some of the frequent critiques of mainstream transitional justice practice, particularly the idea that it is largely a top-down and state-centric enterprise that pays insufficient attention to questions of local ownership, agency, priorities, practices, and values. In Section IV, I examine some of the promises and pitfalls of greater engagement with the local in matters of transitional justice. In Section V, I argue for the need to break down concepts of local ownership as a means of striking a better global-local balance. Section VI concludes the article.

A. The Historical and Ideological Origins of Transitional Justice

Transitional justice can be conceived of as a set of moral, legal, and political dilemmas involving how best to respond to mass atrocities and other forms of profound injustice in the wake of conflict or in times of political transition.²⁷ It is often defined in part by reference to a set of practices—including prosecutions, truth-seeking, vetting and dismissals, reparations, and institutional reform—now associated with responses to widespread human rights violations.²⁸ In the last three decades, these practices have become increasingly widespread. Priscilla Hayner, for example, has documented the existence of some 40 modern-day truth commissions.²⁹ Kathryn Sikkink has demonstrated an increasing crescendo of human rights prosecutions taking place at national and international levels leading, she argues, to the emergence of a new global

²⁷ Sriram, “Justice as Peace?,” 582-83. For a review of how definitions of transitional justice have evolved over time, see Rosemary Nagy, “Transitional Justice as a Global Project: Critical Reflections,” *Third World Quarterly* 29, no. 2 (2008): 277-78; see also Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009): 329-32 (tracing the history of the use of the term “transitional justice”).

²⁸ According to a famous UN definition, “[transitional justice comprises] the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” U.N. Secretary-General, *The Rule of Law and Transitional Justice* (2004), ¶ 8.

²⁹ Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2011), 256-62.

norm of accountability, at least for certain harms.³⁰ In a relatively brief span of history, therefore, transitional justice has in a sense gone mainstream, with the question no longer being whether there will be some kind of transitional justice, but what particular interventions will be deployed, and what their scope and sequencing might look like.³¹ Though it continues to be shaped by the broader field of international human rights, transitional justice has emerged as its own field of theory, policy, and practice, with dedicated NGOs, job descriptions, academic journals, and itinerant expert consultants.³²

Practices now associated with what we call transitional justice can be traced back millennia,³³ yet the origins of the modern field have firm roots in the 1980s and 90s and the attempts of nascent democracies during the so-called “third-wave” of democratic transitions³⁴ to grapple with historical legacies of repression and widespread human rights abuses.³⁵ Born out of the euphoria of the immediate post Cold-War era, an era pregnant with the rhetoric of Francis Fukuyama’s “end of history,”³⁶ transitional justice was shaped not just by a preoccupation with accountability for past human rights violations, but by the notion that grappling with the legacies of the past would also help to facilitate a democratic political transition.³⁷ Implicit in these twin impulses and the

³⁰ See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton and Co., 2011), 21.

³¹ See Nagy, “Transitional Justice as a Global Project,” 276; see also Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34 (2007): 412.

³² See Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” *International Journal of Transitional Justice* 3, no. 1 (2009): 7 (arguing that transitional justice emerged as a distinct field sometime after 2000); Laura Arriaza and Naomi Roht-Arriaza, “Social Reconstruction as Local Process,” *International Journal of Transitional Justice* 2, no. 2 (2008): 152 (noting that “[a] whole agenda—and a whole set of institutions and professionals—has emerged to implement ‘transitional justice’ interventions.”)

³³ See generally Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004) (reviewing historic practices now associated with the modern field of transitional justice).

³⁴ The “third wave” is a term used by political scientist Samuel Huntington to describe a period of global democratization beginning in the mid-1970s that touched more than sixty countries in Europe, Latin America, Asia, and Africa. See generally Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991).

³⁵ See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 325-26. The definitive source that captures the thinking and spirit of the period is Neil Kritz’s seminal three-volume work. See generally Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington: USIP, 1995).

³⁶ See generally Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1992).

³⁷ Influential scholars from the period attempted to predict to what extent the scope of transitional justice would be determined by a set of bargains between the various elite groups facilitating the democratic transition, with more or less justice possible depending on the extent to which previous elites retained a grip on the levers of power. Samuel P. Huntington, “The Third Wave: Democratization in the Late Twentieth Century,” in Kritz, *Transitional Justice*, 54-81; Guillermo

ideology of the era was a sort of teleological or “stage-theory” view of history.³⁸ As part of this narrative, transitional justice mechanisms become a sort of secular right of passage symbolizing evolution³⁹ as countries progress from barbarism, communism, and authoritarianism to Western liberal democracy. Thus, viewing transitional justice as an apolitical “toolbox,” a notion implicit in UN and other definitions, fails to account for the important historical and ideological underpinnings of the field.⁴⁰ While transitional justice is a dynamic and evolving field, these origins remain key to understanding some of its modern conceptual boundaries, assumptions, and blindspots, shaped as they have been by a particular faith in the ability of key liberal goods, including the rule of law, democracy, legalism, and human rights, to create peace.⁴¹

Origins also help to explain in part the dominance of certain disciplines, approaches, and professional sensibilities in the field today. In the abstract, the question of how best to respond to mass atrocities is one well-suited to a range of disciplines, including philosophy, history, religion, anthropology, and psychology, yet in practice the field has for the most part been dominated by lawyers and political scientists.⁴² Given the dominance of lawyers in particular, it is perhaps not surprising that mass atrocities have been largely analogized as a form of mass crime,⁴³ and that the tools that have been marshaled in response have had a heavily legal character, often focusing more on retributive justice via formal courts and tribunals rather than other forms of justice.⁴⁴ This “prosecution preference,” under which anything short of Western-style courtroom justice is often seen as comprised justice, is seemingly hardwired into the DNA of mainstream transitional justice.⁴⁵ It has been and continues to be persistent source of debate and global-local frictions.⁴⁶ Though truth commissions as a form of restorative justice are

O'Donnell and Philippe Schmitter, “Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies,” in Kritz, *Transitional Justice*, 57-64.

³⁸ See Hinton, “Introduction,” in *Transitional Justice: Global Mechanisms*, 6-7.

³⁹ See Michael Rothberg, “Progress, Progression, Procession: William Kentridge and the Narratology of Transitional Justice,” *Narrative* 20, no. 1 (2012): 5.

⁴⁰ To An-Na'im, these historical and ideological underpinnings include an implicit neocolonial logic that places dominant conceptions of “transitional justice” within “the grand ‘modernizing’ mission of North Atlantic societies.” See Abdullahi Ahmed An-Na'im, “Editorial Note: From the Neocolonial ‘Transition’ to Indigenous Formations of Justice,” *International Journal of Transitional Justice* 7, no. 2 (2013): 197.

⁴¹ Sririam, “Justice as Peace?,” 579. On the dominance of law and legalism in transitional justice, see generally McEvoy, “Beyond Legalism.”

⁴² See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 333.

⁴³ Miriam Aukerman, “Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal* 15 (2002): 94-97.

⁴⁴ Rama Mani stands as an early exception to this trend, arguing for a more balanced approach to post-conflict reconstruction that would include three dimensions of justice: retributive, rectificatory, and distributive. See Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden: Blackwell Publishers, 2002);

⁴⁵ Aukerman, “Extraordinary Evil,” 39-44 (describing the “prosecution preference”).

⁴⁶ The prosecution preference can be seen in debates that raged in the late 1990s concerning whether a truth commission alone could constitute an adequate form of justice. See, e.g., Reed

arguably an exception to the historic emphasis on retributive responses to mass atrocities, it has been argued that they are still fundamentally rooted in Western modes of truth telling and traditions of public confession and may not be appropriate in cultures with a different historical grounding.⁴⁷ Other items routinely considered as among the standard tools of transitional justice such as reparations, which could be considered a limited form of distributive justice, have in practice been given comparatively little emphasis and funding in many transitional processes.⁴⁸

As a thought experiment, Arthur observes, one might consider the possible orientation of theory and praxis if the intellectual origins of transitional justice had been rooted in paradigmatic transitions to socialism and the dominant disciplines had been history and developmental economics.⁴⁹ While it is impossible to say for sure, it seems likely that the perceived dilemmas and preoccupations, together with the tools marshaled to address them would look considerably different. As an example, one could note the historic preoccupation of transitional justice with civil and political rights rather than economic and social rights, with acts of egregious physical violence such as murder, torture, and rape, rather than equally devastating acts and policies of economic and structural violence.⁵⁰ Greater attention to questions of distributive justice in transition—

Brody, "Justice: The First Casualty of Truth?," *The Nation*, April 30, 2001, 25 (arguing that truth commissions can serve as "a soft option for avoiding justice.") More recently, one can look to controversies sparked by ICC indictments of leaders of the Lord's Resistance Army rebel group in Uganda where some members of the Acholi community in Northern Uganda would prefer to forgo prosecutions in favor of *Mato Oput*, a local ritual that emphasizes reconciliation and reintegration rather than simple retribution. See generally Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21, no. 2 (2007): 179.

⁴⁷ See Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions; Lessons from Sierra Leone*, United States Institute for Peace Special Report 130 (Washington: USIP, 2005); see also Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly* 27 (2005): 361.

⁴⁸ See Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence," in *My Neighbor, My Enemy*, eds. Eric Stover and Harvey Weinstein (Cambridge: Cambridge University Press, 2004), 121 (noting that "[o]utside the context of the Second World War, examples of large-scale reparations programs become scarcer.")

⁴⁹ See Arthur, "How 'Transitions' Reshaped Human Rights," 359.

⁵⁰ There is a growing literature examining the extent to which transitional justice can and should grapple with economic and social rights and questions of distributive justice more generally. See, e.g., Dustin Sharp, ed., *Justice and Economic Violence in Transition* (New York: Springer, 2014); Gaby Oré Aguila and Felipe Gómez Isa, eds., *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Cambridge, Intersentia, 2011); Morten Bergsmo et al, eds., *Distributive Justice in Transitions* (Oslo: PRIO, 2010); Pablo de Grieff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: ICTJ, 2009); Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Politics* 40, no. 1 (2007): 1. The importance of greater engagement questions of economic justice has also been recognized by the UN. See, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634 (Oct. 12, 2011) ¶ 24 (observing "growing recognition that truth commissions should also address the economic, social and cultural rights dimensions of conflict to enhance

something that might have come more naturally if the field had different historical, ideological, and professional grounding—might well have entailed a focus on prosecutions for corruption and other economic crimes, together with a push for policies involving redistributive taxation or land-tenure reform in the wake of conflict. Yet as the field has evolved, these issues have been largely pushed to the margins.⁵¹ Thus, the Western liberal roots of transitional justice together with the professional orientations of those first drawn to the field helped to shape conceptions of both problems and solutions, circumscribing and stunting the nature of what counts as an injustice, who counts as a victim, as well as the nature of and emphasis within the “toolbox” itself.⁵²

While the historical and ideological origins of transitional justice may have predisposed the field to privilege certain forms of harm and certain ways of responding to those harms, it can be argued that the field’s roots in Western liberalism do not necessarily dictate internationally imposed solutions, “top-down” responses, or the more general marginalization of the local that has featured in many transitional justice interventions over time.⁵³ At the same time, the historic association between transitional justice and largely Western and legalistic responses to mass atrocity, when coupled with the field’s grounding in international law and international human rights more generally, has served to privilege international institutions, norms, practices, knowledge, and expertise.⁵⁴ The early dominance of lawyers and legalism may also help to explain a tendency to view social change as a function of elite bargaining and top-down legal-institutional reforms.⁵⁵ The result is an emphasis on a constrained yet institutionally demanding understanding of transitional justice that some have argued is not consistent

long-term peace and security”); United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (March 2010), 7 (noting that “Successful strategic approaches to transitional justice necessitate taking account of the root causes of conflict or repressive rule, and must seek to address the related violations of all rights, including economic, social, and cultural rights.”)

⁵¹ See generally Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 266.

⁵² For example, under the South African TRC Act, a “victim” was limited to individuals who had suffered “gross violations of human rights, including killing, abduction, torture, or ill-treatment.” The poverty, racism, and structural violence of the Apartheid system itself were thereby excluded. Pablo De Greiff and Roger Duthie, “Repairing the Past: Reparations for Victims of Human Rights Violations,” in *The Handbook on Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 8.

⁵³ Roland Paris has made this point with respect to similar critiques that have been leveled against the broader field of post-conflict peacebuilding. See Roland Paris, “Saving Liberal Peacebuilding,” *Review of International Studies* 36, no. 2 (2010): 363. I outline these critiques in more detail below.

⁵⁴ See generally Sharp, “Interrogating the Peripheries.”

⁵⁵ See Sandra Rubli, *Transitional Justice: Justice by Bureaucratic Means?* (Geneva: Swiss Peace Working Paper 4 – 2012), 11.

with the quality and capacity of state institutions in many post-conflict countries, to say nothing of cultural congruence.⁵⁶

Against this backdrop, the felt need for prosecutions and truth commissions “in conformity with . . . international standards”⁵⁷ often leads to the involvement of international donors, NGOs, and experts, placing a further thumb on the scales favoring the primacy of the global rather than the local. Indigenous or homespun solutions come to appear rough around the edges, second-best approaches to questions of how to do justice in times of transition.⁵⁸ Mirroring the savages-victims-saviors paradigm at the heart of some human rights advocacy, these dynamics produce a situation where the locals (savages) need to be assisted by international experts and institutions (saviors) not just from the abuses they have committed against victims during the conflict, but from the “mistakes” locals would make in attempting to devise their own post-conflict solutions as well.⁵⁹ Internationally constructed categories of “perpetrator” and “victim” are essential to justifying such interventions. (Who after all will defend the rights of “victims” if not members of the “international community”?)⁶⁰ The international assistance offered in such a context is projected as apolitical and technocratic, yet it carries with it heavy implications for the distribution of power (political, legal, social, etc.) in the post-conflict context.⁶¹

Of course, origins are not destiny, and the biases and blindspots of the early years of transitional justice need not necessarily be those of today. Thus, in seeking to understand contemporary challenges, unduly rigid notions of path dependency must be avoided. There are signs of limited but increasing openness to more diverse and culturally-grounded approaches to justice and a growing reconsideration of the need to

⁵⁶ See Lydiah Bosire, “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa,” *Sur International Journal on Human Rights* 5, no. 5 (2006): 72.

⁵⁷ U.N. Secretary-General, *The Rule of Law and Transitional Justice* (2004), ¶ 36.

⁵⁸ See An-Na'im, “Editorial Note,” 197 (observing that “preference is given to a standard of justice that is mandated by the international community over indigenous or ‘traditional’ practices.”)

⁵⁹ See generally Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42 (2001): 201.

⁶⁰ For a useful deconstruction of the problematic term “international community,” see generally Berit Bliesemann de Guevara and Florian Kuhn, “‘The International Community Needs to Act’: Loose Use and Empty Signaling of a Hackneyed Concept,” *International Peacekeeping* 18, no. 2 (2011): 135.

⁶¹ See Lundy and McGovern, “Whose Justice?,” 276-77 (noting that “wider geo-political and economic interests too often shape what tend to be represented as politically and economically neutral post-conflict and transitional justice initiatives”); Bronwyn Anne Leebaw, “The Irreconcilable Goals of Transitional Justice,” *Human Rights Quarterly* 30, no. 1 (2008): 98-106 (arguing that a superficial consensus as to the goals of transitional justice can serve to mask a deeper level of politicization and debate, and that assessment of the tensions, trade-offs, and dilemmas associated with transitional justice has become difficult to the extent that they have been conceptualized in apolitical terms); Sririam, “Justice as Peace?,” 587-88 (discussing the ways in which post-conflict institutional reform strategies relating to the judiciary, constitution, and security forces may be seen by key protagonists as permanently cementing new power arrangements and therefore not as neutral or apolitical processes).

address questions of economic justice.⁶² The field is also increasingly being shaped by perspectives from disciplines other than law and political science. Yet it is also true that once sets of practices and assumptions come to dominate a field, more than superficial change can prove difficult and slow going. As James Cavallaro and Sebastián Albuja have argued, the early years of transitional justice helped to establish a “dominant script” that has gone on to be replicated irrespective of how suited it has been to some new contexts.⁶³

Over time, the democratic transitions paradigm in which the field was originally grounded has become less explicit, and transitional justice is increasingly associated with the much broader field of post-conflict peacebuilding.⁶⁴ One could ask whether this newfound association will help to break through the conceptual boundaries and dominant scripts that have developed over time.⁶⁵ However, as many have noted, the field of international post-conflict peacebuilding is itself largely rooted in the belief that free markets and Western liberal democracies are the surest path to peace.⁶⁶ As I have argued elsewhere, the critiques of what has become known as “liberal international peacebuilding” share much in common with critiques of transitional justice, including that they both frequently involve top-down and state-centric interventions that serve to

⁶² See generally Sharp, “Interrogating the Peripheries.”

⁶³ James Cavallaro and Sebastián Albuja, “The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond,” in *Transitional Justice from Below, Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford and Portland, Oregon: Hart Publishing, 2008), 125. The problem of set templates and formulaic paths is of course not unique to transitional justice, but has dogged the broader work of post-conflict peacebuilding as well. See Ole Sending, *Why Peacebuilders Fail to Secure Ownership and be Sensitive to Context*, Security in Practice, NUPI Working Paper 755 (2009), 7. It is important to note, however, that even established and dominant scripts can and do change (as evident in the growing work of certain African truth commissions on questions of economic justice), even if it typically involves a very slow and uneven process. See generally, Dustin Sharp, “Economic Violence in the Practice of African Truth Commissions and Beyond,” in *Justice and Economic Violence in Transition*, 79.

⁶⁴ Thus, for example, transitional justice practices are now associated with countries and regime changes such as Rwanda that can hardly be considered democratic. See generally Phil Clark and Zachary Kaufman, eds, *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2009).

⁶⁵ Many have questioned the utility of the transitions paradigm altogether. See, e.g., Moses Chrispus Okello, “Afterword: Elevating Transitional Local Justice or Crystallizing Global Governance?,” in *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, 278-79 (questioning the “unintended consequences of assuming that we are all progressing towards the same destination”); Harvey M. Weinstein et al., “Stay the Hand of Justice: Whose Priorities Take Priority?,” in *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, 36 (stating that “[i]t is time to reconsider whether the term *transitional justice* accurately captures the dynamic processes unfolding on the ground”).

⁶⁶ See generally Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004).

marginalize local ownership, agency, priorities, practices, and values.⁶⁷ There is reason to worry that the concerns that have given rise to these parallel critiques will be exacerbated by greater association between transitional justice and post-conflict peacebuilding, not made better.⁶⁸ Thus, one should not expect global-local frictions in transitional justice to disappear as the historical and ideological origins of the field slip further below the surface. On the contrary, the lingering perception that transitional justice and post-conflict peacebuilding more generally share a common project to remake illiberal and imperfectly liberal states in the image of Western liberal democracies⁶⁹ helps to contribute to the tendency of post-conflict interventions with a strong international component to produce some of the global-local frictions discussed in the following Section.⁷⁰

B. Critiques of Transitional Justice Practice *Vis-à-Vis* the Local

While the ideological and professional origins of transitional justice theory and practice helped to shape the conceptual boundaries of the field and to set in motion some of the global-local frictions experienced today, it would be too simple to attribute everything to those origins. We must also look to several decades of transitional justice practice to better understand the dilemmas of the local. Transitional justice practice is, of course, not a monolith, and where trenchant critiques have been raised, there are always notable exceptions to the more general trend.⁷¹ And to be clear, much of the work of transitional justice—be it national-level human rights prosecutions or locally initiated and driven restorative justice practices—is carried out without significant tension with the global.⁷² Yet a persistent critique of many transitional justice initiatives is that they pay insufficient attention to questions of locality and have been distant from the

⁶⁷ See generally, Dustin Sharp, “Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique,” *Chicago Journal of International Law* 14, no. 1 (2013): 165.

⁶⁸ Ibid.

⁶⁹ See Lundy and McGovern, “Whose Justice?,” 276-77.

⁷⁰ As with development and transitional justice, there is a burgeoning peacebuilding literature analyzing the dilemmas of the local. See, e.g., Oliver Richmond, “The Romanticisation of the Local: Welfare, Culture, and Peacebuilding,” *International Spectator: Italian Journal of International Affairs* 44, no. 1 (2009): 161-63; Roger Mac Ginty, “Indigenous Peace-Making Versus the Liberal Peace,” *Cooperation and Conflict: Journal of the Nordic Studies Association* 43, no. 2 (2008): 139; Donais, “Empowerment or Imposition?,” 3.

⁷¹ See Jenny Peterson, “A Conceptual Unpacking of Hybridity: Accounting for Notions of Power, Politics and Progress in Analyses of Aid-Drive Interfaces,” *Journal of Peacebuilding and Development* 7, no. 2 (2012): 12 (noting the tendency of assessments of liberal interventions to homogenize).

⁷² At the same time, as I note in the following Section, great caution with categories of global and local is warranted. What may look like a purely “local” effort or initiative may turn out to have been in part initiated by internationals, and receive international funding, framing, and technical assistance. Thus, in practice, there is often a blurring of categories.

victims and larger communities they were at some level intended to serve. Examples here will be largely drawn from transitional justice initiatives with a significant international component or where global-local frictions have otherwise risen to the surface most palpably. International prosecutions, in particular, have tended to set global-local frictions in sharpest relief, and will be examined in some detail before turning more briefly to the work of truth commissions.⁷³

In many ways, the paradigm for modern-day international tribunals can be found in the Nuremburg International Military Tribunal (IMT) established by the victorious allied powers shortly after the Second World War in order to try senior Nazi leaders for aggression, war crimes, and crimes against humanity.⁷⁴ From the outset, the tribunal was dogged with criticism that it exemplified a form of victor's justice and made little attempt to secure what we might today call local ownership, drawing both judges and prosecutors from the ranks of the victors.⁷⁵ Indeed, quite apart from a preoccupation with such niceties, one of the chief policy debates in the lead up to the creation of the tribunal was whether to summarily execute senior Nazi leaders, with options ranging from 50 to 50,000 executions.⁷⁶ The trial option prevailed, however, and unlike some modern international tribunals the IMT was located in country, and in Nuremburg no less, the ceremonial birthplace of the National Socialist (Nazi) party and site of annual propaganda rallies. The choice of a trial (rather than executions) and a symbolic location in Germany were intended to help to generate a sense of defeat amongst the vanquished (*i.e.*, the locals), but also to serve an educational function for ordinary Germans in conveying some sense of the scope of the atrocities committed by the Nazis

⁷³ By "international prosecutions" I include purely international tribunals such as the international criminal tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC) and the so-called "hybrid" tribunals, such as the Special Court for Sierra Leone (SCSL). Though one could argue for a distinction between "international criminal justice," limited primarily to international and hybrid criminal tribunals, and the broader work of "transitional justice," the fact remains that since Nuremburg international tribunals have often been associated with transitional and post-conflict contexts, and tend to generate similar legal, political and moral dilemmas. Because it has the potential to hear cases from a great variety of countries, the International Criminal Court is not of course limited to addressing crimes in post-conflict or transitional contexts, yet its work in places like Uganda and Côte d'Ivoire has become central to post-conflict dynamics in both countries. Even when operating where there is no political transition to speak of, the ICC has demonstrated a capacity to generate very sharp global-local frictions. Thus, for purposes of analyzing global-local frictions at least, a sharp line between international criminal justice, on the one hand, and transitional justice on the other need not be drawn.

⁷⁴ For a fascinating account of the establishment of the Nuremburg tribunal and recap of the debates that it engendered, see Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2002), 147-205.

⁷⁵ With respect to the victor's justice charge, Chief Justice Stone of the United States Supreme Court famously called the trials a "high-grade lynching party" and a "sanctimonious fraud." Louise Arbour, "The Rule of Law and the Reach of Accountability," in *The Rule of Law*, eds. Cheryl Saunders and Katherine Le Roy (Annandale: Federation Press, 2003), 104.

⁷⁶ Gary Bass, *Stay the Hand of Vengeance*, 158-95.

in their name.⁷⁷ Ultimately, though better than the alternatives debated at the time, there can be little doubt that the Nuremburg (and lesser known Tokyo) tribunals were an imposed justice and that the ability of local constituencies to have meaningful input into the process was limited to nonexistent.⁷⁸

Despite some of the controversy generated by the Nuremburg and Tokyo tribunals, they helped to spark an interest in the creation of a permanent international criminal court.⁷⁹ However, Cold War frictions soon made consensus on the parameters of such an institution impossible.⁸⁰ Nevertheless, the Nuremberg model remains important because it was in some respects resurrected in the mid 1990s with the creation of the ad-hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The first major post-Cold War experiments in international justice, both tribunals served as a lightning rod for critiques and concerns relating to their engagement with the local. Neither tribunal was fully supported by the national governments most concerned, and the tribunals themselves were set up far from the victim communities and publics on whose behalf, at least in part, they ostensibly worked.⁸¹ Focusing on this sense of almost imperial remoteness, one early critic argued that the tribunals “orbit in space, suspended from political reality and removed from both the individual and national psyches of the victims as well as the victors in those conflicts.”⁸²

Perhaps predictably, the distanced and isolated nature of the tribunals led to a lack of understanding of their work in both regions.⁸³ Nationals of the affected states were

⁷⁷ See Ibid., 154 (noting President Roosevelt’s desire that “every person in Germany should realize that this time Germany is a defeated nation” and speculating that the aspect of the Nuremburg trials that may have most appealed to President Roosevelt was their educational value for the local population in terms of conveying some of the truth of what was done during the war). Beyond its symbolic value, Nuremburg was also chosen out of convenience since its Palace of Justice was large and relatively undamaged by the war.

⁷⁸ The majority of defense counsel were German lawyers.

⁷⁹ See John Dugard, “Obstacles in the Way of an International Criminal Court,” *Cambridge Law Journal* 56, no. 2 (1997): 329 (noting that “[t]he enthusiasm generated by Nuremberg and Tokyo for a permanent court”).

⁸⁰ See Ibid. Between 1949 and 1954, the International Law Commission prepared several draft statutes that would have led to the creation of a permanent international criminal court, but they were eventually shelved.

⁸¹ The ICTY is located in The Hague, The Netherlands, far from the killing fields of Bosnia. The ICTR is located in Arusha, Tanzania. Unlike the ICTY, the Rwandan government actually asked the Security Council to create a tribunal, though it eventually cast the sole dissenting vote against the tribunal due to its location outside of Rwanda, its primacy over Rwandan courts, and its lack of ability to impose the death penalty. Its relations with the tribunal have ranged from coolness to hostility. See Alison Des Forges and Timothy Longman, “Legal Responses to Genocide in Rwanda,” in *My Neighbor, My Enemy*, 54.

⁸² Makau Mutua, “Never Again: Questioning the Yugoslav and Rwanda Tribunals,” *Temple International and Comparative Law Journal* 11 (1997): 168.

⁸³ See Laurel Fletcher and Harvey Weinstein, “A World Unto Itself? The Application of International Justice in the Former Yugoslavia,” in *My Neighbor, My Enemy*, 29; Timothy Longman et al., “Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda,” in *My Neighbor, My Enemy*, 206.

excluded from holding high-level positions on the tribunals, further eroding a sense of ownership, and leading to a situation where those doing the prosecuting and judging not only did not share the traditions of the alleged perpetrators, but in many cases were almost totally ignorant about local history and culture.⁸⁴ Despite expectations that the tribunals would contribute to peace in the respective regions, it has been argued that, in the case of the ICTY, the tribunal's architects "gave little thought to how it would relate to those most affected by the carnage" ultimately threatening "the legitimacy of the court in the eyes of the society it was trying to help."⁸⁵ Given the misunderstandings and lack of local legitimacy, it is perhaps not surprising that some local constituencies have come to see the work of the ICTY as a form of victor's justice.⁸⁶ While the ICTR has provoked less overt hostility among ordinary Rwandans, many see it as largely useless, an affair conducted by the international community for the international community.⁸⁷

Mounting criticism of the ad-hoc tribunals eventually led to the creation of "community outreach" units, though turning around perceptions of the tribunals' work has proved to be a tall order, and such outreach and other community-centered objectives have always been ancillary to the primary task of securing convictions.⁸⁸ Writing in 2003, some five years after the creation of the ICTR's outreach program, Uvin and Mironko note that "[t]he main sentiment in Rwanda regarding the ICTR may well be massive ignorance: ordinary people know or understand next to nothing about the tribunal's work, proceedings, or results."⁸⁹ These are disappointing results, and it is hard to see how a

⁸⁴ See Fletcher and Weinstein, "A World Unto Itself?," 32; Des Forges and Longman, "Legal Responses to Genocide in Rwanda," 53 (noting that in the early years of the ICTR, "[v]irtually none of the tribunals staff . . . knew anything about the history and culture of Rwanda.")

⁸⁵ See Fletcher and Weinstein, "A World Unto Itself?," 32-33.

⁸⁶ *Ibid.*, 40. With regards to the ICTR, the tribunal's failure to prosecute crimes committed by the Rwandan Patriotic Front has been seen by some as a form of victor's justice. International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed*, Africa Report No. 30 (Brussels: ICG, 2001), iii.

⁸⁷ *Ibid.* See also Bert Ingelare, "The Gacaca Courts in Rwanda," in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, eds. Luc Huyse and Mark Salter (Stockholm: IDEA, 2008), 31-45 (arguing that "[o]n Rwandan soil, the International Criminal Tribunals for Rwanda is portrayed and perceived as an instance of the Western way of doing justice—highly inefficient, time-consuming, expensive and not adapted to Rwandan custom.")

⁸⁸ See David Cohen, "'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future," *Stanford Journal of International Law* 43 (2007): 5-6; Varda Hussain, "Sustaining Judicial Rescues: The Role of Judicial Outreach and Capacity-Building Efforts in War Crimes Tribunals," *Virginia Journal of International Law* 45 (2005): 551; see also Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice* 3 (2005): 950-61.

⁸⁹ Peter Uvin and Charles Mironko, "Western and Local Approaches to Justice in Rwanda," *Global Governance* 9 (2003): 221. This ICTR is not alone in this regard. Though hailed as modestly innovative, it has been argued that the Outreach Section of the Special Court for Sierra Leone "largely failed in its primary goal of educating Sierra Leoneans about the Special Court." Stuart Ford, "How Special is the Special Court's Outreach Section?," in *The Sierra Leone Special*

tribunal could contribute to broader efforts at reconciliation and post-conflict peacebuilding when so many are not familiar with its work in the first place.⁹⁰ Lack of information likely also contributes to distortions promoted by those opposed to the work of the tribunals, including elites and former perpetrators attempting to sway public opinion against them.⁹¹

Much has therefore been said about the potential for more and better outreach.⁹² However, even a well staffed, well funded, and brilliantly executed outreach program can only do so much to bridge the substantial gap that can exist between local populations and international justice efforts. In and of itself, outreach does little to address the marginalization of local agency, priorities, values, and practice in the set up and operation of the tribunals, and carries with it a subtext of locals as passive recipients of international justice discourse and practice. Outreach does not, for example, change the fact that Rwandans are being judged outside of Rwanda by non-Rwandans using Western-style judicial practices not all Rwandans agree with or understand in an international tribunal that has primacy over national proceedings within Rwanda, the very creation of which was opposed by the Rwandan government in the first place.⁹³ It also does not change the fact that defendants found guilty by the ICTR will serve their sentences outside of Rwanda in conditions far superior to that of anyone found guilty on similar charges by Rwanda's national courts.⁹⁴ Outreach does not change the fact that, at the end of the day, neither the Rwandan government nor the so-called international community solicited the views of the Rwandan people regarding how justice should best be achieved in post-genocide Rwanda.⁹⁵ Thus, while being better informed about a distant process is better than being wholly ignorant, it is still very different than having a meaningful say about the setup and implementation of justice processes that might deeply affect a community.

Court and Its Legacy: The Impact for Africa and International Law, ed. Charles Jalloh (Cambridge: Cambridge University Press, 2013), 505.

⁹⁰ The preamble to the United Nations Security Council resolution establishing the ICTR provides that "the prosecution of persons responsible for serious violations of international humanitarian law, would enable this aim [bringing effective justice] to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace." UNSCR 955, S/RES/955, November 8, 1994.

⁹¹ See Fletcher and Weinstein, "A World Unto Itself?," 32.

⁹² See, e.g., Ramji-Nogales, "Designing Bespoke Transitional Justice," 29-38; Etelle Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform," *Arizona Journal of International and Comparative Law* 23 (2005-06): 363-76, 387-88, 410-13, 425.

⁹³ The reasons for the Rwandan government's opposition to the creation of the tribunal are discussed in footnote 81, *infra*.

⁹⁴ The disparate treatment of defendants and those convicted has been a source of some resentment in Rwanda as it gives the impression that the "big fish" who orchestrated the genocide are being given better treatment than "rank-and-file" offenders. See Jennie Burnet, "The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda," *Genocide Studies and Prevention* 3, no. 2 (2008): 175.

⁹⁵ Longman et al., "Connecting Justice," 206.

Of course, one could debate to what extent international tribunals *should* spend valuable time and resources trying to be more communicative, be more connected to local communities, and pursue wider social aims beyond delivering judgments.⁹⁶ There may indeed be cause to be modest in our expectations for what a tribunal can meaningfully accomplish given historic resource limitations and established bureaucratic incentives and priorities.⁹⁷ Yet one danger in not doing a better job engaging in questions of locality than the ICTY and ICTR is a potential loss of legitimacy and a sense that the tribunals are little more than a “theoretical exercise in developing international humanitarian law.”⁹⁸ While scrupulously run proceedings and eventual convictions are unquestionably important, a process viewed by locals with indifference (at best) to hostility (at worst) would seem to represent a lost opportunity when it comes to deeper projects of accountability and the rule of law associated with long-term peacebuilding.

Following the many challenges, success, and failures of the ad-hoc tribunals, a new international tribunal model emerged, that of the so-called “hybrid” or “mixed” tribunals of Sierra Leone (Special Court for Sierra Leone), Kosovo (“Regulation 64” Panels in the Courts of Kosovo), East Timor (the Serious Crimes Panels of the District Court of Dili), and Cambodia (the Extraordinary Chambers in the Courts of Cambodia).⁹⁹ Unlike the ICTY and ICTR, hybrid tribunals are generally located in the country most affected by the conflict, and are comprised of national and international judges and staff.¹⁰⁰ This model was initially greeted with some enthusiasm, being thought to hold the promise of greater local legitimacy, greater norm penetration at the local level, and the ability to do more local capacity building, including strengthening domestic judicial systems.¹⁰¹ In the literature, they are often presented as a sort of evolution from and response to the failures and critiques of the ad-hoc tribunals,¹⁰² representing a sort of middle ground that

⁹⁶ See e.g., Marlies Glasius, “Do International Criminal Courts Require Democratic Legitimacy?,” *European Journal of International Law* 23, no. 1 (2012) (reviewing critiques of international courts).

⁹⁷ See Padraig McAuliffe, “Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan,” *Journal of International Law and International Relations* 7 (2011): 64 (arguing that without a significant re-orientation of the priorities of international criminal justice policymakers, expectations for tribunals should be dampened.)

⁹⁸ See Fletcher and Weinstein, “A World Unto Itself?,” 30.

⁹⁹ A great deal has been written about the establishment, functioning, and failures of hybrid tribunals. See, e.g., McAuliffe, “Hybrid Tribunals at Ten”; Cohen, “‘Hybrid’ Justice in East Timor”; Higonnet, “Restructuring Hybrid Courts.”

¹⁰⁰ There have been slight deviations from this norm. The trial of Charles Taylor before the Special Court for Sierra Leone was held in The Hague, due primarily to fears about security. See generally Giulia Bigi, “The Decision of the Special Court for Sierra Leone to Conduct the Charles Taylor Trial in The Hague,” *The Law and Practice of International Courts and Tribunals* 3 (2007): 303.

¹⁰¹ McAuliffe, “Hybrid Tribunals at Ten,” 10-22.

¹⁰² See Cohen, “‘Hybrid’ Justice in East Timor,” 1; Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals: Interaction and Resistance in Bosnia and Herzegovina and Cambodia,” in *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism*, eds. Oliver Richmond and Audra Mitchell (New York: Palgrave Macmillan, 2012), 73.

harnesses the power and legitimacy of international law, remains connected to local expertise and populations, while avoiding the staggering costs of purely international prosecutions.¹⁰³ Yet closer study of the creation of the various hybrid tribunals reveals a process of quick decisions and tough compromises more than a conscious process of experimentation as part of an effort to improve upon past failures.¹⁰⁴ It should also be noted that the exceptional cost of the ad-hoc tribunals (which represented a full 15 percent of the UN budget at the time of the creation of the hybrid tribunals) made the possibility of creating additional courts modeled on the ICTY and ICTR impossible as a practical matter.¹⁰⁵ Thus, the narrative of progress and institutional learning regarding the best relationship between tribunals and the local may not be as straightforward as once imagined.

Over a decade after the enthusiasm that greeted the first hybrid tribunals, evaluations of their success have become more circumspect. McAuliffe argues that some of the hybrid tribunals were often more hybrid in principle than in practice.¹⁰⁶ That is, far from being paragons of shared or local ownership, in the case of a number of the tribunals, “domestic authorities were largely marginalized or disengaged” while internationals dominated the process.¹⁰⁷ This may have resulted in part from ambiguity over allocation of responsibility and in part out of a seeming reluctance by some national governments to share blame and responsibility.¹⁰⁸ Compounding matters, tribunals in Sierra Leone, East Timor, and Cambodia have also been severely underfunded, particularly when it comes to activities such as outreach.¹⁰⁹

If the ad hoc tribunals orbited in space,¹¹⁰ the hybrid tribunals have been described as a “spaceship phenomenon,” with the tribunals’ physical headquarters a strange and alien hive of activity largely seen as an irrelevant curiosity by the local population.¹¹¹ In practice, some critics argue, far from being the goldilocks solution some had hoped for

¹⁰³ Higonnet, “Restructuring Hybrid Courts,” 349 (outlining the potential power of hybrid tribunals in theory if not reality); Ellen Stensrud, “New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia,” *Journal of Peace Research* 46, no. 1 (2009): 7 (arguing that “[t]he combination of international standards through UN involvement and local ownership through physical proximity and national participation may increase the legitimacy of these mechanisms.”)

¹⁰⁴ McAuliffe, “Hybrid Tribunals at Ten,” 23

¹⁰⁵ George Yacoubian, “Evaluating the Efficacy of the International Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law,” *World Affairs* 165 (2003): 136.

¹⁰⁶ See McAuliffe, “Hybrid Tribunals at Ten,” 36 (noting that the hybrid tribunals were “hybrid in form but never in ethos.”); Higonnet, “Restructuring Hybrid Courts,” 349.

¹⁰⁷ McAuliffe, “Hybrid Tribunals at Ten,” 36.

¹⁰⁸ *Ibid.*, 35; see also Cohen, “‘Hybrid’ Justice in East Timor,” 36 (discussing challenges arising from unclear or contested ownership).

¹⁰⁹ Cohen, “‘Hybrid’ Justice in East Timor,” 36.

¹¹⁰ Makau Mutua, “Never Again,” 168.

¹¹¹ Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny* (New York: ICTJ, March 2006), 2 (defining the spaceship phenomenon as “a Court that is perceived as a curiosity and an anomaly with little impact on citizens’ everyday lives.”)

that brings together the best of the global and the local, hybrid tribunals may sometimes turn out to be the worst of both worlds, bringing together the remoteness of purely international tribunals like the ICTR and ICTY with the shoestring budgets and occasional lack of rigor that can at times stymie purely local efforts.¹¹² Thus, while hybrid tribunals as a *model* continue to hold much promise,¹¹³ some have argued that without a radical shift in priorities and funding, we may need to be modest in our expectations as to what they can accomplish beyond the fairly straightforward work of trying defendants and rendering judgments.¹¹⁴

Given that enthusiasm for hybrid tribunals has waned and additional ad hoc tribunals modeled on the ICTR and ICTY seem unlikely for the foreseeable future, the ability of the International Criminal Court (ICC) to better engage with questions of locality and to avoid some of the failures of the past becomes especially important.¹¹⁵ Yet as a model, the institution created by the Rome Statute seems to harken back to Nuremburg and the ad hoc tribunals, suggesting, even in the absence of any practice, that the potential to generate significant global-local frictions would be high.¹¹⁶ Indeed, with a headquarters far removed both physically and culturally from the conflicts and perpetrators it has thus far addressed, the ICC's first decade of practice has been regularly punctuated by what one could characterize as a clash between global and local.¹¹⁷ In Uganda, for example,

¹¹² See, e.g., Caitlin Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 143-70.

¹¹³ Higonnet, "Restructuring Hybrid Courts," 349.

¹¹⁴ McAuliffe, "Hybrid Tribunals at Ten," 53-65.

¹¹⁵ This is not to deemphasize the importance of national-level or "domestic" human rights prosecutions. Indeed, Kathryn Sikkink has shown that the worldwide crescendo of human rights prosecutions in recent decades rests upon a bedrock of national trials. See Sikkink, *The Justice Cascade*, 21.

¹¹⁶ See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (July, 2002). One obvious but notable distinction between the ad hoc tribunals and the ICC is that while the former were created by fiat of the United Nations Security Council (UNSC), accession to the Rome Statute is voluntary, even if the UNSC retains the power to refer cases involving non states parties to the Court under Article 13(b). In addition, provisions in the Rome Statute relating to victim access, participation, and compensation, as well as some flexibility as to where the court may sit represent a distinct improvement compared to the ad hoc tribunals, at least in principle. For review of the Court's outreach work in practice, see Marlies Glasius, "What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," *Human Rights Quarterly* 31, no. 2 (2009): 509-20.

¹¹⁷ Thus far, all of the Court's official investigations are in Africa: Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Kenya, Libya, Mali, Sudan (Darfur), and Uganda. Though it has yet to take advantage of it, it should be noted that a degree of flexibility has been built into the Rome Statute, allowing the Court to sit in locations outside of The Hague. See Rome Statute of the International Criminal Court, Art. 3 (While "[t]he seat of the Court shall be established at The Hague in the Netherlands," "[t]he Court may sit elsewhere, whenever it considers it desirable . . ."). Judges at the ICC have recently suggested that it might be desirable to hold portions of a trial against Kenyan officials in either Kenya or neighboring Tanzania. BBC News,

some members of Acholi constituencies in the North have expressed a strong preference for using local reconciliation and reintegration practices to address crimes committed by former members of the Lord's Resistance Army rather than the ICC's retributive justice.¹¹⁸ With respect to Kenya, a variety of African states and the African Union (AU) have attempted to pressure the Court to drop charges against Kenyan President Uhuru Kenyatta, with the AU chairman going so far as to accuse the ICC of being racist for only prosecuting cases in Africa.¹¹⁹ With respect to Sudan, members of the African Union voted to refuse cooperation with the indictment of Omar Al-Bachir.¹²⁰ Taken together, declining enthusiasm for the Court, particularly in Africa, constitutes a serious challenge to the future health and legitimacy of the fledgling institution, highlighting the importance of taking questions of locality seriously.¹²¹

It would be easy to write off some criticism of the ICC as a sort of rearguard effort by autocratic leaders and regimes to preserve some of the privileges and impunity associated with power. Indeed, as demonstrated in Kenya, support for the work of the Court may at times be higher among ordinary citizens than in segments of a self-interested political class, even if the views of the former are eventually susceptible to elite manipulation.¹²² At the same time, one should note that the possibility of having a former president or senior official tried for human rights abuses in a foreign country or before an international tribunal has almost always generated significant tensions and feelings of ambivalence, from Augusto Pinochet, to Charles Taylor, to Laurent Gbagbo today.¹²³ Thus, one should expect that prosecutions of the type carried out by the ICC will generate controversy even in the best of circumstances.

"ICC Delays Cases of William Ruto and Laurent Gbagbo," June 3, 2013, <http://www.bbc.co.uk/news/world-africa-22762283>.

¹¹⁸ See Tim Murithi, "African Approaches to Building Peace and Social Solidarity," *African Journal on Conflict Resolution* 6 (2006): 23–27.

¹¹⁹ BBC News, "ICC Delays Cases"; Jenny Vaughan and Aude Genet, "Africa Closes Ranks to Condemn 'Racist' ICC on Kenya Cases," AFP, May 27, 2013. Perspectives among ordinary Kenyans are highly varied, ranging from support for the ICC's work in Kenya, to ambivalence, to opposition. See generally Thomas Obel Hansen, "Kenya's Power-Sharing Arrangement and Its Implications for Transitional Justice," *International Journal of Human Rights* 17 (2013): 307.

¹²⁰ See "African Union in Rift with Court," BBC NEWS, July 3, 2009, <http://news.bbc.co.uk/2/hi/africa/8133925.stm>.

¹²¹ See William Schabas, "The Banality of International Justice," *Journal of International Criminal Justice* 11, no. 3 (2013): 545.

¹²² See generally Obel Hansen, "Kenya's Power-Sharing Arrangement."

¹²³ Consider in this regard the potential controversy if George W. Bush or Donald Rumsfeld were arrested and put on trial outside of the United States. The possibility of similar scenarios helped spawn the American Service-Members Protection Act of 2002, 22 U.S.C. § 7427, a federal law adopted with a stated purpose "to protect United States military personnel and other elected and appointed officials of the United States government against criminal prosecution by an international criminal court to which the United States is not party." It authorizes the President to use "all means necessary and appropriate to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court." Because "all means necessary" would not seem to preclude the use of force, the

However, though important, overemphasis of these factors would serve to ignore some of the deeper issues driving the global-local frictions that seem to plague the Court's work, issues stemming from the way global and local responsibilities and powers are structured under the Rome Statute. Put simply, the very architecture the Rome Statute hinges on a delicate compromise between global and local sovereignty in matters of justice.¹²⁴ Under the principle of complementarity, sometimes described as the "cornerstone" of the Rome Statute, member states exercise primary but only conditional sovereignty in matters of justice, with power effectively ceded to the ICC where a member is "unwilling or unable" to prosecute a case itself.¹²⁵ The "unwilling or unable" standard echoes other emerging international norms and practices associated with the "responsibility to protect" and the US war on terror that are serving to reconfigure the relationship between global and local by replacing traditional notions of sovereignty with a sense of conditionality.¹²⁶

law has been nicknamed the "Hague Invasion Act." See Human Rights Watch, "US: 'Hague Invasion Act' Becomes Law," Press Release, August 4, 2002, <http://www.hrw.org/en/news/2002/08/03/us-hague-invasion-act-becomes-law>.

¹²⁴ See Shaw and Waldorf, "Introduction," in *Localizing Transitional Justice*, 19 (describing the ICC as "an uneasy and unstable compromise between international justice and state sovereignty").

¹²⁵ Rome Statute of the International Criminal Court, Art. 17. Thomas Obel Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity," *Melbourne Journal of International Law* 13 (2012): 217 (noting that "the principle of complementarity has often been pointed to as the cornerstone of the Rome Statute.") The phrase "unwilling or unable" is defined in only the broadest terms in the Statute, but under the Court's emerging jurisprudence, it has largely come to pivot on a determination of inactivity. See *ibid.*, 218.

¹²⁶ Consider, for example, the various formulations of the emerging principle of the responsibility to protect, or "R2P," where a nation state's sovereignty effectively becomes conditional on its ability or willingness to protect its people from mass atrocities. See The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), xi (providing that while "primary responsibility" for protection lies with each individual state, "the principle of non-intervention yields to the international responsibility to protect" where the state is "unwilling or unable" to protect its people from serious harm); U.N. Secretary-General, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (December 2, 2004), ¶ 201 (noting that there "is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens . . . when they are unable or unwilling to do so that responsibility should be taken up by the wider international community...."). The threshold for intervention was arguably raised in 2005 with the language adopted in the World Summit Outcome Document where it was agreed that national authorities must "manifestly fail" to protect before intervention is warranted. United Nations General Assembly, A/60/L.1 (September 15, 2005), ¶ 139. Beyond R2P, a similar construction of a conditional sovereignty can be seen in the Obama Administration's controversial claim to the right to unilaterally pursue and kill targets in states without consent if that country is deemed "unable or unwilling to suppress" what the United States believes to be a threat. See Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, copy leaked to NBC news, 2013,

While the principle of complementarity is in many ways a form of deference to the local, and stands in contrast to the primacy of jurisdiction exercised by the ad hoc tribunals, it also establishes a potential tension between the global and the local insofar as it invites the Court to stand as ultimate arbiter as to the adequacy of local effort and capacity.¹²⁷ The principle of complementarity would also seem to preclude local approaches to atrocity that differ from a retributivist approach in some instances.¹²⁸ Consider in this regard the possible response of the ICC not just to a local pardon or grant of amnesty, but an effort to address offenses using restorative, “traditional,” or otherwise alternative local practices of justice and reconciliation.¹²⁹ In instances without concurrent prosecutions, would such alternative approaches to justice be tantamount to “unwilling or unable” under the terms of the Rome Statute? While former Chief Prosecutor Louis Moreno-Ocampo has suggested that there should be great flexibility when it comes to lower-level offenders and the modalities of justice applied, the possibility for deviating from international retributivism when it comes to high-level offenders is less clear.¹³⁰

Building upon the principle of complementarity and the notion of the primary responsibility of national governments, the ICC has no enforcement mechanisms of its own, but is completely dependent on state cooperation to carry out investigations and enforce its judgments.¹³¹ Particularly in cases of self-referral under Article 14 of the Rome Statute, this can create special challenges to the Court’s legitimacy as ICC intervention is played through the prism of local politics.¹³² In Uganda, for example, a

http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf. Both R2P and the Obama administration’s terrorism policy might be considered to be an expression of a larger post Cold War trend where the “transformation of the adversary into a criminal [has] permitted, in the name of protecting humanity, intervention beyond state boundaries.”) Pierre Hazan, “Transitional Justice after September 11,” in *Localizing Transitional Justice*, 52.

¹²⁷ See William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007), 175 (observing that the relationship between international justice and national justice established under the principle of complementarity is “far from ‘complementary,’” with the two systems functioning “in opposition and to some extent with hostility *vis-à-vis* each other.”) Aside from deference, it should be noted that the principle of complementarity also acknowledges the reality that the ICC is a court of limited jurisdiction without the resources to address the great bulk of the world’s human rights atrocities.

¹²⁸ See Alexander Greenawalt, “Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court,” *Virginia Journal of International Law* (2009): 141-44.

¹²⁹ Some scholars take exception to the word “traditional” as a description of such practices because it can imply that local are static and because it can also have pejorative implications. As noted in Section C, *infra.*, “traditional” practices used in the modern-day transitional justice context tend to be adaptations of much older forms of local justice and reconciliation practices.

¹³⁰ See Greenawalt, “Complementarity in Crisis,” 141-44.

¹³¹ See Charles Jalloh, “What Makes a Crime Against Humanity a Crime Against Humanity,” *American University Law Review* (2013): 419.

¹³² Under Article 14(1), a “State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more

2003 referral by the Ugandan government has resulted in the indictment of senior-level commanders in the Lord's Resistance Army.¹³³ This has proven divisive for several reasons. First, because it is arguably subverting local judicial and reconciliation practices in Northern Uganda where segments of the population would prefer the use of customary justice practices to the Western retributive justice of the ICC.¹³⁴ Second, because it would seem to turn a blind eye to violations committed by the Ugandan army at the height of the civil war in Northern Uganda, potentially giving the impression that the ICC is taking sides in a conflict rather than meting out impartial justice.¹³⁵ Similarly, in Côte d'Ivoire, former President Laurent Gbagbo stands indicted as an indirect co-perpetrator of crimes against humanity while crimes committed by forces loyal to his erstwhile political opponent, current president Alassane Ouattara, are largely overlooked.¹³⁶ In this and other cases, it may prove difficult for the ICC to serve as a credible check on state power while needing to tread lightly enough to ensure local cooperation.¹³⁷

Both the Ugandan and Ivorian cases illustrate one of the key challenges for the ICC and international tribunals more generally *vis-à-vis* the local. To stand wholly aloof and independent from the local invites mistrust and misunderstanding, ultimately undercutting the potential to do more than develop abstract international legal precedents. Yet the ICC is also dependent on the local for its day-to-day work, and this carries with it the possibility of playing into local political agendas that may further notions of victor's justice, besmirch the impartiality and credibility of the ICC, and play into narratives that would see in the ICC a Western project that picks winners and plays

specific persons should be charged with the commission of such crimes." Rome Statute of the International Criminal Court, Art. 14(1).

¹³³ See generally, Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006).

¹³⁴ See Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21, no. 2 (2007): 195. It should be noted, however, that the Acholi population is not a monolith, and there are also segments of the population that support ICC intervention. See *Ibid.*, 192.

¹³⁵ See *Ibid.*, 187-90 (2007). The suggestion of partiality was not helped when then Chief Prosecutor Louis Moreno-Ocampo appeared at a joint press conference in London with President Museveni in January 2004. See Michael Otim and Marieke Wierda, "Justice at Juba: International Obligations and Local Demands in Northern Uganda," in *Courting Conflict? Justice, Peace and the ICC in Africa*, eds. Nicholas Waddell and Phil Clark (London: The Royal African Society, 2008), 22. There are also suggestions that it was actually Moreno-Ocampo who first persuaded Museveni to file the "self-referral" in the first place, further giving the impression of some kind of unseemly partnership. See Phil Clark, "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," in *Courting Conflict?*, 43.

¹³⁶ See Human Rights Watch, *Turning Rhetoric into Reality: Accountability for Serious International Crimes in Cote d'Ivoire* (New York: HRW, 2013), 10; see also Pascal Airault, "Côte d'Ivoire – CPI: Gbagbo ou le Bénéfice du Doute," *Jeune Afrique*, June 14, 2013.

¹³⁷ See Janine Clark, "Peace, Justice and the International Criminal Court: Limitations and Possibilities," *Journal of International Criminal Justice* 9 (2011): 527-29.

favorites.¹³⁸ What seems clear is that an international tribunal that ignores the complexity of local context (history, politics, culture, etc.) does so at its own peril.¹³⁹ Building the legitimacy of transitional and post-conflict justice interventions over time will likely require an exquisite sensitivity to context, and this may, as Greenawalt has argued, “call for as much, if not more, open-ended political assessment and balancing than for legal expertise.”¹⁴⁰

While the dilemmas of the global and the local are perhaps most acute in the realm of international and mixed tribunals, truth commissions often raise similar issues, though perhaps in more subtle ways. Over the last thirty years, the truth commission has become a truly global phenomenon, with some forty commissions having been created, and new ones emerging on a fairly regular basis.¹⁴¹ Though their mandates, composition, and powers vary greatly, most truth commissions attempt to accomplish three essential tasks: (1) diagnosing “what went wrong” in the lead up to the conflict or period of abuses; (2) documenting and analyzing the human rights abuses that were perpetrated; and (3) offering prescriptions for the future with a view to preventing recurrence of conflict.¹⁴²

These tasks would seem to require an approach that is much more open-ended, context sensitive, and participatory than most tribunals. And indeed, truth commissions tend to be located in the affected region, largely staffed by locals, and typically involve the direct participation of a greater number of members of the affected public than a tribunal.¹⁴³ At the same time, as Rama Mani has noted, owing to restricted mandates

¹³⁸ See Glasius, “What is Global Justice,” 519 (arguing that “[o]n the basis of current indictments he [the ICC prosecutor] could even be accused of exercising victor’s justice . . . He has helped governments, including some that are none too friendly to human rights, to constrain rebels and rogue states under the banner of international law.”)

¹³⁹ For this reason, it has been argued that a “stakeholder assessment” employing qualitative interviews, ethnographies, focus groups, or population-based surveys should be carried out prior to a transitional justice intervention in order to discern local preferences, values, and cultural knowledge. See Ramji-Nogales, “Designing Bespoke Transitional Justice,” 63-67. Nogales argues that under this model, the ICC prosecutor “would issue an indictment only if the population expresses a preference for international prosecutions in a distance location.” Ibid., 70. While efforts along these lines to gain a greater appreciation of context would be a welcome step forward in many instances, at the same time, in the case of a potential ICC intervention based on a self-referral by a national government, this would raise some serious questions about sovereignty in the context of international justice. Even where a government might not be fully representative or a population divided, one could ask whether it is appropriate for an international treaty-based institution to do an end run around a state party in this way.

¹⁴⁰ See Greenawalt, “Complementarity in Crisis,” 159.

¹⁴¹ In her authoritative book on the topic, Priscilla Hayner documents the existence of forty modern-day truth commissions. Hayner, *Unspeakable Truths*, 256-62. Since that volume’s publication, new commissions have emerged in Côte d’Ivoire and Brazil.

¹⁴² Sharp, “Economic Violence in the Practice of African Truth Commissions,” in *Justice and Economic Violence in Transition*.

¹⁴³ There has been at least one call for a permanent international truth commission. See generally, Michael Scharf, “The Case for a Permanent International Truth Commission,” *Duke Comparative and International Law Journal* 7 (1997): 375. That said, as Hayner has noted, “[m]ost truth commissions are predominantly national, in both commission members and staff.” Hayner,

and budgets, participation of the local population can still be quite limited, and the dissemination of reports can be erratic, incomplete, or even nonexistent.¹⁴⁴ Nevertheless, truth commissions have, by and large, been spared the trenchant critiques directed toward tribunals *vis-à-vis* their rather clumsy engagement with the local. Yet there is also a sense in which truth commissions have become part of a global project rather than a local initiative, a box to tick on post-conflict checklist funded by international donors and assisted by a shadow staff of international consultants, rather than the result of a home-grown push for the particular type of truth and accountability that a truth commission can deliver.¹⁴⁵ One might consider in this regard the truth commission in East Timor, established not by domestic actors, but by a legal act of the UN's Human Rights Unit,¹⁴⁶ or the extremely close association between the International Center for Transitional Justice and the work of the Moroccan Equity and Reconciliation Commission (*Instance Équité et Réconciliation*, IER).¹⁴⁷ The result may often be a truth-seeking process that is not as attuned to local needs and realities as one might expect. Thus, Cavallaro and Albuja observe that in some respects truth commissions tend to hew to a "dominant script" that has been established over time not because it was necessarily perfectly attuned to each new context, but as a result of "repeated information exchange and consultations."¹⁴⁸ Funding from international donors, training workshops by international NGOs, and the occasional "technical assistance" provided by international consultants likely contribute to this phenomenon.

More fundamentally, anthropologist Rosalind Shaw has argued that the truth commission as a global phenomenon is rooted in Western modes of truth telling and traditions of public confession and may not be appropriate in cultures with a different historical grounding.¹⁴⁹ In Sierra Leone, for example, many people preferred a "forgive and forget" approach grounded in local practices of memory, healing, and social forgetting.¹⁵⁰ Similarly, in Mozambique, Mani argues, the desire to remember to the truth

Unspeakable Truths, 214-15. A notable exception is El Salvador where the truth commission was under the administration and oversight of the United Nations, with an entirely foreign staff and set of commissioners. Ibid, 214.

¹⁴⁴ Rama Mani, "Rebuilding an Inclusive Political Community after War," *Security Dialogue* 36, no. 4 (2005): 519.

¹⁴⁵ See David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?," *International Studies Review* 6 (2004): 355-56 (noting that truth-telling is increasingly considered a necessary component of the post-conflict peacebuilding process, together with demobilization, disarmament, and the holding of postwar elections).

¹⁴⁶ See Carsten Stahn, "Justice Under Transitional Administration: Contours and Critique of a Paradigm," *Houston Journal of International Law* 27 (2004-2005): 335-36.

¹⁴⁷ See Mark Freeman and Veerle Opgenhaffen, *Transitional Justice in Morocco: A Progress Report* (New York: ICTJ, 2005); see also International Center for Transitional Justice, *Morocco, ICTJ's Role*, <http://ictj.org/our-work/regions-and-countries/morocco>.

¹⁴⁸ Cavallaro and Albuja, "The Lost Agenda," 125.

¹⁴⁹ See generally Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute for Peace Special Report 130 (Washington: USIP, 2005).

¹⁵⁰ See Ibid., 9.

did not even exist.¹⁵¹ The prevailing sentiment seemed to be that “the less we dwell on the past, the more likely reconciliation will be,” and traditional cleansing rituals were used to help reintegrate combatants into their communities and at the sites of massacres.¹⁵² Assumptions about the purportedly universal benefits of verbally remembering violence that appear to undergird the work of most truth commissions, Shaw argues, may undermine and serve to displace these alternative approaches to dealing with the past.¹⁵³ This may explain why many Sierra Leoneans attending truth commission hearings appeared to be less than enthusiastic about the process, though Kelsall notes that some hearings may have had unintended benefits once locals started to transform them through the incorporation of a process of community ritual.¹⁵⁴

From this, it can be said that many of the assumptions of truth commissions—including the notion that personal healing promotes national healing, that truth-telling promotes reconciliation, and that forgetting the past necessarily leads to war—even if valid in some contexts and cultures, may not hold in others. For these and other reasons, Mendeloff argues that one should not be so quick to proclaim the necessity of truth commission in the aftermath of violent conflict.¹⁵⁵ As with tribunals, the need for context-specific approaches that take into account questions of local ownership, agency, priorities, values, and practices must be given greater weight if truth-seeking practices and institutions are to live up to their many promises.¹⁵⁶

C. The Promises and Pitfalls of the Local

“Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable ... [w]e must learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards.”

--U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, ¶ 17 (Aug. 23, 2004).

If an imperious global justice has in some contexts been stymied by a ham-fisted engagement with the local that has served to blunt both legitimacy and effectiveness, making the global in some ways part of the problem, can it be that giving greater weight to principles like “local ownership” will lead to better solutions in the transitional justice

¹⁵¹ Mani, “Rebuilding an Inclusive Political Community,” 519.

¹⁵² Hayner, *Unspeakable Truths*, 197-203.

¹⁵³ See Shaw, *Rethinking Truth and Reconciliation Commissions*, 1.

¹⁵⁴ See generally Kelsall, “Truth, Lies, Ritual,” 361.

¹⁵⁵ See Mendeloff, “Truth-Seeking,” 355.

¹⁵⁶ See *Ibid.*, 358-361 (2004) (outlining claims made with respect to the beneficial effects of truth commissions on social healing and reconciliation, justice, the official historical record, public education, institutional reform, democracy, and deterrence).

context? In the UN policy literature in particular, the concept of local ownership has become nearly sacrosanct, with incantations to the local found across range of policy documents.¹⁵⁷ Some see in the prominence of the concept an attempt to paper over the legitimacy crisis in UN peacekeeping and peacebuilding, sparked in part by criticism emphasizing their neo-colonial and overly Western character.¹⁵⁸ But whatever the exact impetus, it is painfully clear that rhetorical tribute to local ownership has often failed to translate into meaningful changes “on the ground,” making the concept superficial and slippery in practice.¹⁵⁹ At the same time, because of the intellectual currency that the concept has achieved in donor and policy circles, it continues to be invoked by different actors in different ways to assert influence over post-conflict policy processes.¹⁶⁰ Bendix and Stanley, for example, observe that in the context of security sector reform donors demand local ownership to legitimize donor-driven policy prescriptions, local governments demand local ownership to secure their own power and influence, and non-state actors want local ownership as a means to give themselves access to the policy process.¹⁶¹

Taken together, local ownership has become something of an empty signifier, employed by nearly everyone while at the same time remaining vague and poorly

¹⁵⁷ A 2011 UN report on the rule of law together with annexes invokes the word “ownership” no less than 17 times. See U.N. Secretary-General, *Strengthening and Coordinating United Nations Rule of Law Activities*, UN Doc. A/66/133 (August 8, 2011). While this may be an extreme example, Simon Chesterman, who has written widely about the concept of ownership in post-conflict peacebuilding, has noted that “[e]very UN mission and development program now stresses the importance of local ‘ownership.’” See Chesterman, “Walking Softly,” 41. The concept itself is often traced to the field of economic development, and represents the evolution in some ways of concepts like “participatory development.” See Simon Chesterman, “Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations,” *Journal of Intervention and Statebuilding* 1, no. 1 (2007): 7; see also Benjamin de Carvalho and Niels Nagelhus Schia, *Local and National Ownership in Post-Conflict Liberia: Foreign and Domestic Inside Out?*, NUPI Working paper 787 (Oslo: NUPI, 2011), 6. For an example of what one might call a backlash to the growing discourse of local ownership, see Edward Joseph, “Ownership is Over-rated,” *SAIS Review* 27 (2007): 109.

¹⁵⁸ See Carvalho and Schia, *Local and National Ownership*, 1-6.

¹⁵⁹ See Donais, “Empowerment or Imposition?,” 5; see also Chesterman, “Ownership in Theory and in Practice,” 9. Indeed, far short of giving meaningful content to “ownership,” Longman has argued that “[g]overnments and international institutions, such as the United Nations, rarely, if ever, consult affected populations when formulating policies aimed at rebuilding post-war societies.” Longman et al., “Connecting Justice to Human Experience,” 206. But see Anna Triponel and Stephen Pearson, “What do You Think Should Happen? Public Participation in Transitional Justice,” *Pace International Law Review* 22 (2010): 103 (examining a trend toward increasing public consultation in the set up phase of transitional justice mechanisms).

¹⁶⁰ See Patricia Lundy, “Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland,” *International Journal of Transitional Justice* 3, no. 3 (2009): 329 (arguing that “the concept of local/home-grown transitional justice is capable of being expropriated and manipulated to mask or serve other interests and ‘unjust practices’”).

¹⁶¹ Bendix and Stanley, “Deconstructing Local Ownership,” 101.

understood.¹⁶² Yet the opacity of the concept does not diminish its importance. As Donais has argued, “there are real limits on the ability of outsiders to shape, direct, and influence events within states emerging from conflict,” meaning that there is no real alternative to substantive local ownership over the longer term.¹⁶³ International experts can run an international or hybrid tribunal in the short term and donors can fund a truth commission, but ultimately only “deep and locally owned social and political dynamics” can guarantee “well functioning institutions that produce substantive results.”¹⁶⁴ Compounding matters, successful initiatives require the kind of profound local knowledge of context and culture that international actors almost never possess.¹⁶⁵ Yet even with ample awareness of context, interventions felt to be imposed “from the outside” are more likely to be seen as illegitimate, raising the possibility of backlash and ill will towards reforms.¹⁶⁶ In this sense, the struggle to give greater significance to local ownership can be seen as profoundly pragmatic.

More fundamentally, however, the concept of local ownership raises important normative questions, asking us to consider whether people have the right to determine their own destiny and make their own mistakes.¹⁶⁷ As Stahn observes, to even ask the question suggests a certain paternalism,¹⁶⁸ and could risk pathologizing and infantilizing entire post-war populations.¹⁶⁹ The normative pull of principles of self-determination and democratic control emanating from the concept of local ownership is especially strong when you consider that even with the best of intentions, errors of intervention are likely, yet it is locals who must live with and bear the costs of these errors over the long term.¹⁷⁰ International actors, in contrast, will pack their bags and move on to the next crisis. In this sense, the concept of local ownership asks us to recognize that if the goals of post-conflict peacebuilding include classic liberal goods of democracy, good governance, and the rule of law, divorcing control and agency over a set of post-conflict initiatives from accountability and cost bearing is ultimately a self-defeating exercise in contradiction.¹⁷¹

¹⁶² Chesterman, “Ownership in Theory and in Practice,” 7-10.

¹⁶³ See Donais, “Haiti and the Dilemmas of Local Ownership,” 772.

¹⁶⁴ See Uvin, “Difficult Choices in the New Post-Conflict Agenda,” 186.

¹⁶⁵ von Carlowitz, *Local Ownership in Practice*, 54 (observing that while they often possess technical knowledge and professional skills, international actors mostly lack sufficient knowledge of local structures and traditions).

¹⁶⁶ Talentino, “Perceptions of Peacebuilding,” 153.

¹⁶⁷ See Stahn, “Justice Under Transitional Administration,” 326; von Carlowitz, *Local Ownership in Practice*, 54 (observing that “local ownership might remain rhetoric because international actors are unwilling to allow their local counterparts to make their own mistakes.”); An-Na’im, “Editorial Note,” 199 (arguing that “the practice of justice for every society can only emerge through an indigenous process of trial and error.”)

¹⁶⁸ Stahn, “Justice Under Transitional Administration,” 326.

¹⁶⁹ See Vanessa Pupavac, “Pathologizing Populations and Colonizing Minds: International Psychosocial Programs in Kosovo,” *Alternatives: Global, Local, Political* 27 (2002): 490

¹⁷⁰ See Uvin, “Difficult Choices in the New Post-Conflict Agenda,” 185; Stahn, “Justice Under Transitional Administration,” 330.

¹⁷¹ See Gerald Knaus and Felix Martin, “Travails of the European Raj,” *Journal of Democracy* 14, no. 3 (2003): 64 (exploring tensions between unaccountable international intervention and the

Despite its obvious importance, the turn to the local in matters of post-conflict justice and peacebuilding is no panacea. In calling for better engagement with questions of locality, there is danger of propagating the myth of a virtuous local that may lead to a tendency to overlook its complexities.¹⁷² Even without such romanticization, making local ownership meaningful in the post-conflict context is extraordinarily challenging. The more intrusive international peace and justice interventions often occur in regions where there has been a profound breakdown in local political and normative structures and ordering.¹⁷³ In some cases, the formal institutions of governance have been hollowed out or collapsed entirely, and much of the expertise that may have helped to re-build the country has fled, resulting serious deficits in terms of capacity and technical expertise.¹⁷⁴ Complicating matters further, with the ethnic, political, and economic cleavages that often lead to and continue in the aftermath of conflict, there is often no coherent set of “local owners” in the first place.¹⁷⁵ Indeed, it has been argued that “[p]ostconflict spaces, almost by definition, are characterized far more by diversity and division than by unity.”¹⁷⁶ In this context, post-conflict justice, like other interventions affecting distributions of power, can be utilized by post-war elites as a means of jockeying for gain, furthering partisan political agendas, and attempting to re-impose pre-conflict power structures that may be discriminatory or otherwise not in keeping with international human rights standards.¹⁷⁷ Ultimately, therefore, as one set of waggish commentators put it, “the local ownership championed by the international community is not local

need to plant the seeds of democratic politics in Bosnia); see also Stahn, “Justice Under Transitional Administration,” 330 (exploring how the United Nations Mission in Kosovo absolved itself of legal checks on its power, making accountability a one-way street where locals are expected to bear the costs).

¹⁷² See Richmond, “The Romanticisation of the Local,” 149; Mazlish, “The Global and the Local,” 95.

¹⁷³ Examples are not in short supply, but post-war Sierra Leone and Liberia would be among the more challenging of such contexts.

¹⁷⁴ As an example, the brutal Liberian civil war spanned more than a decade, resulting in the loss of as many as 250,000 lives and the displacement of one million individuals. These are staggering numbers for a country whose pre-war population numbered just over two million. See Sharp, “Economic Violence in the Practice of African Truth Commissions and Beyond,” 98. In Rwanda, 10% of the population of eight million had been killed and over two million had fled to neighboring countries. See Barbara Oomen, “Donor-Driven Justice and its Discontents: the Case of Rwanda,” *Development and Change* 36, no. 5 (2005): 900.

¹⁷⁵ See Donais, “Haiti and the Dilemmas of Local Ownership,” 759; see also Joseph, “Ownership is Over-rated,” 119 (contending that in some instances locals “do not take ownership of their problems primarily because they do not agree on who ought to be the owner.”)

¹⁷⁶ See Donais, “Haiti and the Dilemmas of Local Ownership,” 759.

¹⁷⁷ Of course, the dangers of insertion of self-interest by international elites into the peacebuilding process can be equally problematic. See Kristoffer Liden, Roger Mac Ginty, and Oliver Richmond, “Introduction: Beyond Northern Epistemologies of Peace: Peacebuilding Reconstructed?,” *International Peacekeeping* 16, no. 5 (2009): 594; see also Knaus and Martin, “Travails of the European Raj,” 66 (noting that like all institutions, international peacebuilding missions have a tendency to pursue self-interest).

ownership *tout court* but local ownership of a *specific* kind: the good kind.”¹⁷⁸

If the post-conflict waters are sewn with mines that serve to make local ownership difficult in practice, navigation is made all the more complex by the role, expectations, and financial power of the international actors drawn to the scene. Taking concepts like local ownership seriously necessarily involves significant additional time and expense, yet international actors and donors tend to be impatient and anxious for results.¹⁷⁹ At the same time, international standards for transitional justice interventions are institutionally demanding, tending privilege technocratic expertise over deep local contextual knowledge.¹⁸⁰ When coupled with global-local imbalances in terms of financial capacity, the end result is that all too often post-conflict justice interventions tend to place less of a premium on local ownership in practice than the global policy rhetoric would suggest.

Taken together, in many instances it might be said that true local ownership in the sense of full local agency and control is simply unrealistic.¹⁸¹ In the context of international and hybrid tribunals in particular, it may well be impossible.¹⁸² How, for example, could one truly have local ownership—again in the sense of agency and control—of a prosecution by the ICC, ICTY, or SCSL?¹⁸³ Even outside the context of such tribunals, global power and funding structures, together with the momentum and politics of the international justice advocacy movement would seem to suggest that some degree of international involvement is inevitable as a practical matter.

Building on this, it has been argued that in some cases full local ownership may not even be desirable, and that some degree of international involvement is necessary in at least a supporting role if not more.¹⁸⁴ In many instances for example, “local violent conflicts are no longer local or traditional in their causation or dynamics,” having been

¹⁷⁸ de Carvalho and Schia, *Local and National Ownership in Post-Conflict Liberia*, 5.

¹⁷⁹ See Lucius Botes and Dingie van Rensburg, “Community Participation in Development: Nine Plagues and Twelve Commandments,” *Community Development* 35 (2000): 50-51 (discussing the tensions in the context of development projects between pressures for results and the process demands of community participation); Stahn, “Justice Under Transitional Administration,” 336-37 (noting that greater local ownership with respect to judicial reconstruction in Afghanistan led to a slower process that was less protective of individual rights.)

¹⁸⁰ See Bosire, “Overpromised, Underdelivered,” 72.

¹⁸¹ See Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), 242.

¹⁸² See Matthew Saul, “Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects,” *International Criminal Law Review* 12 (2012): 434 (arguing that one cannot always assume that “more local ownership will always be desirable.” Rather, “it is possible that in some contexts where it is self-evident that there is a need for an international criminal tribunal, it might be in the best interests of the situation overall for there to not be any particular effort to incorporate local ownership into the establishment process.”)

¹⁸³ In the case of the ICC, one might say that the opportunity for full local ownership effectively disappears the moment a state is deemed “unwilling or unable” to prosecute under the terms of Article 17 of the Rome Statute.

¹⁸⁴ See Joseph, “Ownership is Over-rated,” 115-16.

transformed by “interventions of regional and global actors.”¹⁸⁵ In such cases, simple concepts of “local solutions to local problems” would seem to fail to capture the complexity of the situation. There are also arguments that some kind of global-local balance is required due to “capacity gaps” and the possibility of excessive parochialism.¹⁸⁶ Might it be, for example, that a better global-local balance in the trial of Saddam Hussein could have resulted in something less like a show-trial?¹⁸⁷ Similar weaknesses in the national judiciaries of Kosovo, East Timor, Sierra Leone, and Cambodia led in part the creation of international hybrid tribunals.¹⁸⁸ Finally, outside of the courtroom, other local experiments in transitional justice such as *Gacaca* in Rwanda, described in greater detail below, can and do conflict with international human rights standards—raising difficult question about whether and how to balance individual freedoms against principles of self-determination.¹⁸⁹

For these and other reasons, while the local is often seen as one of the keys to the legitimacy of transitional justice initiatives, perceived legitimacy is in practice quite complex and there are no guarantees that a process will be seen as legitimate at any level simply because there is a high degree of local ownership.¹⁹⁰ In some instances, local constituencies might actually express a preference for an international prosecution, for example, due to perceptions that national courts are corrupt and lack independence.¹⁹¹ In the end, therefore, too much local may raise as many questions as too much global.¹⁹² As Mazlish argues, the local cannot simply be used as a talisman to ward off all possible intervention.¹⁹³ The world over, someone’s local has often given way to a larger local—with the dismantling of segregation in the Southern United States being one example—the results of which are hard to disagree with in the long term.¹⁹⁴

Simply put, while there is no alternative to local ownership in the long run, in the short-run at least, local ownership may at times be an impossible ideal. If this makes for

¹⁸⁵ An-Na’im, “Editorial Note,” 202.

¹⁸⁶ See Joseph, “Ownership is Over-rated,” 115-16.

¹⁸⁷ Ibid.

¹⁸⁸ See McAuliffe, “Hybrid Tribunals at Ten,” 24-28; see also Stahn, “Justice Under Transitional Administration,” 318-20 (reviewing some of the challenges of national courts that may bolster an argument for some international involvement).

¹⁸⁹ This dilemma is particularly acute in the case of *Gacaca* given the strong argument that it would have been impossible for Rwanda to comply with all international standards relating to accountability norms, victims’ rights, and due process.

¹⁹⁰ See Saul, “Local Ownership of the International Criminal Tribunal for Rwanda,” 434 (noting that an increase in local ownership could come with complications that can actually reduce legitimacy). Consider in this regard the example of *Gacaca* in Rwanda, which though locally owned in the sense of literal control by the Rwandan government, has minimal legitimacy in the eyes of many local constituencies. See Burnet, “The Injustice of Local Justice,” 188.

¹⁹¹ Observation based on the author’s experience documenting human rights violations in Guinea and Côte d’Ivoire for Human Rights Watch.

¹⁹² Such preferences were often expressed to the author during his time documenting human rights violations in Guinea and Côte d’Ivoire for Human Rights Watch.

¹⁹³ Mazlish, “The Global and the Local,” 98-99.

¹⁹⁴ Ibid.

a very difficult needle to thread in terms of post-conflict programming, it may explain why so much of the literature on local ownership does little more than say that it is both important and hard.¹⁹⁵ At the policy level, the tendency in the face of these dilemmas is to elide complexity, with local ownership becoming a sort of cheap bureaucratic trope to signal the need for local “buy in” and support rather than meaningful input or control.¹⁹⁶ Moving past this state of affairs in order to strike a better balance between global and local requires that we look more deeply into constructions of “global” and “local.”

D. Striking a Better Balance Between Global and Local

For all of their importance, there is a sense in which the dilemmas of the global and the local are false dilemmas created by rigid intellectual categories.¹⁹⁷ As Goodale has observed, outside of the academic and policy literature, there is no place called “local” or “global”—any more than there is an “international plane,” an “international community,” or places called “on the ground” and “in the field,” yet these concepts are often spoken of as if they actually existed.¹⁹⁸ The global-local binary is also problematic insofar as it implies that there are only two levels at which social processes emerge or unfold, and insofar as it implicitly invokes a normative hierarchy and teleology.¹⁹⁹ Thus, both categories tend to essentialize and depoliticize sets of actors that are neither ideologically monolithic nor politically homogenous. For these and other reasons, some scholars have questioned the value of the concept of the local, arguing instead for more complicated notions of “glocality” and “translocality.”²⁰⁰

Despite these problems, the global-local distinction remains a central theme in human rights discourse, and is useful for its ability to underscore power asymmetries in the transitional justice context.²⁰¹ Similarly, as a policy trope and as an ideal, the concept of the local can provide an important counterweight to the centralizing and universalizing tendencies of transitional justice and liberal international peacebuilding more generally.²⁰² There may be therefore be times when it is useful to categorize and essentialize to avoid pushing power differentials to the background, somewhat in

¹⁹⁵ de Carvalho and Schia, *Local and National Ownership in Post-Conflict Liberia*, 5.

¹⁹⁶ See Chesterman, *You, the People*, 242 (arguing that in practice “ownership . . . is usually not intended to mean control and often does not even imply a direct input into political questions.”)

¹⁹⁷ See Lundy, “Exploring Home-Grown Transitional Justice,” 329 (cautioning against using the local in simply binary terms).

¹⁹⁸ See Mark Goodale, “Locating Rights, Envisioning Law Between the Global and the Local,” in *The Practice of Human Rights: Tracking Law Between the Global and the Local*, eds. Mark Goodale and Sally Engle Merry (Cambridge: Cambridge University Press, 2007), 15-16.

¹⁹⁹ See Goodale, “Locating Rights,” 14-15.

²⁰⁰ See Lundy, “Paradoxes and Challenges,” 93; Mazlish, “The Global and the Local,” 99.

²⁰¹ See Goodale, “Locating Rights,” 23.

²⁰² See Susan Thomson and Rosemary Nagy, “Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda’s Gacaca Courts,” *International Journal of Transitional Justice* 5, no. 1 (2010): 11 (positioning the turn to the local in transitional justice as a “corrective to the shortcomings of internationalized, ‘one-size-fits-all’ approaches.”)

keeping with Spivak's concept of "strategic essentialisms."²⁰³ Thus, concepts of the local and the global retain utility for purposes of both analysis and policymaking, even if they do not accurately describe the full complexity of all transitional justice processes as they emerge and unfold. Working through the dilemmas of the local therefore requires a complicated analytical tightrope act. On the one hand, the global-local binary remains a useful construct for the reasons articulated. At the same time, understanding the complexity of global-local dynamics requires some deconstruction and destabilization, breaking down simple binary notions.

The analytical utility of breaking down simple binary notions of local and global can be illustrated by examining the *Gacaca* process in Rwanda.²⁰⁴ Historically, *Gacaca* served as a form of community-based informal arbitration employed to resolve minor disputes at the village level.²⁰⁵ Following the arrests of suspected *génocidaires* in the years that followed the 1994 genocide, Rwanda's prisons population swelled to well over 130,000.²⁰⁶ These figures grossly overwhelmed the capacity of Rwanda's legal system, creating the very realistic possibility that thousands of individuals would either die in Rwanda's severely overcrowded prisons before they would be granted a trial, or need to be released without trial.²⁰⁷ This led to pressure from a variety of actors to solve a very palpable human rights problem, and the idea adapting *Gacaca* to address genocide-related crimes emerged.²⁰⁸

While its exact provenance is somewhat murky, the idea of using *Gacaca* may have arisen out of a conversation between a researcher for Human Rights Watch and some professors from the National University.²⁰⁹ Alternatively, Oomen points to "evidence that it was representatives of the donor community who first raised the

²⁰³ See Peterson, "A Conceptual Unpackaging of Hybridity," 14.

²⁰⁴ If focusing on the case of *Gacaca*, I do not mean to conflate the local with customary law and tradition or to suggest that the dilemmas of the local can be solved by mere incorporation of local ritual. Ultimately, giving greater weight to the local in matters of post-conflict justice must address the deeper and fundamental privileging of Western liberal responses to atrocity that may crowd out other ways of understanding and doing justice. Nevertheless, examination of the tensions associated with the embrace of local ritual and tradition as seen in the *Gacaca* process is useful to help complicate simplistic binary notions of global and local, and as an antidote to the romanticization of the local that initially accompanied *Gacaca*. See Oomen, "Donor-Driven Justice," 903 (noting that there was "an element of Orientalism" in the appeal that *Gacaca* held for the international community).

²⁰⁵ There is an ample literature on *Gacaca*, including its historical origins and evolution. See, e.g., Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda; Justice without Lawyers* (Cambridge: Cambridge University Press, 2010); Burnet, "The Injustice of Local Justice," 177; Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79 (2006): 1; Longman, "Justice at the Grassroots? *Gacaca* Trials in Rwanda," in *Transitional Justice in the Twenty-first Century*, 206-28.

²⁰⁶ See Burnet, "The Injustice of Local Justice," 177.

²⁰⁷ See Des Forges and Longman, "Legal Responses to Genocide in Rwanda," 58.

²⁰⁸ See Burnet, "The Injustice of Local Justice," 175.

²⁰⁹ *Ibid.*, 176.

idea.”²¹⁰ Others point to a 1996 report by the United Nations High Commission for Human Rights, which concluded that *Gacaca* might play a role in dealing with genocide-related crimes, but only as a sort of truth-seeking adjunct to the work of tribunals or a community reconciliation mechanism that should be buffered from too much government interference.²¹¹ Whatever the precise origins, the idea of drafting *Gacaca* into national service to address Rwanda’s post-genocide justice challenges was eagerly seized upon by the Rwandan government and members of the international donor community.²¹²

As adopted and adapted, the *Gacaca* of “tradition” was effectively transformed by the Rwandan government from a relatively informal community-driven conflict-resolution mechanism to a modernized and formalized public punitive justice institution backed by the power of the state.²¹³ Whereas pre-genocide *Gacaca* was not applied in cases of cattle theft, murder, or other serious crimes, it was adapted to complex circumstances involving mass atrocities and genocide.²¹⁴ This proved especially troubling to international human rights groups who questioned the lack of protections for the accused, minimal training for *Gacaca* judges, and issues of corruption, among other things.²¹⁵

Despite some of the controversy, *Gacaca* was initially welcomed by many outside Rwanda in the as an creative and pragmatic means to address a troubling backlog of cases relating to the 1994 genocide.²¹⁶ It also appeared to enjoy widespread support by ordinary Rwandans.²¹⁷ From a distance, it seemed to be the embodiment of a homegrown, locally owned, culturally embedded process—a Rwandan solution to

²¹⁰ See Oomen, “Donor-Driven Justice and its Discontents,” 902.

²¹¹ See Bert Ingelare, “The *Gacaca* Courts in Rwanda,” 31-36.

²¹² See Oomen, “Donor-Driven Justice,” 897 (noting the “massive support” on the part of donors for *Gacaca*).

²¹³ In describing the ways in which *Gacaca* was adapted, I do not mean to suggest that its pre-genocide or “traditional” form was static. As noted by Luc Huyse, “traditional techniques, in Rwanda and in other African post-conflict countries, have been greatly altered in form and substances by the impact of colonization, modernization, and civil war.”). Luc Huyse, “Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice, and Reconciliation Policies,” in *Traditional Justice and Reconciliation after Violent Conflict*, eds. Huyse and Salter, 6-7. In this sense, the label “traditional” is potentially problematic insofar as it suggests a practice not subject to constant change. See *ibid.* at 7. Bert Ingelare argues that the “new” *Gacaca* is such a radical departure from the “old” that it represents an “invented tradition.” Ingelare, “The *Gacaca* Courts in Rwanda,” 32. Others have suggested terms such as “reinvented tradition” and “neo-traditional.”

²¹⁴ See Waldorf, “Mass Justice for Mass Atrocity,” 48 (noting that “traditional *gacaca* generally did not treat cattle theft, murder, or other serious crimes, which were handled by chiefs or the king’s representatives”).

²¹⁵ See Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community Based *Gacaca* Courts* (New York: HRW, May 2011), 4.

²¹⁶ For a more upbeat, though cautious assessment at the outset of the implementation of *Gacaca*, see generally Longman, “Justice at the Grassroots?”; see also Oomen, “Donor-Driven Justice,” 902 (noting that *Gacaca* was once heralded as “ground-breaking” and “revolutionary.”)

²¹⁷ Paul Gready, “Reconceptualizing Transitional Justice: Embedded and Distanced Justice,” *Conflict, Security, and Development* 5, no. 1 (2005): 13.

Rwandan problems—yet this obfuscates some of the complex reality.²¹⁸ As noted, while loosely based on a traditional dispute resolution process and championed by the Rwandan government as the only possible solution, the impetus for *Gacaca* also owes much to discussion generated by Rwandan scholars, international human rights activists, UN reports, and donors to say nothing of sustained pressure from international NGOs and other entities to address Rwanda's serious prison overcrowding problem. It was carried out in large part as a result of support from international donors.²¹⁹ What was presented as "traditional" and "community based" was really a hybrid that moved back and forth between historical origins and capture by the nation state.²²⁰ Thus, to adopt the neologism of some scholars, it might indeed be correct to say that the origins and unfolding of the *Gacaca* process were very much "glocal" or "translocal."²²¹ In this way, the emergence and shaping of transitional justice processes might be seen as part of a continued dialectical process between multiple "levels"—global, regional, national, and community. Simple categories of global and local fail to capture this complexity.

The complex reality of transitional justice processes only serves to further illustrate just how problematic simple notions of local ownership really are. Just as the global-local binary must be questioned and blurred, making better sense of global-local dilemmas and interactions also requires us to break down and unpack concepts like "local ownership" into constituent parts. In practice, I argue, the term has become a sort-of catch all for concerns relating to actual *control* (agency, decision making, funding), *process* (whether a transitional justice initiative is "bottom-up," participatory or homegrown, being shaped by input from "the grassroots," or "top-down" and imposed; whether it is driven by the state or "the community"), and *substance* (whether a transitional justice initiative honors and resonates with local values and practices). While the control, process, and substance dimensions of local ownership are in practice often going to be highly related, it may not be necessary to satisfy concerns relating to all three for a transitional justice program to be perceived as legitimate. For example, hypothetically, a UN or otherwise "externally" controlled and funded program might be seen as legitimate by many local constituencies if it were heavily shaped by a bottom-up participatory process that put local priorities and practices at the heart of the program. In contrast, a transitional justice program might be fully controlled by a national government or other locals, and yet still be part of a state-centric solution imposed from the top-down upon local peasant communities without significant input, and ultimately be seen by many locals as lacking legitimacy.

Both hypotheticals presented here would seem to suggest that the process dimension of local ownership is especially key to the design of transitional justice

²¹⁸ See Christine Venter, "Eliminating Fear through Recreating Community in Rwanda: the Role of the Gacaca Courts," *Texas Wesleyan Law Review* 13 (2007): 580 (describing Gacaca as a "uniquely Rwandan . . . grassroots [effort] to deal with the genocide . . . from the bottom up.") Of course, the Rwandan government itself was also at some pains to present *Gacaca* as homegrown and locally devised. See Oomen, "Donor-Driven Justice," 902.

²¹⁹ See generally Oomen, "Donor-Driven Justice."

²²⁰ Huyse, "Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice," 8.

²²¹ See Lundy, "Paradoxes and Challenges," 93.

interventions, not simply because process can help to generate feelings of (il)legitimacy, but also because, in practice, satisfying process concerns may tend to lead to transitional justice modalities that hit positive notes on the substance axis.²²² At the same time, undue focus on the process dimension alone is potentially problematic as it has been observed in other contexts that ideas like “participatory development” can easily be co-opted by states and international institutions to their own ends.²²³ In the transitional justice context, it has similarly been noted that where efforts at “consultation” do take place, local communities are often asked for input into project implementation long after more fundamental questions of design and set-up have already been established, suggesting that process concerns are often treated as a shallow, technical exercise.²²⁴ There is therefore a danger that as notions of process, including participation, are mainstreamed, they become yet another bureaucratic planning tool, muddying useful distinctions between genuinely people-centered, bottom-up processes and top-down, technocratic ones.²²⁵ Finally, beyond process, one should not dismiss the importance of the control dimension, which—being intimately linked to the power and politics of transitional justice interventions—still plays an important role in global-local frictions and feelings of legitimacy.

By offering this schema, the intent is not to suggest that categories of control, process, and substances are in any way definitive, or that local ownership could not be broken down into alternative or additional categories. The key point is that thinking of local ownership *multi-dimensionally* based on the unique history of each particular context is a much more useful exercise than the loose sloganeering that often takes place around the concept today. Again, the *Gacaca* process serves as a useful real-world illustration of some of these complex dynamics.

At the most superficial level, the *Gacaca* process was very much “locally owned” as compared to the ICTR, for example, in the sense that formal control was retained by Rwandans. Yet to end there would be to confuse local ownership with ownership by the national government, a distinction that is potentially problematic in a context where the government cannot be assumed to represent many local constituencies or to be subject to checks and balances if it fails to consider their input.²²⁶ The results of the *Gacaca* process illustrate that this kind of national ownership alone will often not be sufficient to

²²² See generally, Triponel and Pearson, “What do You Think Should Happen” (examining trend toward increasing public consultation in the set up phase of transitional justice mechanisms.

²²³ See Lundy, “Exploring Home-Grown Transitional Justice,” 329. The concept of participation has a long history in the field of development, and is both revered and reviled in the literature for its power to both empower and co-opt. For a review of the history and trajectory of the concept, see generally Sam Hickey and Giles Mohan, “Towards Participation as Transformation: Critical Themes and Challenges,” in *Participation: From Tyranny to Transformation?*, eds. Samuel Hickey and Giles Mohan (New York: Zed Books, 2004).

²²⁴ See Rubli, *Transitional Justice: Justice by Bureaucratic Means*, 12.

²²⁵ See Hickey and Mohan, “Towards Participation as Transformation,” 4.

²²⁶ Oomen, “Donor-Driven Justice,” 899-902 (discussing the “increasingly oppressive” and authoritarianism climate in Rwanda).

create legitimacy in the eyes of many local constituencies.²²⁷ Thus, the process dimension of local ownership, including whether a transitional justice initiative is carried out in a manner that is “bottom-up,” drawing upon meaningful input and participation by affected communities, remains critical.²²⁸ While the *Gacaca* process certainly involved a lot of participation by ordinary Rwandans in the hearings themselves, attendance at *Gacaca* hearings eventually dwindled and had to be coerced, and Rwandans had little space to contest dimensions of the larger *Gacaca* process itself.²²⁹ Thus, there was a very real sense in which the process was imposed from the top-down (with the top being Kigali rather than New York or Geneva).²³⁰

Beyond control and process, there is also a substantive dimension to questions of local ownership, including the extent to which a transitional justice initiative honors and resonates with local values and practices. Even on this score, the *Gacaca* process receives mixed results. While initially greeted with enthusiasm by the Rwandan population as a distinctively Rwandan approach to post-conflict justice in contrast with the remote and Western ICTR, many Rwandans were ultimately alienated by the process and felt that it lacked legitimacy.²³¹ In many respects, the process appeared to be more in tune with national (or government) values and priorities than community-based ones in the sense that it was engineered to reinforce longstanding partisan narratives favored by the Rwandan Patriotic Front (RPF) political party by excluding crimes committed by the RPF from the *Gacaca* process.²³² Thus, *Gacaca* illustrates that adapting the trappings of local practices, traditions, and rituals alone is not sufficient to generate a sense of legitimacy and good will toward a transitional justice program.

With the process concluded as of 2012, *Gacaca* leaves an ambiguous legacy.²³³ While it constitutes an important experiment in post-conflict justice programming, its glaring gaps and deficiencies also serve as something of a cautionary tale.²³⁴ Initially

²²⁷ Many ordinary Rwandans prefer the *Gacaca* courts over Rwanda’s national courts and the ICTR. See Ingelare, “The *Gacaca* Courts in Rwanda,” 51. At the same time, other Rwandans see it as an imposition from Kigali. See Burnet, “The Injustice of Local Justice,” 188; see also Oomen, “Donor-Driven Justice,” 904 (noting that “the public at large seemed to increasingly consider the [*Gacaca*] meetings as mandatory events to sit through, just like community service.”)

²²⁸ See generally, Triponel and Pearson, “What do You Think Should Happen?”

²²⁹ See Ingelare, “The *Gacaca* Courts in Rwanda,” 31, 46-47

²³⁰ See Burnet, “The Injustice of Local Justice,” 188

²³¹ See *Ibid.*

²³² See Christopher Le Mon, “Rwanda’s Troubled *Gacaca* Courts,” *Human Rights Brief* 14 (Winter 2007): 16. The RPF was the military victor in the Rwandan conflict and has effectively set the agenda for post-genocide Rwanda without much restraint. See Ingelare, “The *Gacaca* Courts in Rwanda,” 31-32.

²³³ Phil Clark has written a comprehensive review of *Gacaca*, delving into strengths and weaknesses in great detail. See generally Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda*; see also Ingelare, “The *Gacaca* Courts in Rwanda,” 51-57 (evaluating the strengths and weaknesses of *Gacaca*).

²³⁴ These include the fact that the *Gacaca* process actually led to *increases* in the numbers of the accused and detained. See Burnet, “The Injustice of Local Justice,” 178. It may have also increased conflict in some communities. See *ibid.*, 74.

projected as an exemplar of local ownership in transitional justice, Gacaca was in practice another top-down, state-based solution imposed on affected communities, and ultimately suffered a loss of legitimacy as a result.²³⁵ Given the authoritarian political climate in Rwanda, this should not be surprising.²³⁶ Rather than transcending Rwanda's post-genocide political culture, Gacaca was simply played out through its prism.²³⁷

At a deeper level, Gacaca illustrates the almost inescapable pull of both universalism and particularism in transitional justice processes, with notions of what it means to do justice in the aftermath of conflict invariably shaped by contested global and local standards.²³⁸ More than that, however, it represents a clash of purportedly universal commitments, between liberal internationalism and international human rights, on the one hand, and conceptions of local autonomy, self-determination, and sovereignty on the other. Given the seeming inevitability of these competing forces in many transitional justice interventions, the disappointments and politics of Gacaca point not to the need to abandon alternative or "hybrid" approaches to post-conflict justice, but to consider possibilities that offer a better balance, including global-local balance, along the multiple axes of local ownership: control, process, and substance.²³⁹

²³⁵ See Oomen, "Donor-Driven Justice and its Discontents," 906-07; see also Thomson and Nagy, *Law*, "Power and Justice," 13 (describing Gacaca as a "state-imposed" project).

²³⁶ See Thomson and Nagy, "Law, Power and Justice," 13 (noting that legal systems, traditional or otherwise, "inescapably embody prevailing constellations of power.")

²³⁷ See Andrew Iliff, "Root and Branch: Discourses of 'Tradition' in Grassroots Transitional Justice," *International Journal of Transitional Justice* 6, no. 2 (2012): 8 (arguing that Gacaca was used to "bolster[] the current Rwandan government's framing of the genocide as a singular event legitimating its authoritarian rule.")

²³⁸ For a review of the ways in which the universality debate in human rights can inform dilemmas of the global and the local that arise in the transitional justice context, see generally Lieselotte Viaene and Eva Brems, "Transitional Justice and Cultural Contexts: Learning from the Universality Debate," *Netherlands Quarterly of Human Rights* 28 (2010): 199; see also Alexander Betts, "Should Approaches to Post-conflict Justice and Reconciliation be Determined Globally, Nationally, or Locally?," *European Journal of Development Research* 17 (2005): 740-44 (discussing the ways in which the universalism-versus-relativism debate played out in post-genocide Rwanda).

²³⁹ It is important to note that not all attempts to integrate local or "traditional" approaches to post-conflict justice and reconciliation have been as controversial as Gacaca. These efforts have not typically substituted for trials and truth commissions, but have served as an important complement to them. For example, in East Timor's Community Reconciliation Process, reconciliation between perpetrators and former combatants with members of their estranged communities was facilitated by drawing upon elements of local ritual, arbitration, and mediation practice. See generally Patrick Burgess, "A New Approach to Restorative Justice – East Timor's Community Reconciliation Process," in *Transitional Justice in the Twenty-first Century*, eds. Roht-Arriaza and Mariezcurrena, 176-205. In Sierra Leone, the formal, state-sanctioned truth commission incorporated aspects of local ritual into its work. See generally Kelsall, "Truth, Lies, Ritual." The non-governmental organization Fambul Tok ("Family Talk" in the Krio language) has also worked to facilitate a context-specific response to reconciliation. See generally Park, "Community-Based Restorative Transitional Justice." All of these efforts have been marked by significant elements of global-local hybridity.

As noted in the area of hybrid courts, practices of genuine global-local hybridity hold promise, yet have not been adequately tested in practice, suggesting the need for further innovation.²⁴⁰ For all of their promise, however, future experiments in alternative or hybridized justice and reconciliation are unlikely to involve easy compromise or simple solutions to the dilemmas of the global and the local. Better global-local balance requires a give and take on *both* “sides,”²⁴¹ something that goes well beyond the lip service paid to tokenistic concepts of local ownership today.²⁴² Moving beyond superficial concepts of local ownership will necessarily entail a fundamental re-consideration of the primacy of Western approaches to mass atrocity.²⁴³ Thus, reimagining the foreclosed possibilities will require more than a simple call to place greater emphasis on the local or non-Western,²⁴⁴ requiring instead a more fundamental re-consideration of what it means to

²⁴⁰ The concept of hybridity has been offered in the broader context of peacebuilding as one way to begin to move beyond simple global-local debates and to better capture the complexity of the relationships between the many actors involved. See generally Roger Mac Ginty, *International Peacebuilding and Local Resistance. Rethinking Peace and Conflict* (New York: Palgrave MacMillan, 2011). Hybridized forms of peacebuilding that involve a mixture of conventional and local practices and models are also offered as one way to begin to move beyond the confines of liberal international peacebuilding. See Edward Newman et al, “Introduction,” in *New Perspectives on Liberal Peacebuilding*, eds. Edward Newman et al (United Nations University, 2009), 16. In addition to being a useful analytical tool, in some cases the concept is portrayed as “a desirable political project[] that could stimulate alternatives and counter what is perceived to be hegemonic, externally driven liberal programming.” Peterson, “A Conceptual Unpackaging of Hybridity,” 7. For the application of a hybridity lens to post-conflict justice more specifically, see generally, Chandra Lekha Sriram, “Post-Conflict Justice and Hybridity in Peacebuilding: Resistance or Cooptation,” in *Hybrid Forms of Peace*, eds. Richmond and Mitchell.

²⁴¹ Existing UN doctrine does not really allow for this. In a landmark 2004 report on transitional justice, for example, former Secretary General Kofi Annan notes that “due regard must be given to indigenous and informal traditions” yet suggests in the same sentence that “due regard” will only be extended insofar as there is “conformity” with international standards. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004), ¶¶ 16-17, 36. As I suggest below, space must be made for a substantial “margin of appreciation.”

²⁴² See Lundy and McGovern, “Whose Justice?,” 279 (noting that “[d]espite being identified as key issues in international reports and development circles for years, the virtues of local ownership, empowerment, and participatory approaches have tended only to be implemented in a vague, weak, and ad hoc manner.”)

²⁴³ See Weinstein et al, “Stay the Hand of Justice,” 35 (noting that “there has been little room for consideration of broader or alternative approaches, especially those that might emerge out of different or non-western conceptions of justice.”)

²⁴⁴ See Moses Chrispus Okello, “Afterword: Elevating Transitional Local Justice,” 277 (noting that a call for greater weight to be placed on the local “does not in itself represent a shift in the underlying assumptions of the field—at most, it is a shift in emphasis.”)

do “justice” in times of transition.²⁴⁵ After all, it would be all too easy for mainstream transitional justice programs and professionals to embrace the local to the extent that it resonates with and resembles Western norms and institutions, using the trappings of the local in an attempt to boost legitimacy and buy-in to a larger set of projects.²⁴⁶ Yet this would represent at best a form of co-option, a leveraging of the local only insofar as it stands in conformity with the global.

In the end, giving more than rhetorical weight to principles of local ownership in matters of post-conflict justice will require a significant “margin of appreciation”²⁴⁷ and acceptance of an at-times uncomfortable pluralism²⁴⁸—forcing us to stand on that tenuous yet inevitable middle ground between universalism and relativism.²⁴⁹ However, striking a global-local balance also means that one particular local will at times have to give way to a larger local.²⁵⁰ This reflects the simple recognition that neither global nor local dimensions of justice holds a monopoly on emancipatory projects, possibilities, and wisdom.

E. Conclusion

Dilemmas of the global and the local are now firmly entwined in transitional justice narratives, sticky strands that we can neither remove nor let go. Those dilemmas call on

²⁴⁵ See An-Na'im, “Editorial Note,” 197 (observing that the dominant transitional justice paradigms are so strong that “even the possibility of an indigenous alternative conception of justice is not taken seriously at a theoretical or empirical level.”)

²⁴⁶ See Erin Baines, “Spirits and Social Reconstruction,” 411-12, 414-15.

²⁴⁷ See Viaene and Brems, “Transitional Justice and Cultural Contexts,” 210 (reviewing the margin of appreciation doctrine that has developed under the European Convention on Human Rights).

²⁴⁸ On the complexities of legal pluralism in international law more broadly, see generally Brian Tamanha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Sydney Law Review* 30 (2008): 375.

²⁴⁹ Using different terminology, scholars from a range of disciplines have made attempts to carve out a position between strong universalism and strong relativism. See, e.g., Paul Healy, “Human Rights and Intercultural Relations,” *Philosophical and Social Criticism* 32 (2006): 513 (arguing for a middle ground between ethnocentric universalism and radical cultural relativism); Gérard Cohen-Jonathan, “Universalité et Singularité des Droits de l'Homme,” *Revue Trimestrielle des Droits de l'Homme* 53 (2003): 11 (discussing a “pluralist” conception of human rights); Anne Hellum, “Women’s Human Rights and African Customary Laws: Between Universalism and Relativism – Individualism and Communitarianism,” in *Development and Rights: Negotiating Justice in Changing Societies*, ed. Christian Lund (New York: Frank Cass, 1999), 96 (using the idea of “cultural pluralism” to create a space between universalism and relativism); Ronald Cohen, “Human Rights and Cultural Relativism: The Need for A New Approach,” *American Anthropologist* 91, no. 4 (1989): 1015-16 (calling for a middle ground between “simplistic polarities of relativism versus universalism.”).

²⁵⁰ See Mazlish, “The Global and the Local,” 99 (discussing the idea of local giving way to larger local);

us to interrogate the historical and ideological origins of the field, grounded as it has been in Western liberalism and legalism, and may even point to the need to abandon paradigms of “transition” altogether.²⁵¹ While one should avoid simplistic notions of path dependency, an examination of origins remains useful in helping to identify some of the lingering assumptions and blindspots that have in part helped to generate many of the global-local frictions so often associated with transitional justice interventions today.

At one level, attempts to resolve or at least manage these dilemmas reflect a healthy pragmatism and acknowledgement that transitional justice efforts are unlikely to contribute to larger aims of post-conflict reconstruction if they are not embraced by those who have to live with them, making questions of legitimacy and sustainability paramount. Yet beyond pragmatism, increasing attention paid to concepts like local ownership may reflect a deeper ambivalence with the imperiousness of international justice and some measure of discomfort with the *sotto voce* imperialism of liberal international peacebuilding more generally.²⁵² Few Western countries or world powers, for example, would accept some of the more intrusive dimensions of international justice. At the same time, the local also inspires another sort of moral ambivalence. Global institutions now insist that the local must be given “due regard,” but wring hands over where due regard must give way to international standards and best practices.²⁵³ In the end, the dilemmas of the global and the local therefore express tensions between different normative commitments, between liberal internationalism and international human rights on the one hand, and principles of local sovereignty and autonomy on the other.

Yet if we are to do more than repeat that addressing the dilemmas of the global and local is both important and hard, we must start by questioning simple categories and narratives of global and local, coming to understand transitional justice processes instead as part of a more complicated dialectical process that moves between multiple levels. At the same time, we must carefully parse what we mean by local ownership. The normative currency of the local is now such that concepts like local ownership can be used as a legitimate shield—as a form of resistance to the hegemony of liberal international peacebuilding and a way to carve out a legitimate sphere of autonomy in matters of post-conflict justice—but also as a talisman by enterprising elites who would seek donor dollars while furthering their own partisan political agendas.²⁵⁴ Coming to understand local ownership along its multiple dimensions or axes—including control, process, and substance—might help to clarify thinking in crafting future experiments in transitional justice. Such experiments will hopefully build upon more equitable global-local partnerships, reflecting an acceptance of genuine practices of hybridity that take us beyond the self-imposed parameters of the transitional justice “toolbox.”

²⁵¹ See generally An-Na'im, “Editorial Note.”

²⁵² See Uvin, “Difficult Choices in the New Post-Conflict Agenda,” 186 (arguing that “[t]aken to its extreme, the new post-conflict agenda, then, amounts to a license for interventionism so deep and unchecked it resembles colonialism.”)

²⁵³ For an argument that so-called “best practices” tend to promote an undesirable uniformity and bias interventions towards the global rather than the local, see generally, Warren Feek, “Best of Practices?,” *Development in Practice* 17 (2007): 653.

²⁵⁴ See Iliff, “Root and Branch,” 8.

