Rethinking Justice in Transitional Justice: An Examination of the Mãori Conception and Customary Mechanism of Justice

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by

Stéphanie, Anne-gaëlle Vieille B.A., M.A

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THE UNIVERSITY OF WESTERN ONTARIO
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CERTIFICATE OF EXAMINATION

Supervisor

Dr. Joanna Quinn

Supervisory Committee

Dr. Nandita Biswas-Mellamphy

Dr. Charles Jones

Examiners

Dr. Nandita Biswas-Mellamphy

Dr. William Danaher

Dr. Doug Long

Dr. Rosemary Nagy

The thesis by

Stéphanie Anne-gaëlle Vieille

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ABSTRACT

As a relatively young field of academic inquiry, the transitional justice scholarship presents some important difficulties, not least of which is its lack of critical evaluation of the approaches to justice it adopts and promotes. This research argues that the framework used in the transitional justice scholarship is ill-suited to account for, and to think about, the philosophy of justice embodied in customary mechanisms of justice. It explains that the type of "justice" embodied in customary mechanisms of justice is difficult to appreciate by using the retributive, reparative, and the restorative approaches. These Western, individualistic and legally based approaches are often antithetical to the conception of "justice" embodied in customary mechanisms of justice. This study is substantiated with an examination of the Mãori tradition and justice practices. It conceptualizes the type of justice that is embodied in traditional mechanisms of justice as a form of "relational justice," which is described as an approach to doing justice that prioritizes relationships. This study argues that this is based on the primacy of communal well-being. It also discusses the implications research findings have for the field of transitional justice. That is, it addresses the problematic propensity of the scholarship to see the rule of law as the "end all, be all," and to use it as a benchmark against which all other justice practices are to be measured. This research also takes the opportunity to push the boundaries of the transitional justice literature further by speaking to the need to revise the common understanding of what constitutes a transitional society.

KEYWORDS

Transitional Justice, Retributive Justice, Reparative Justice, Restorative Justice, Customary Mechanisms, Mãori, Indigenous, the Rule of Law.

DEDICATION

A maman, pour tous tes sacrifices et ton amour. Saches que ma réussite est tout aussi la tienne;

et

A mon papy, qui a rejoint mammie. J’espère que vous êtes tous les deux fiers de moi, tout là haut…

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He aha te mea nui o te ao?
He tangata! He tangata! He tangata![1]

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Et enfin, maman, encore et toujours, merci!

[1] Mãori Proverb, "What is the most important thing in the world? It is people! It is people! It is people!"

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LIST OF ABBREVIATIONS

AU	African Union
CEP	Common Experience Payment
CONADEP	National Commission on the Disappearance of Persons
DFID	Department for International Development (UK)
DPKO	Department of Peacekeeping Operations of the United Nations
FGC	Family Group Conferencing
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDEA	Institute for Democracy and Electoral Assistance
NGO	Non-governmental organization
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission
UN	United Nations
UNDP	United Nations Development Program

PREFACE

"As I read the passage, all the familiar landmarks of my thought--*our* thought, the thought that bears the stamp of our age and our geography--breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes a 'certain Chinese encyclopedia' in which it is written that 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (1) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies'. In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that."*[2]

[2] Michel Foucault, *The Order of Things: An Archeology of Human Sciences* (New York: Routledge, 2002), xvii.

CHAPTER ONE

INTRODUCTION

Both settler and post-conflict societies often have to face the legacies of mass violations of human rights. Countries like Rwanda and Chile, for instance, have had to deal with the consequences of intra-state violence or genocide. In the cases of settler societies, like New Zealand and Canada, indigenous populations have been the targets of state-sponsored human rights violations and other discriminatory policies aiming at their complete assimilation or eradication. While the circumstances that led to these human rights violations differ significantly in settler and post-conflict societies,[3] the measures used in both contexts are often similar. Truth-seeking bodies, such as truth commissions, are sometimes created to delve into the past. This was the case in South Africa, which set up a Truth and Reconciliation Commission in the hope to facilitate reconciliation between black, "coloured," and white South Africans. Although Canada is not going through a regime transition, as was the case in South Africa, it also set up a Truth Commission to shed light upon the human rights violations carried out under the government's residential school policies.

[3] Broadly speaking, post-conflict societies include societies transitioning from warfare and unrest to peace. This thesis recognizes, however, that transitions between unrest and peace are not always clearcut and definite. Chapter Two discusses the link between transitional justice and conflict resolution. When referring to settler societies, this research considers countries that have been colonized, with as a primary concern, the occupation of land and creation of a new society. Settler societies differ from other forms of colonization where trade and resources, rather than the occupation of land, were the primary motivation. For more information, see for instance, Patrick Wolfe, "Settler Colonialism and The Elimination of the Native," *Journal of Genocide Research* 8 no. 4 (2007): 387-409.

Transitional justice scholars have paid significant attention to post-conflict societies, but much less to settler societies. Yet, in both cases, a key question is raised: How can these societies deal with the past and come to terms with the present? More specifically, how can individuals live peacefully together after the occurrence of mass violations of human rights?[4] While the circumstances and the kinds of human rights violations carried out in settler societies often differ from those in post-conflict situations, both types of societies have to grapple with similar moral, ethical, social and political concerns. These transitional societies, for instance, have to come up with ways to acknowledge a difficult past, to hold human rights abusers accountable, and to reconcile different segments of society. Using New Zealand as case study contributes directly to the broadening of the transitional scholarship, by showing that settler and post-conflict societies sometimes share similar challenges in facing the legacies of past human rights violations, and that lessons can be learnt and shared between both. In the case of New Zealand, a settler society, the government is trying to repair some of the harm caused by colonization, through, for instance, the creation

[4] When referring to human rights, this thesis takes, as a point of reference, the Universal Declaration of Human Rights (1948). It does so recognizing the debates surrounding the universality of human rights as discussed, for instance, in Robert Patman, *Universal Human Rights?* (New York: St Martin's Press, 2000); Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6 no. 4 (1984): 400-419; Thomas M Franck, "Are Human Rights Universal?" *Foreign Affairs* 80 (2001): 191-204; Tim Dunne and Nicholas Wheeler, *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 2000). A discussion of the debates surrounding the political nature of human rights is beyond the scope of this research. The thesis also briefly explains the link between human rights and the transitional justice scholarship, in Chapter Two.

of the Waitangi Tribunal,[5] and the implementation of a number of policies aimed at accommodating Mãori cultural preferences and traditions.[6]

What motivates this project is an interest in community-based, customary mechanisms of justice used by indigenous and remote communities when dealing with offenders. This research answers the following questions: *What is the philosophy of justice embodied in customary mechanisms of justice? And, to what extent can this philosophy of justice be accommodated by the approaches to justice used in the transitional justice scholarship?* This study builds on existing but disparate research surrounding processes of reconciliation, truth commissions, and the legacies of mass violation of human rights. It also draws together the literature on peacebuilding, transitional justice, and legal pluralism, all of which questions the centrality of the state as the sole legitimate and normative source of order.[7] Based on the examination of the philosophy of justice embodied in *tikanga Mãori*, this thesis argues that the framework normally used in the transitional justice scholarship is ill suited to account for, and to think about, the philosophy of justice embodied in customary mechanisms of justice.[8]

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[5] The Waitangi Tribunal was established in 1975. It is a permanent commission of inquiry responsible for making recommendations on claims put forth by Mãori and pertaining to breaches of the Treaty of Waitangi. See, The Waitangi Tribunal, [website]; accessible at http://www.waitangi-tribunal.govt.nz/; accessed April 22nd 2010.

[6] This research concentrates on the reforms that target the New Zealand judicial system. However, the government has been active in initiating reforms in other sectors such as in the health and education sectors. See, for instance, Patricia Laing and Eru Pomare, "Mãori Health and the Health Care Reform," *Health Policy* 29 no. 1-2 (1994): 143-156.

[7] Rosemary Nagy,"Traditional Justice and Legal Pluralism in Transitional Contexts: The Case of Rwanda's Gacaca Courts," in *Reconciliation (s): Transitional Justice in Postconflict Societies*, ed. Joanna R. Quinn (Montreal: McGill University Press, 2009), 89.

[8] This research refers to indigenous and customary mechanisms and approaches to justice interchangeably. This is done for practical reasons, as this thesis discusses customary approaches to justice broadly, but uses an indigenous approach (Tikanga mãori) as a case study to substantiate the argument. Further explanation of this choice of word can be found in Chapter Three (footnote 13).

Transitional Justice

Situating the field of transitional justice within the conflict resolution literature helps to draw attention to the some of the conceptual difficulties inherent in the field of transitional justice. These conceptual difficulties affect a number of the central concepts of the field including "truth" and "reconciliation." This study illustrates the complexity of such a fast growing academic field of inquiry, through a critical assessment of the transitional justice scholarship. Understanding the field of transitional justice and its intrinsic complexities is an important step towards a discussion of alternative conceptions, and, subsequently, mechanisms of justice. Furthermore, highlighting the connection between transitional justice and the literature on peacemaking, peacebuilding and peacekeeping is useful as it allows us to highlight the extent to which the transitional justice scholarship borrows its ideas and assumptions about justice from the overly state-centred field of peacebuilding. This affects, for instance, the literature's current understanding of what constitutes a society in transition. This is important because it leads scholars of the field to focus their attention on post-conflict cases, at the expense of other potentially relevant instances where serious human rights violations have been committed, including settler societies such as New Zealand. This research underlines the need to broaden the scholarship's view of what characterizes transitional societies, to include societies where no overt regime change is taking place, but where states are dealing with the legacies of state-sponsored mass violations of human rights.

The transitional justice scholarship has generally been reluctant to engage with customary mechanisms of justice outside of the legalistic and over-

individualistic framework that it uses to categorize approaches to justice.[9] When accounted for, customary mechanisms of justice are often described as embodying a mix of retributive, reparative and restorative values. These mechanisms have rarely, if at all, been examined outside of the existing and well-established framework in which the field of transitional justice is grounded. This deontological liberal framework has clear roots in the Western intellectual tradition and favors a certain understanding of the individual, the society and justice, which do not jive with other, in this case Māori, intellectual traditions and cultural sensibilities. This has important

[9] A significant number of scholars use the retributive, reparative and restorative approaches to categorize and describe customary mechanisms of justice. In fact some researchers simply equate 'traditional' and 'local' approaches with restorative justice. See, for instance, Erin Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda," *The International Journal of Transitional Justice* 1 no.1 (2007), 96; Lucy Hovil and Joanna R. Quinn, "Peace First, Justice Later: Transitional Justice in Northern Uganda," *Refugee Law Project Working Paper Series*, Working Paper no. 17, July 2005, 14; Jonathan Rudin, "Aboriginal Justice and Restorative Justice," in *New Directions in Restorative Justice: Issues Practice and Evaluation*, ed. Elizabeth Elliott and Robert Gordon, 89-114. (Devon: Willan Publisher, 2006); Mechthild Nagel, "Ubuntu and Indigenous Restorative Justice," Africa Peace and Conflict Network, 2008. [Report on-line]. Accessible at http://www.africaworkinggroup.org/files/UbuntuBriefing3.pdf; Luc Huyse and Mark Salter, "Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences," Stockholm: International Institute for Democracy and Electoral Assistance, 2008. [ISBN: 978-91-85724-28-4], [report online]; accessible at http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf; James Guest, "Aboriginal Legal Theory and Restorative Justice," Native Law Centre of Canada, 4 no. 3, 1999, [article online]; accessible at http://www.usask.ca/nativelaw/publications/jah/1999/Ab_Legal_Theory_Pt2.pdf; Donna Durie Hall, "Restorative Justice: A Māori Perspective," in *Restorative Justice. Contemporary Themes and Practice*, ed. Helen Bowen and Jim Consedine, 25-35. (Littleton: Ploughshares, 1999); Sinclair Dinnen, "Traditional Justice Systems in the Pacific, Indonesia and Timor-Leste," a paper presented at the UNICEF Conference on Justice for Children in the Pacific, Indonesia and Timor-Leste, Papua New Guinea, 2009; Jim Consedine, "The Māori Restorative Tradition," in *Restorative Justice Reader: Texts, Sources, Context*, ed. Gerry Johnstone, 152-57. (London: Willan, 2003); Phil Clark, "Hybridity, Holism and 'Traditional' Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda," *George Washington International Law Review* 39 (2007): 765-835; Jane Dickson-Gilmore and Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005); John Braithwaite, "Encourage Restorative Justice." *Criminology and Public Policy* 6, no. 4 (2007): 689-96. A few exceptions include, for instance, Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Canada: Penguin, 2006); Harry Blagg, *Crime, Aboriginality, and the Decolonization of Justice* (Sydney: Hawkins Press, 2008); Matt Hakiaha, "Resolving Conflict from a Māori Perspective," in *Restorative Justice: Contemporary Themes and Practice*, ed. Jim Consedine and Helen Bowen, 91-94. (Christchurch: Plougshare, 1999).

implications for the transitional justice scholarship, as well as for customary approaches and mechanisms of justice, which often end up being misunderstood and altered to correspond to the expectations of the existing legal framework. Indeed, the framework used by transitional justice scholars makes these three approaches to justice inapt and unsuitable to explain customary mechanisms of justice. It claims that their overly legalistic and individualistic focus renders the retributive, reparative and restorative approaches partly incongruous.

This has an important impact on the ability of the transitional justice scholarship to remain relevant to the work carried out in transitional societies. As the UN Secretary-General noted in his *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, "due regard must be given to indigenous and informal traditions for administering justice or settling disputes."[10] An examination of these mechanisms, and of the philosophies of justice that underpins them is well overdue. For this reason, this thesis suggests that a communitarian approach is better equipped to account for the kind of justice that is embodied in many traditional and customary mechanisms of justice.[11]

[10] Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability after War* (Cambridge: Polity, 2007), 156; Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," The United Nations (S/2004/616), 2004.

[11] It is important to note, here, that this research does not claim that all customary mechanisms of justice adopt the same philosophy of justice. Rather it seeks to explore one existing approach to justice that is embodied in some customary mechanisms of justice, such as Tikanga mãori, and that cannot be accommodated by the deontological liberal framework used by transitional justice scholars.

Customary Mechanisms of Justice

In a number of cases, customary mechanisms have been revived and adapted to deal with the return of offenders to communities. Customary mechanisms are (neo)-traditional processes based on local customs and often used by communities, across Africa, Latin America and the South Pacific, for instance, to deal with offences and violations of rules. They differ from other judicial mechanisms, such as tribunals and courts, in that they seek to remain largely uncodified, uninstitutionalized and community-based. Rwanda's *Gacaca* courts are one of the most famous and debated examples of customary mechanisms of justice being modified to deal with the outcome of grave human rights violations.[12] In practice, such mechanisms are often supported by the international community on "an ad hoc basis…but without a coherent policy or guidelines," as in Timor Leste and Mozambique.[13] Customary mechanisms of justice have also, sometimes, been entrenched in states' legal systems, such as in Uganda, and Bolivia. Yet, customary mechanisms of justice and the philosophy they embody generally remain misunderstood and largely under examined.

For this reason, Chapter Six advances a typology of customary mechanisms of justice based on the evidence furnished by the existing transitional justice scholarship. It also highlights the importance and value of these mechanisms, and explores some of the challenges that are frequently raised against their use. For instance, it questions the extent to which transitional justice is able to tolerate practices that may be

[12] See, for instance, Mark Drumbl, "Sclerosis: Retributive Justice and the Rwanda Genocide," *Punishment and Society* 2 no. 3 (2000): 287-307; see also Stephen Brown, "The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda," a paper presented at the Annual Convention of the International Studies Association, New York, 2009.
[13] Kerr and Mobekk, *Peace and Justice*, 151.

contrary to some fundamental principles that underpin the scholarship, such as gender equality and fairness. Indeed, in some instances, customary mechanisms of justice may limit the role of women or be fraught with power struggles over authority. Such cases raise important concerns, regarding, for instance, whether the transitional justice scholarship could, or even *should* accommodate these practices, or whether, the recognition of the cultural bias of the literature's approach to justice places an obligation on scholars to accept approaches and practices that may be fundamentally contrarian to some basic human rights principles. Here, the view that a middle ground can and must be reached is adopted. This research contends that the field of transitional justice must engage in the search for this common ground, if the research that comes out of the field is to remain relevant to the challenges encountered by transitional societies. For that, however, transitional justice scholars must step out of the traditionally legalistic confines of the field and be willing to question their own assumptions when examining alternative approaches to doing justice.

In addition, this thesis examines two philosophies of justice, namely the African, Bantu concept of *Ubuntu* and the Canadian Aboriginal notion of "healing justice." Both approaches are useful instances of indigenous, non-Western alternative mechanisms of justice, and help highlight some crucial differences between these philosophies of justice and the legalistic approaches used in the transitional justice scholarship.[14] In fact, both *Ubuntu* and Aboriginal "healing justice" put great

[14] This research broadly refers, throughout, to 'Aboriginal,' 'indigenous' and 'Western' approaches. While there is a danger of grossly generalizing different cultures and regions, it is important to stress that this is not the intention. Rather, this thesis seeks to highlight the commonality of the philosophical and intellectual traditions as well as historical experiences that make up 'the West' and 'indigenous peoples.' It appreciates the variety of cultures and peoples that make up these broad categories and does not claim their uniformity. For an interesting discussion on the subject, see Ashis Nandy, *The Intimate Ennemy:Loss and Recovery of Self Under Colonialism* (Delhi: Oxford University Press,

emphasis on notions of interconnectedness and holistic justice, which are rarely accounted for in the existing literature. This thesis provides important clues about what indigenous, customary and community-based approaches to justice have in common and how they differ from the conceptions of justice adopted in the transitional justice literature.

The Mãori Conception of Justice: A Case Study

This study is substantiated with an examination of Mãori practices and approach to justice. Three months of ethnographic research were conducted in New Zealand, during the summer of 2010, during which 33 interviews with individual Mãori were gathered. New Zealand is a very good example of a democratic society in transition, struggling to accommodate and include Mãori cultural practices and judicial processes within its institutions.

Throughout its history, New Zealand has been the site of political, economic, territorial, and social struggles between the settler society and the indigenous population. More recently, the New Zealand government has launched numerous policies and initiatives to remediate some of the impact these struggles have had on the Mãori, and while at the same time seeking to redress historical wrongs. Yet, the evidence gathered shows that many Mãori, still, to a large extent, doubt government policies. They also often continue to rely on their own customary mechanisms and

1989), xi. Nandy discusses how colonization has provided a 'shared culture' (i.e. language, experience, understanding) for the colonized and the colonizers respectively. See also, Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999).

traditions in their everyday lives, rather than resort to state intuitions, which they distrust.

The three months spent conducting ethnographic research in New Zealand and interviewing Mãori community members provided invaluable information on *tikanga Mãori* and the cultural sensibilities that underpin the Mãori conception of justice. The evidence gathered through fieldwork and the examination of the transitional justice scholarship leads this study to question the extent to which the philosophy of justice embodied in customary mechanisms of justice can be accommodated by Western, legal and individualistic approaches used in transitional justice.

The thesis makes an important contribution to the field of transitional justice by providing an in-depth examination of *tikanga Mãori*, the Mãori approach to justice. Indeed, studies of alternative mechanisms of justice and the philosophy of justice they embody are sparse. And, while there is some research available on *tikanga Mãori*, the latter is generally dated or is silent on its current interaction with government policies. In this research *tikanga Mãori* is defined as a form of "relational justice," which stresses the importance of kinship to the Mãori. This research also identifies the pillars of the Mãori approach to doing justice, including the principles of i) interconnectedness and collective responsibility, ii) community participation and iii) collective well-being. It touches upon the current attempts of the New Zealand government to include Mãori values within the official legal system, with the creation of the family conferencing model, and other calls for attention to be paid the tendency of the government to equate the Mãori legal traditions with the restorative tradition. This tendency is problematic. Yet, it is symptomatic of some existing international

efforts to include and promote customary mechanisms of justice within existing legal systems.

Tikanga Mãori, Restorative Justice and Implications for the Field

This project critically assesses the validity of the claim that *tikanga Mãori* can be equated with the restorative justice approach. It does so by carrying out a comparison between i) restorative justice practices, as described in the transitional justice literature, ii) the family group conferencing model set up in New Zealand to accommodate *tikanga Mãori,* and iii) the practice of *tikanga Mãori* in Mãori communities. Most importantly, this comparison helps debunk the widely accepted claim that customary mechanisms of justice and restorative justice practices are one and the same. It also addresses the communities' responses and dislike of the government's propensity to dilute Mãori culture to fit its legal framework. While, at first sight, *tikanga Mãori* shares some characteristics with restorative justice mechanisms and approach, the values that underline both approaches significantly differ. Current efforts to account for, and accommodate "relational" justice are fraught with a severe lack of understanding of the different cultural sensibilities that give essence to customary conceptions of justice.

This research is valuable, for it draws attention to the wider implications for the field of transitional justice when dealing with approaches and mechanisms that fall outside of its frame of reference. In practical terms, this research seeks to shed light on the philosophy of justice that underpins the Mãori customary mechanism of justice and customary law. This thesis also highlights, through the examination of the New

Zealand government's policies, the inherent limitations of any accommodation movement that does not, in the first place, seek to engage with customary laws and beliefs outside of the existing deontologically-driven legal framework.[15] As it turns out, this is seen as dangerous, since it risks delegitimizing the transitional justice scholarship along with any solutions and recommendations that it may provide.

[15] By deontologically-driven framework, this thesis refers to a specific approach to justice, which has roots in the European intellectual traditon. The writings of Kant are particularly illustrative of this approach, which presupposes individuals as independant moral agents, *a priori* of their membership to any community. In addition, this deontologically-driven framework assumes that the conception of justice is largely independant of one's cultural orientation, and is guided by a universal notion of the '*right*.' What is meant by 'deontologically-driven' framework, is discussed in further detail, in Chapter Three.

CHAPTER TWO

TRANSITIONAL JUSTICE: THE STATE OF THE FIELD

Transitional justice scholarship deals essentially with the legacies of mass violations of human rights and how to best come to terms with them.[16] As a rapidly growing field of study and research, transitional justice has to deal with important conceptual and practical challenges. Understanding the nature and purpose of the field of transitional justice is of crucial importance to this research. It is essential to situate the field of transitional justice within the broader spectrum of conflict resolution, discussed below, in order to understand the relevance of the transitional justice scholarship to conflict resolution and peacebuilding efforts, and to understand the origin of some of the inadequacies of the field, including its focus on state mechanisms and the rule of law.

Many of the core elements of the field of transitional justice present significant challenges. Concepts such as truth and reconciliation are some of the most problematic. Indeed, both concepts are often referred to, but hardly examined and evaluated. Yet, they are critical elements to be considered in transitional societies. A similar observation can be made regarding scholars' choice of case studies, which reflects the field's understanding of what constitutes a transitional society. Indeed, traditionally, the scholarship has largely focused its attention on human rights

[16] This chapter discusses and defines the transitional justice scholarship further, below.

violations in post-conflict situations, thereby ignoring all other instances where there had been no overt regime change, including Canada, Australia and New Zealand.

Here, this research examines the conception of justice that is embodied in alternative mechanisms of justice in the aftermath of mass violations of human rights. This chapter seeks to demonstrate some of the inconsistencies and challenges that plague the transitional justice literature, and argues that the Western liberal framework within which the scholarship of transitional justice originated and continues to operate largely defines it.

Making Sense of Transitional Justice

Bringing about the conditions around which justice can safely develop is one of the central elements of transitional justice. As such, the field of transitional justice is deeply concerned with the anchoring of peaceful, democratic norms and values in the aftermath of mass violations of human rights. Yet, as a relatively young field of study, transitional justice is filled with uncertainties regarding some of its core elements and how best to implement them. This section introduces the reader to the nature and purpose of transitional justice as a field of study, for reflections inspired by scholars' and practitioners' experiences of transitional societies. As a fundamentally inter-disciplinary subject, it can be a thorny task to try to fit transitional justice within any one particular area of study. Nonetheless, transitional justice deals extensively, although not exclusively, with countries in transition from a troubled past, most frequently resulting from social unrest and divide or conflict. Therefore, this chapter

situates the field of transitional justice within the broader topic of conflict resolution, in order to define the field and some of its challenges.

What is Transitional Justice?

As it first emerged in the 1980's, the field of transitional justice was mostly concerned with "how justice could be administered fairly in a time of political and institutional flux."[17] In fact, the scholarship was shaped by a specific experience of transition from oppressive rule to liberal democracies, characterized by the third wave of democratization, during which some thirty countries across Latin America and Europe transitioned to democratic rule.[18] From its inception, the field of transitional justice was, therefore, largely defined by a specific notion of transition, implicitly understood as transition to peace, and democracy. Only more recently, has peace been discussed in connection to justice.[19] This quickly became "the dominant normative lens" of the field.[20]

Transitional justice encompasses the "legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict."[21] It is important to add, here, that it also does so in settler societies dealing with historical wrongs. Teitel suggests that the field of transitional justice has to deal more generally

[17] Melissa Nobles, "The Prosecution of Human Rights Violations," *Annual Review of Politcal Science* 13 (2010), 166.
[18] Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (USA: University of Oklahoma Press, 1993), xiii; and Tomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (2002): 5.
[19] Chandra Sriram, "Justice as Peace ? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society: Journal of Interdisciplinary International Relations* 21 no. 4 (2007), 584.
[20] Arthur Paige, "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009), 325-326.
[21] Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, "Justice Discourses in Transition," *Social and Legal Studies* 13 no. 3 (2004), 305.

with "the grounding within society of a normative shift in the principles underlying and legitimating the exercise of state power."[22] Transitional justice is engaged in the (re-) creation of institutions inclusive of society members and reflective of peaceful social norms and new order. In this respect, it signals a breakaway from the previous social order, and provides a tool for rethinking and casting a new vision and direction for society. In the cases of settler societies, it also symbolizes a government's acknowledgment of policies that contributed to the violation of the human rights of parts of its population. This is the case, for instance, in Australia, Canada, and New Zealand, which have taken a step towards redressing past wrongs.

Lydia Bosire prefers to say that the very endpoint and goal of transitional justice is reconciliation.[23] This account of reconciliation is problematic since it narrows, and by the same token, severely weakens the field of transitional justice and its primary concern for justice. The concept of reconciliation, as it is discussed in more length below, lacks complete theorization. As such, considering reconciliation as the endpoint and goal of transitional justice further complicates any account of the field of transitional justice, and assumes that reconciliation is the most desirable goal in the aftermath of mass violations of human rights. Viewing reconciliation accordingly risks dimishing the importance and role of other central aspects of transitional justice, including the re-establishment of democratic institutions.

The definition of transitional justice adopted, in this study, echoes the definition put forth by Hugo van der Merwe, Victoria Baxter and Audrey Chapman,

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[22] Ruti Teitel, *Transitional Justice* (New York : Oxford University Press, 2000), 213.
[23] Lydia Bosire, "Overpromised, Undelivered: Transitional Justice in Sub-Sahara Africa," Occasional Paper Series, The International Center for Transitional Justice, 2006, [paper online]; accessible from http://ictj.org/publication/overpromised-underdelivered-transitional-justice-sub-saharan-africa

who hold that transitional justice refers to "societal responses to severe repression, societal violence, and systemic human rights violations that seek to establish the truth about the past, determine accountability and offer some form of redress, at least of a symbolic nature."[24] To this, one could add that transitional justice provides a space for addressing, coming to terms with, and healing past wrongs, in a variety of contexts, such as in settler or post-conflict societies. This definition is valuable particularly because of its breadth. Indeed, it is broad enough to include both post-conflict and settler societies in their search for truth, accountability, social repair and reconciliation.

Truth commissions, national tribunals, and the International Criminal Court are some of the mechanisms commonly used to establish justice in the aftermath of mass violence. A small number of transitional justice scholars[25] have only very recently turned their attention to "the legacy of indigenous practices of dispute settlement and reconciliation," processes whose nature and features have so far gathered little consensus.[26] Indeed, Borer claims that existing accounts of various

[24] Hugo Van Der Merwe, Victoria Baxter and Audrey Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington: United States Institute for Peace, 2009), 1-2.
[25] See, for instance, Joanna R. Quinn, "Customary Mechanisms and the International Criminal Court," a paper presented at the Canadian Political Science Association, Toronto, 2006; Luc Huyse and Mark Salter, "Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences," Stockholm : International Institute for Democracy and Electoral Assistance, 2008. [ISBN: 978-91-85724-28-4], [report online]; accessible at http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf; Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," World Bank, 2005, [report online]; accessible at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf
[26] Huyse and Salter, "Traditional Justice and Reconciliation," 3

transitional justice mechanisms demonstrate an "insufficient understanding of how exactly these mechanisms contribute to peace."[27]

Although research in the area of traditional mechanisms of justice is as yet insufficient, scholarship on transitional justice has succeeded in bringing attention to the existence of such practices and the implications the can have for the implementation of justice in the aftermath of mass violations of human rights. Quinn, for instance, notes the importance of what she calls customary practices in the promotion of acknowledgment—an essential element in justice and reconciliation.[28] Hovil and Quinn explain that the traditional African sense of justice exemplified through traditional, customary processes, incorporates retribution as one part of "an overarching process that also encompasses rehabilitation, reconciliation, compensation, and restoration."[29] Such accounts demonstrate the embedded-ness of legal traditions within a culture, a way of life and network of meanings.[30] Other authors draw our attention to alternative ways to view and carry out justice emanating from Canada's First Nations, for instance, and note the difficulty in protecting such practices.[31] While alternative modes of conflict resolution and alternative mechanisms of justice remain largely under examined, existing testimonies note the latent tension between those traditional, grassroots, and informal mechanisms, and Western,

[27] Tristan Anne Borer, *Telling the Truths: truth telling and peace building in post-conflict societies* (Indiana: University of Notre Dame Press, 2006), 3.
[28] Joanna R. Quinn, "Comparing Formal and Informal Mechanisms of Acknowledgment in Uganda," a paper presented at the International Studies Association Annual Meeting, San Francisco, 2006.
[29] Lucy Hovil and Joanna R. Quinn, "Peace First, Justice Later: Transitional Justice in Northern Uganda," *Refugee Law Project Working Paper Series*, Working Paper no. 17, July 2005, 13.
[30] Susan Drummond, *Incorporating the Unifamiliar: An Investigation into Legal Sensibilities of Nunavik* (Kingston: Queens University Press, 1997), 23.
[31] Wanda McCaslin, *Justice as Healing Indigenous Ways* (Minnesota: Living Justice Press, 2005).

legalistic and state centred approaches to justice. The field of transitional justice is only just starting to grapple with some of these issues.

As noted by Bell, Campbell, and Nì Aolàin, discourses and accounts of transitional justice are themselves also in transition.[32] As a relatively recent field of study, transitional justice is as yet unable to define and address all dimensions of conflict transformation and transitions to peace and justice. Transitional justice widely deals with concepts of accountability, responsibility, reparation, forgiveness, reconciliation, acknowledgment, apology, healing and truth telling, to name a few. Moreover, it also addresses the need for justice and questions its role and nature within the process of reconciliation. Although these are all central elements of transitional justice, little attention has been paid to what they actually mean. As a relatively young and rapidly growing field of study, many concepts central to transitional justice are posited at the crux of animated debates. Transitional justice is a field of study where theory and practice heavily impact and influence each other. Debating and questioning these concepts is therefore necessary if the field of transitional justice is to move forward and reflect the complexities involved in transitions to reconciliation in different contexts.

Where Does Transitional Justice Fit?

Before going any further, it is important to situate the field of transitional justice within the existing literature on conflict resolution. The literature on conflict resolution seeks to identify the necessary means to ensure a successful transition from

[32] Bell, Campbell and Ní Aoláin, "Justice Discourses."

unrest to peace, a concern more or less shared by transitional justice scholars.[33] Conflict resolution can be defined as the active search for peace, and the best way to sustain it in troubled societies. It is equated with the de-escalation of tensions.[34] However, the nature of conflict resolution differs, depending on the phases it is called upon to address. The transition from mass violations of human rights towards positive peace, understood as the absence of fighting, is usually divided into three broad categories: peacemaking, peacebuilding, and peacekeeping. While many discuss these categories separately,[35] Ramsbotham, Woodhouse and Miall provide the most convincing account of these three aspects as components of conflict resolution.[36]

Peacemaking is seen as the first step in that process. In Miall's view, peacemaking is otherwise understood as conflict settlement, which can be considered as an elite process, in that it does not engage citizens *per se,* but, rather, government officials.[37] Others define peacemaking as "the process of forging a settlement between disputing parties."[38] This echoes the United Nations, which regards peacemaking as the "action to bring hostile parties to agreement, essentially through

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[33] See for instance, Wendy Lambourne, "Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation," *Peace, Conflict and Development*, no. 4 (2004), 3; and Chandra Sriram, Olga Martin-Ortega, and Johanna Herman, *War, Conflict and Human Rights: Theory and Practice* (New York: Routledge, 2010).

[34] Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (Cambridge: Polity Press, 1999), 11.

[35] See for instance, John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington: United States Institute of Peace Press, 1997); Olara Otunnu and Michael Doyle, *Peacemaking and Peacekeeping for the New Century* (New York: Littlefield, 1998); Charles-Philippe David, "Does Peacebuilding Build Peace? Liberal (Mis) Steps in the Peace Process," *Security Dialogue* 30 no. 1 (1993): 25-41; Fen Osler Hampson, *Nurturing Peace: Why Peace Settlements Succeed or Fail* (Washington: United States Institute for Peace, 1996); Roland Paris, "Peacebuilding and the Limits of Liberal Internationalism," *International Security* 22 (1997): 54-89.

[36] Ramsbotham, Woodhouse and Miall, *Contemporary Conflict Resolution*, 11.

[37] Ibid.

[38] Conflict Research Consortium, University of Colorado, [website]; accessible at http://www.colorado.edu/conflict/peace/treatment/peacemkg.htm; accessed June 7th 2009.

peaceful means."[39] Settlements and peace treaties can be achieved through negotiations, and generally require the involvement of a third party to mediate the process. In a number of its publications, the United States Institute of Peace, for instance, equates peacemaking with mediation, or, in other words, negotiation between different formerly conflicting parties.[40] It appears that peacemaking is generally considered the first step towards peace and consists of the immediate cessation of hostilities and the signing of treaties and peace agreements.

Peacebuilding is seen as the second step. It is equated with conflict transformation. The bulk of the literature on conflict resolution describes this second step as the (re)-creation of democratic institutions.[41] Jeong explains that peacebuilding activities are designed to "enhance public security, generate economic recovery, facilitate social healing and promote democratic institutions."[42] To that, Lederach adds that peacebuilding is "an array of processes, approaches and stages needed to transform conflict towards more sustainable, peaceful relationships."[43] This step is also the one that triggers the most discussion and debate in the literature. Surely, if peacebuilding is about conflict transformation, it will then require more than the mere institutionalization of peaceful practices of governance. One can, therefore, distinguish between a *minimalist* approach to peacebuilding, which consists

[39] Boutros Boutros-Ghali, "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping," (A/47/277) The United Nations Security Council, 1992.
[40] United States Instute for Peace, [website]; accessible at http://www.usip.org/; accessed March 23rd 2009.
[41] See for instance, Peter Batchelor, Kees Kingma and Guy Lamb, *Demilitarisation and Peace-Building in Southern Africa: The Role of the Military in State Formation and Nation-Building* (Aldershot: Ashgate, 2004); Lederach, *Building Peace*; Timothy Morithi, *The Ethics of Peacebuilding* (Edinburgh: Edinburgh University Press, 2009).
[42] Ho-Wong Jeong, *Peacebuilding in post conflict societies: strategy and processes* (Boulder: Lynne Rienner Publisher, 2005), 12.
[43] Lederach, *Building Peace*, 20.

of the promotion of democratic state institutions, law and order; and a *maximalist* approach, which seeks to engage different layers of a divided society in promoting social healing and recreating social trust.[44] The maximalist approach, for instance, is adopted in a number of United Nations reports,[45] as well by the Canadian International Development Research Centre, which defines peacebuilding as "the pursuit of policies, programs and initiatives that seek to create the conditions war torn countries need to transform or manage their conflict without violence so that they can address longer terms developmental goals."[46]

The last step identified by the literature on conflict resolution is *peacekeeping*—distinct again from peacemaking and peacebuilding—or conflict containment,[47] which is generally understood as a post-ceasefire prevention of a return to violence.[48] The United Nations notes that the purpose of its peacekeeping efforts is primarily to maintain a ceasefire, once it has been established, and to stabilize situations on the ground.[49] The Department of Peacekeeping Operations of the United Nations (DPKO), nevertheless, notes the existence of changing circumstances that prompt a shift in the traditional understanding of peacekeeping, as involving strictly military forces, to "complex multidimensional enterprises designed to ensure the implementation of comprehensive peace agreements and assist in laying the foundations for sustainable peace."[50] Peacekeeping is, therefore, no longer

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[44] Jeong, *Peacebuilding in post conflict societies,* 22.
[45] United Nations Peacebuilding Commission, [website]; accessible at http://www.un.org/peace/peacebuilding/; accessed December 12th 2008.
[46] International Center for Transitional Justice, "What is Transitional Justice?"
[47] Ramsbotham, Woodhouse and Miall, *Contemporary Conflict Resolution*, 12.
[48] Ibid.
[49] United Nations Peacebuilding Commission.
[50] United Nations Peacekeeping, The Department of Peacekeeping Operations, [website]; accessible at http://www.un.org/Depts/dpko/dpko/; accessed March 27th 2009.

restricted to preventing the return of violence and unrest, but, rather, is more readily involved in conflict transformation and in what used to be considered strictly peacebuilding activities.

These three categories, peacemaking, peacebuilding, and peacekeeping are in no way fixed. As a result, they often overlap in much of the literature. The United Nations' *Peacekeeping Operations: Principles and Guidelines*, often called the *Capstone Doctrine*, notes, for instance, that "the boundaries between conflict prevention, peacemaking, peacekeeping, peacebuilding have become increasingly blurred."[51] Others, such as Lederach, prefer to talk about a post-agreement phase which takes place after peacemaking, and consists of the "ability to create a vision of change that does not see the post-agreement phase as a distinct time period but rather as systematically connected to broader processes of change within a given context."[52] Doyle and Sambanis encourage an even broader notion, encompassing everything from peace building, peacemaking, peacekeeping to post-conflict reconstruction.[53]

In this research, peacebuilding is seen as being inclusive of all activities that support the transition from conflict to long, lasting peace. This understanding of peacebuilding builds upon Lederach, Doyle and Sambanis' views, which seem to provide an appropriate framework to discuss countries in transition, where the fighting is not always over and the lines between peacemaking, peacebuilding and peacekeeping are often blurred. Transitional justice has, at times, even been

[51] The United Nations Secretariat, "United Nations Peacekeeping Operations: Principles and Guidelines," 2008, 22, [report online]; accessible at http://www.peacekeepingbestpractices.unlb.org/pbps/library/capstone_doctrine_eng.pdf
[52] Lederach, *Building Peace*, 6.
[53] Michael Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton: Princeton University Press, 2006), 10.

considered as a sub-section of peacebuilding. Thallinger, for instance, argues that transitional justice "forms an absolutely essential component in every post-conflict peacebuilding process."[54]

It is important to note that the focus on the stages of conflict resolution, as presented in the majority of the literature, is largely devoted to the state and the institutional settings that may facilitate the end of violence, and the establishment and maintenance of peace.[55] Communities, and the web of relationships that constitute them, often remain uninvolved in, and unaffected by, the conflict resolution process. This state-centric view is challenging since it limits the role of reconciliation, as part of the peacebuilding phase, to the launch of national and international judicial prosecutions and programs that seek to engage reconciliation and may result in discouraging local endeavours.[56]

Civic engagement in the re-recreation of a peaceful society, therefore, often remains marginalized and unaccounted for in most theoretical accounts of peacebuilding. Saunders alludes to the importance of reconciliation among citizens of divided societies when he explains, "only governments can write peace treaties, but only human beings, citizens outside of the government can transform conflictual

[54] Gerhard Thallinger, "The UN Peacebuilding Commission and Transitional Justice," *German Law Journal* 8 no. 7 (2007), 693. Also note that Thallinger uses the terms of 'peacebuilding' and 'post conflict peacebuilding' interchangibly.
[55] See for instance, Morithi, *The Ethics of Peacebuilding;* Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004); Michael Doyle and Nicholas Sambanis, *Making War and Building Peace*; Stuart Gordon and Francis Toase, *Aspects of Peacekeeping* (Portland: Frank Cass Publishers, 2001); John Darby and Roger Mac Ginty, *Contemporary Peacemaking: Conflict,Violence and Peace Processes* (Basingstoke: Palgrave, 2003); Oliver Richmond, *Maintaining Order, Keeping Peace* (New York: Palgrave, 2002).
[56] Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79 no. 1 (2006), 32.

relationships […] into peaceful relationships."[57] Arguments such as those by Lederach, Assefa, and Saunders help in opening up the discussion.[58] In turn, they raise a number of questions regarding the type of change to be brought about, as well as the mechanisms and processes necessary, for justice and long lasting peace to be achieved. Peace and justice are, in fact, mutually reinforcing, although not everyone agrees that this is the case.[59] In fact, there exist a number of instances where peace seemed to prevail, while injustices continued to be carried out.[60] This was, for instance, the case in Australia, throughout the late 19th and early 20th Centuries, where, despite apparent peace, the country's Aborigines suffered severe injustices, such as the removal of children from their families--widely known as the "Stolen Generations."[61] This is also the case in Aceh (Indonesia), where despite the cessation of hostilities with a 2005 peace settlement, justice has been difficult to implement. In fact, "few people expect that perpetrators of past abuses will be brought to justice."[62] Nonetheless, this thesis adopts the view put forth by the United Nations' Secretary

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[57] Harold Saunders, *A Public Peace Process: Sustained Dialogue to Transform Racial and Ethnic Conflict* (New York: Palgrave, 1999), xvii.
[58] Saunders, A *Public Peace Process*; Lederach, *Building Peace*; Hizkiaz Assefa, "The Meaning of Reconciliation People Building Peace," *European Platform for Conflict Prevention and Transformation*, [website]; http://www.gppac.net/documents/pbp/part1/2_reconc.htm; accessed April 22nd 2006.
[59] See, for instance, Sorpong Peou,"Human Security through Retributive Justice? The Cases of East Timor & Cambodia," a paper presented at the Canadian Political Science Association, Waterloo, 16-18th May 2011.
[60] For an interesting discussion of the nature of 'peace,' refer to Johan Galtung, "Violence, Peace and Peace Research," *Journal of Peace Research* 6 no. 3 (1969): 167-191 where the author explores the difference between positive peace, as absence of structural violence, and negative peace, as absence of direct physical violence.
[61] Read for instance, Government of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, [report online]; accessible at http://www.humanrights.gov.au/social_justice/bth_report/index.html
[61] BBC News, "Australia Apology to Aborigines," 13th February 2008, [website]; accessible at http://news.bbc.co.uk/2/hi/7241965.stm; accessed on 11th March 2011.
[62] Edward Aspinall,"Peace without Justice? The Helsinki Peace Process in Aceh," Centre for Humanitarian Dialogue, 2008, 5, [research paper online]; accessible at http://www.hdcentre.org/files/Justice%20Aceh%20final.pdf

General, in his Report on the Rule of Law and Transitional Justice, that "peace and justice are not contradictory forces. Rather, properly pursued, they promote and sustain one another."[63] If the roots of conflict and tension are to be removed, for peace to flourish, truth must be told, individuals must be held accountable and justice must be carried out.[64] Peace and justice must go hand in hand, and, must, therefore, be explored as such. The demand for justice is also where the literature on peacebuilding and transitional justice have most in common.[65]

Complexities of Transitional Justice

Dealing with and addressing past violations of human rights requires that attention be paid to some of the inherent complexities of transitional justice. Most importantly, attention must be paid to the specific context of any efforts that are undertaken. This research underlines the need to adapt justice efforts to local realities and experiences, rather than resort to a one-size-fits-all approach. Truth-telling and reconciliation, for instance, are recurrent themes in transitional justice. Yet, they are conceptually indeterminate and require further theorization. The kind of truth to be sought, as well as the type of reconciliation to be promoted, among others, for example, deserve to be examined.

Understanding the field of transitional justice and its uncertainties is an important step towards our discussion of both alternative mechanisms and

[63] Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," The United Nations (S/2004/616), 2004, para 21.
[64] David Tolbert and Marieke Wierda, "Stocktaking: Peace and Justice," briefing, The International Centre for Transitional Justice, Briefing note, 2010, [briefing note online]; accessible at http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Peace-Briefing-2010-English.pdf
[65] Riva Kantowitz and Abikök Riak, "Critical Links between Peacebuilding and Trauma Healing: A Holistic Framework for Fostering Community Development," in *Peacebuilding in Traumatized Societies*, ed. Barry Hart (Boulder: University Press of America, 2008), 3.

conceptions of justice. Each of the two elements that will be dealt with in this section, reconciliation and truth, have a direct relevance to the alternative conception of justice examined in this research. Yet, they require further definition and conceptual refinement to catch up with the ever-growing body of cases analyzed, and questions raised by transitional justice scholars. As noted by Duggan and Thom, Paris and Ron, "research on this subject is still nascent, and many of its early findings are questionable and contradictory."[66]

Conceptual Elements

Reconciliation and truth are two elements frequently mentioned in the literature on transitional justice. They are, however, often taken at face value and require further conceptualization. It is critical, in order to understand the kind of complexities that make up the transitional justice scholarship, to explore in further depth, these two important elements.

Reconciliation

Reconciliation aims at the transformation of conflicting relationships into peaceful ones, and justice is positioned to be at the crux of any effort at "reconciliation."[67] Yet, reconciliation, "an often-stated objective of transitional justice, is a contested notion."[68] It is "often vaguely defined, if at all."[69] Reconciliation is generally

[66] Colleen Duggan, "Show Me Your Impact: Challenges and Prospect for Evaluating Transitional Justice," a paper presented at the Canadian Political Science Association, Ottawa, May 2009; Oskar Thoms, James Ron and Roland Paris, "The Effects of Transitional Justice Mechanisms," Center for International Policy Studies, Working Paper no. 1 (April 2008), 23.
[67] Andrew Rigby, *Justice and Reconciliation: After the Violence* (Boulder: Lynne Rienner Publishers, 2001), 12, 184.
[68] Bosire, "Overpromised, underdelivered," 96.
[69] Erin Mobekk, "Transitional Justice in Post Conflict Societies: Approaches to Reconciliation,"

understood and assumed, in much of the literature, to be a means of conflict prevention and transformation.[70] Hoogenboom and Vieille, for instance, describe it as both an ideal and a process.[71] In this study, reconciliation will be understood as, *both a concept and a process* that seeks to create harmonious and peaceful relationships between previously disputing parties. There is little consensus in the literature, since beyond basic disagreements over what reconciliation precisely entails, definitions also either focus on reconciliation as an abstract construct of the mind, or as a planned series of actions directed to some specific endpoint.[72] In this respect, whether one looks at reconciliation as a concept or a process raises different questions, and will provide different answers regarding the purpose of reconciliation.

Much of the literature in transitional justice regards reconciliation as a process.[73] This is seen in the amount of work that focuses on existing attempts at implementing reconciliation through truth commissions and other institutions. Much attention, for example, has been devoted to the South African case as an instance of how, and by what means, reconciliation can be brought about in deeply divided societies. Reconciliation is also described as a process that is likely to "allow future positive and harmonious relationships between opposing parties."[74] Dwyer sees in

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Geneva Centre for the Democratic Control of Armed Force, 2005, 262, [report online]; accessible at http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg12_psm_100.pdf

[70] In this regard, see Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (3) Volumes (USA: United States Institute for Peace, 1995); Genevieve Jacques, *Beyond Impunity: An Ecumenical Approach to Truth, Justice, and Reconciliation* (USA: Risk Book, 2000); Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999); Lederach, *Building Peace*; John De Gruchy, *Reconciliation: Restoring Justice* (Minneapolis: Fortress Press, 2002).

[71] David Hoogenboom and Stephanie Vieille, "Rebuilding Social Fabric in Failed States: Examining Transitional Justice in Bosnia," *Human Rights Review* 11 no. 2 (2010): 183-198.

[72] Concise Canadian Oxford Dictionary, 2nd ed., "Reconciliation.''

[73] For instance, De Gruchy, *Reconciliation: Restoring Justice*; David Bloomfield, Teresa Barnes and Luc Huyse, *Reconciliation after Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003); Tutu, *No Future without Forgiveness*.

[74] Hizkias, "The Meaning of Reconciliation."

reconciliation "an end to antagonism" and the beginning of "healing and repair of relationships,"[75] while Jeong argues that reconciliation aims at rebuilding "social trust."[76] These definitions, though, are insufficient. They do, nonetheless, provide a springboard and a fertile amount of information for a possible conceptualization of reconciliation.

In any case, justice brought about by reconciliation is often considered the best means to alleviate and reduce victimization and scapegoating, two particularly dangerous elements often present in the aftermath of abuses of human rights that have been directed at a certain portion of the population. Assefa describes justice as being "the core of reconciliation,"[77] while Rigby quite forcefully adds that reconciliation that does not bring about justice is a "failed reconciliation."[78] Reconciliation is often described as requiring the full participation of different sides to a dispute. It is presented as "pro-active"[79] and "dynamic,"[80] in that it requires the highest degree of "mutual participation,"[81] compared to any other kinds of processes of conflict resolution, such as negotiation or arbitration. Reconciliation can also, more simply and rather comprehensively, as presented by Govier, be conceived as a spectrum. Govier presents a spectrum starting with a thick conception of reconciliation, "full of

[75] Susan Dwyer, "Reconciliation for Realists," *Ethics and International Affairs* 12 (1999), 82.
[76] Ho-Wong Jeong, *Peacebuilding in Postconflict Societies: Strategy and Process* (Boulder: Lynne Reinner Publishers, 2005), 156.
[77] Hizkias, "The Meaning of Reconciliation."
[78] Ibid.
[79] Ibid.
[80] Saunders, A *Public Peace Process,* 26.
[81] Hizkias, "The Meaning of Reconciliation."

emotional richness" and ending with a thin conception of reconciliation "where there is little emphasis on attitudes and feelings."[82]

Much of the literature fails to consider the different levels at which reconciliation may occur. Jeong and Dwyer are among the few who discuss the multi-tiered nature of reconciliation, thereby acknowledging the variety of actors who may take part in the process. Jeong explains that reconciliation may occur at three different levels, including the state, inter-group and intra-group group levels.[83] He explains that reconciliation may take different shapes and forms including institutional re-organization at the state level, and personal healing.[84] Dwyer insists on a division between macro-reconciliation, that is, reconciliation between groups, and micro-reconciliation, which emphasizes individuals.[85] She thereby disregards altogether national or state reconciliation. Definitions or understandings of reconciliation may differ depending on at which level the latter is taking place and whose relationship is to be mended. National reconciliation, for instance, may not require as much citizen participation as inter-group or macro-reconciliation. Likewise, the requirements and outcomes of such processes may differ. Indeed, inter-individual reconciliation may, for instance, be sought through some kind of local, community-based process that involves individuals on a one-to-one basis, while national reconciliation is more likely to require national and almost impersonal measures. This is important since it illustrates how transitional justice scholars disagree over the essence of one of the central concepts of the field.

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[82] Trudy Govier, *Taking Wrongs Seriously: Acknowledgement, Reconciliation, and the Politics of Sustainable Peace* (Amherst: Humanity Books, 2006), 13.
[83] Jeong, *Peace-building in Postconflict Societies,* 156.
[84] Ibid.
[85] Dwyer, "Reconciliation for Realists," 82.

In the aftermath of its well-known 1994 genocide, the Rwandan government chose to set up a National Unity and Reconciliation Commission.[86] The purpose of the institution was to sensitize the Rwandan people about the need for reconciliation and unity, as well as to promote tolerance. Various actions were taken to promote national reconciliation, such as re-burying of individuals whose bodies were thrown into mass graves during the genocide.[87] Memorials were created on various sites.[88] Reconciliation and justice were also sought through the modifying of customary mechanisms called *gacaca* courts, which clearly targeted inter-individual, rather than national, reconciliation. The *gacaca* courts operated within local communities and required the attendance of community members. For less serious crimes, they also provided a forum for truth-telling and favoured community service as a penalty, rather than the imprisonment of individuals who had taken part in the killings.[89] Each level of reconciliation fed into the other. National reconciliation, it is argued, could not have succeeded without any attempt to reconcile individuals within divided communities, and *vice versa*.[90]

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[86] The Centre for the Study of Violence and Reconciliation, [website]; accessible at http://www.justiceinperspective.org.za/; accessed May 11th 2009.
[87] Ibid.
[88] Kigali Genocide Memorial Centre, [website]; accessible at http://www.kigalimemorialcentre.org/old/index.html; accessed 11th May 2009. This is one of the memorials created in Rwanda.
[89] Categories of offences were established as part of the *gacaca* jurisdiction (2004). Crimes were divided into four categories based on their severity. All categories of crimes, except category one, were dealt with through the *gacaca* community courts. Category one targets leaders and organizers of the genocide and are outside the jurisdiction of *gacaca* tribunals. Such individuals are brought in front of the International Criminal Tribunal of Rwanda where they are prosecuted.
[90] Questions were raised concerning the success of the Rwanda endeavor towards reconciliation, and most importantly towards the efficiency and legitimacy of the local community courts of *gacaca*. See Erika Frederiksen, "Reconstructing Political Community: Truth Commissions, Restorative Justice and the Challlenges of Democratic Transition," a paper presented at the Canadian Political Science Association, Vancouver, June 2008; Rosemary Nagy, "Transitional Justice as Global Project: critical reflections," *Third World Quarterly* 29 no. 2, (2008): 275-289. Susan Thomson is also very critical of gacaca courts. See Susan Thomson, "The Unity-Generating Machine: State Power and *Gacaca* Trials in Post-genocide Rwanda," a paper presented at the Canadian Political Science Association, Saskatoon,

Truth

The most basic understanding of truth is as indisputable fact, considered to correspond to an immutable reality.[91] As such, truth is often considered a crucial element in reconciling opposing parties. Yet what exactly truth is, is very often assumed. It is described as a central element of peacebuilding and transitional justice, as well as an act of justice in itself.[92] As Goldstone argues, "the public and official exposure of the truth is itself a form of justice."[93] Mendeloff explains that truth-telling facilitates the psychological healing of victims and their families, and therefore, directly contributes to peace and justice.[94] Indeed, the act of talking about the past is considered to be "a key ingredient in reckoning with the past, both on an individual level and in the context of societal recovery."[95] Michael Humphrey echoes this view, but warns, however, that truth-telling alone is "no substitute for the reconstruction of an inclusive political community."[96] Claire Moon notes the rise of a "psychotherapeutic discourse and practices" in transitional settings.[97] In her view, the "therapeutic moral order" has become "one of the dominant frameworks within which

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May 2007; and Susan Thomson, "Resisting Reconciliation: State Power and Everyday Life in Post-Genocide Rwanda," PhD Thesis, Dalhousie University, (2009).

[91] Concise Canadian Oxford Dictionary, 2nd ed., "Truth." This understanding of truth, however, is rejected by some scholars who emphasize the multiple facets of truth. See, for instance, Audrey Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala," *Human Rights Quartlery* 23 no. 1 (2001): 1-43.

[92] Borer, *Telling the Truths*, 18.

[93] Richard Goldstone, "Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals," *New York University Journal of International Law and Politics* 28 (1999), 491.

[94] David Mendeloff, "Truth Seeking, Truth Telling and Peacebuilding: Curb the Enthusiasm?" *International Studies Review* 6 (2004), 360.

[95] Hovil and Quinn, "Peace First," 7.

[96] Michael Humphrey, "Reconciliation and the Therapeutic State," *Journal of Intercultural Studies* 26 no. 3 (2005), 203.

[97] Claire Moon, "Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation," *Journal of Human Rights* 8 no.1 (2009), 74.

states attempt to deal with the legacy of violent conflict."[98] Dealing with the trauma and other psychological dimensions past atrocities have had on societies (for instance through truth-telling mechanisms) has become central to any attempt at postconflict reconciliation.

Judith Herman explains that truth is necessary, not only for individuals, but also for the community as a whole.[99] Direct involvement, inaction, or tacit consent of community members can be seen to have contributed, one way or the other, to the crimes that have taken place. Regardless of whether individuals have been directly involved in the crimes committed or not, all have been affected. As a result, it is important for the community itself to acknowledge the harms committed by its members and to take a stand against these acts. The act of truth-telling before community members is essential. By listening to the testimony of offenders and their victims, the community acts as a recipient of their stories. The community also bears witness and recognizes the harm done to all.[100]

Truth telling helps in shedding light upon the past and breaks the silence about past violations of human rights such as torture and mass killings. In fact, telling and learning the truth about past wrongs not only provides knowledge about the past, it also, and most importantly, provides acknowledgement.[101] It allows communities to reckon with their own difficult past. Truth-telling also plays an important in the establishment of an authoritative record of the past, but also in helping victims to

[98] Ibid., 71.
[99] Judith Herman, *Trauma and Recovery* (New York: Basic Book, 1997).
[100] Howard Zehr, *The Little Book of Restorative Justice* (Pennsylvania: Good Books, 2002), 16-17.
[101] Michelle Parlevliet, "Considering Truth: Dealing with a Legacy of Gross Human Rights Violations," *Netherlands Quarterly of Human Rights* 16 no. 2 (1998), 143.

heal, in making recommendations for reform and promoting accountability.[102] Volkan highlights the danger of not addressing the past, which, in his view, would result in "unresolved trauma" and lay the seeds for future conflict.[103]

While Parlevliet argues in support of truth-telling,[104] it is not always favoured throughout the literature. Truth-telling is said to contribute to the psychological, social and political restoration of countries in transitions.[105] Yet, the assertion is at the centre of much debate. It is not clear, for instance, if national efforts ought to be directed towards forgetting rather than remembering a painful and sometimes shameful past. As noted by Borer, seeking the truth about the past risks re-opening wounds unnecessarily.[106] In some cases, truth is sought, but only in exchange for amnesty.[107] In the case of Guatemala, as in Chile and El Salvador, truth was favoured over trials.[108] In El Salvador, for instance, an amnesty was passed immediately after the publication of the truth commission's report, thereby granting immunity from procedural proceedings for all individuals who had participated in political crimes.[109]

What this reveals is the need to recognize the specific context and embedded-ness of truth and the act of truth-telling itself. Truth may not be considered favourably in all cases. While truth-telling may be favoured for its intrinsic value, it is sometimes

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[102] Margaret Popkin and Naomi Roht-Arriaza, "Truth as Justice: Investigatory Commissions in Latin America," *Law & Social Inquiry* 20 no. 1 (1995): 79–116.
[103] Vamik Volkan, "Large Group Identity and Chosen Trauma," *Psychoanalysis Downunder* 6 (2005).
[104] Ibid.
[105] Mendeloff, "Truth Seeking, Truth Telling and Peacebuilding"; Volkan, "Large Group Identity and Chosen Trauma"; Priscilla Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions* (London: Routledge, 2002): 133-153; Judith Herman, *Trauma and Recovery* (New York: Basic Book, 1997); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998): 61-87; Michael Scharf, "The Case for a Permanent International Truth Commission," *Duke Journal of Comparative and International Law* 7 (1997), 400.
[106] Borer, *Telling the Truths.*
[107] James Gibson, "Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa," *American Journal of Political Science* 46 no. 3 (2002): 540-56.
[108] Priscilla Hayner, *Unspeakable Truths,* 91.
[109] Ibid., 91.

encouraged for more practical reasons, as in El Salvador. "The problem is that the truth neither is nor does all that we expect of it."[110] So while Hamber and Laasko, for instance, praises the value of truth-telling for reconciliation and personal healing,[111] others, including Thoms, Ron, and Paris, stress that there exists no clear evidence that truth-telling really produces any psychological benefits for victims.[112] In fact, Mendeloff states that there is no consensus in clinical studies regarding the benefits of truth-telling in the aftermath post-traumatic disorder.[113] Seeking truth in divided societies may, in fact, provoke further tension and provide new grievances that may fuel additional unrest.[114] In the case of Rwanda, studies have shown that truth-telling has worsened the situation for some of those who participated by telling their stories. For instance, some women have been themselves threatened or harassed after having given testimony.[115]

In reflecting about the experience of the South African Truth Commission in its search for truth, many tackle the difficulty of truth-seeking by discussing different kinds of "truths," and make distinctions between historical truth, moral truth, factual truth, narrative truth, and social truth.[116] Each type of "truth," in their view, sheds

[110] Erin Daly,"Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition," *The International Journal of Transitional Justice* 2 (2008), 23.
[111] Brandon Hamber, *Transforming Societies After Political Violence: Truth, Reconciliation and Mental Health* (New York: Pringer, 2009); Jen Laasko, "In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa," *Social Alternatives* 22 no. 2 (2003): 48-54.
[112] Oskar Thoms, James Ron and Roland Paris, "Does Transitional Justice Work? Perspectives from Empirical Social Science," SSRN Working Paper, 2008, 20.
[113] Mendeloff, "Truth-Seeking," 365.
[114] Mendeloff, "Truth-Seeking"; Eric Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," *International Studies Perspectives* 8 (2007): 16-35.
[115] Karen Brounéus, "Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts," *Security Dialogue* 39 no. 1 (2008): 55-76.
[116] Charles Villa-Villencio and William Verwoed, *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission in South Africa* (London: Zed Book, 2000); Mark Sanders,

light upon a different aspect of past experiences.[117] Chapman and Ball address the multiple dimensions of truth by comparing and combining four types of truth, namely forensic, narrative, social and restorative truth, within the exercise of truth-telling and reconciling disputing parties.[118] Borer asserts that the exercise of truth-telling is merely the "dissemination of a private into public truth" involving the recognition and acceptance of the past.[119] Wilson, on the other hand, argues that all types of truth can be narrowed down to two basic "truth paradigms," namely forensic and narrative truth.[120] Mendez talks about structural versus individualized truth.[121]

Parlevliet sees truth-telling as a form of communication between members of society. She defines the act of truth telling as "the facts about what happened in a country's recent history, and to the preservation, or reassertion of essential norms regarding social relations between people and the organization of the state in the future."[122] She argues that trying to define truth may be a never-ending quest, and concedes that identifying conditions that may facilitate truth-telling in the aftermath of mass violations of human rights is likely to be more fruitful.[123] Open debate, as free encounter and cooperation, in her view, is the best instrument in that it provides

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"Truths and Contestations: Literature and Law," *Law and Literature* 16 no. 3 (2004): 475-88; Chapman and Ball, "The Truth of Truth Commissions."

[117] Historical truth seeks to establish some form of national record or memory of the past, while narrative truth is a personal testament of what happened.

[118] Chapman and Ball, "The Truth of Truth Commissions,"11. Chapman and Ball explain that social truth is sought through truth commissions, whereby narrative/personal truth is appropriated by the wider community and made public. Forensic truth, in their view is a micro level, detailed-centred type of truth.

[119] Borer, *Telling the Truths*, 35.

[120] Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 21.

[121] Ibid., 22.

[122] Parlevliet, "Considering truth," 170.

[123] Ibid., 150.

all the necessary elements (equality, equal chance, reason and sincerity) for communication and truth to be engaged.[124]

Most interesting is the view that the act of truth-telling in itself constitutes some form of communication and recognition of the rational "other," whose identity and self was denied by the violent act that was committed. The act of sharing the truth between a former offender and his or her victim signals the recognition that there is a relationship between the two individuals, as well as the necessity to see the other as a partner in the healing process. Christodoulidis goes as far as to argue that truth-telling is "the experience of community as communication," whereby the act of telling the truth, in itself, establishes a peaceful link between perpetrators and their victims.[125]

This research adopts the view that there exist two types of truth, which are referred to as *individual* truth and *collective* truth, each of which has its own goal.[126] As such, *personal* truth, *individualized* truth,[127] or *narrative* truth[128] communicated through truth-telling mechanisms, for instance, serves to provide a sense of closure, whereby victims may narrate their personal experiences of an event. In turn, the sharing *personal* truth, defined as one's perception and experience of an event, contributes to the creation of a national narrative, collective *truth* or consensus about the past.[129] Van der Merwe, in his case study of South Africa's Truth and Reconciliation Commission, explains that the sharing of personal experiences and

[124] Parlevliet, "Considering truth,"152.
[125] Emiliosa Christodoulidis, "Truth and Reconciliation as Risk," *Social and Legal Studies* 9 no. 2 (2000), 181.
[126] Borer, *Telling the Truths*, 23.
[127] Juan Mendez,"The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth-Telling," in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (Indiana: University of Notre Dame Press, 2006).
[128] Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 36-37.
[129] Borer, *Telling the Truths*, 23.

testimonies of some of the victims of the apartheid helped "the whole country to confront its past, and to make it impossible for people to deny the suffering that had been caused."[130] In this respect, hearing the *personal* truths of victims directly contributed to the acceptance of a difficult past and the creation of a common narrative, understanding and *collective* truth about what had happened.[131]

Another example may help in clarifying this view. Each soldier who fought in the Second World War, for instance, has a unique experience of the fighting he experienced. Each may have fought in a different region, been wounded, or have killed. Emotional responses, in each case, differ. Each former soldier tells about his own personal experience and, therefore, his *personal* truth to children and grandchildren. *Collective* truth can be viewed as a reductionist form of *personal* truths, which builds on the similarity between the multitude of *personal* truths in order to establish a common sense or knowledge of the past. *Collective* truth is communicated and passed down through history books, reports, memorials, museums, and so on. The following quotation successfully captures the nature of the two "truths" outlined above, and the tension that exists between them. Indeed, "collective truth" will never be able to fully reproduce and account for the "personal truth" of those who experienced it.

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[130] Hugo Van der Merwe, "National Narrative versus Local Truths: The Truth and Reconciliation's Engagement in Duduza," Centre for the Study of Violence and Reconciliation, 1998, 2.

[131] Here, it is important to stress that the creation of a common narrative and collective memory is a lenghtly process, that may take years. The sharing of personal truths, while essential, does not guarantee that a common narrative about the past will be created. For further discussion on the risks and difficulty in using personal truths and testimonies in an effort to re-write a national history and collective truth, see Jacobus du Pisani and Kwang-Su Kim, "Establishing the Truth about the Apartheid Past: Historians and the South African Truth and Reconciliation Commission," *African Studies Quarterly* 8 no. 1 (2004): 77-95.

> Even the most comprehensive and objective recounting cannot fully communicate the experience of those who have lived through atrocities. The cries, the terror, the smell of death, the helplessness, the feeling of abandoning one's child – these all get lost in the translation from experience to word. Ironically, truth reports are designed to relate what survivors most commonly refer to as the unspeakable. To speak is not necessarily to convey what happened and to read what happened is not necessarily to know the truth."[132]

However, the question of whose truth is acknowledged remains unanswered. It is uncertain, for instance, whether the victim's truth is more important and valid than that of the perpetrator, or if we should solely adopt the victors' truth and discard that of the wrongdoers.[133] While a mutual acknowledgement of the truth is recognized as a necessary element to bring about justice, the process through which truth is agreed upon, and the nature of the truth to be acknowledged, remains largely assumed. Favouring victims and providing them with a forum for expressing their grief, anger, pain and the experience in general, may cause further isolation and ostracize offenders. This will, in fact, further divide already deeply divided societies and undermine all efforts to bring about reconciliation, peace and justice.

Parlevliet rightly questions whether all "truths" ought to be treated equally.[134] For instance, it is unclear whether forensic truth is more valuable than narrative truth. Forensic truth may contribute to the establishment of facts about the crime such as the time and location of death for instance. Narrative truth, however, facilitates the

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[132] Daly, "Truth Skepticism," 26.
[133] See, for instance, Du Pisani and Kim, "Establishing the Truth"; James. M Statman, "Performing the truth: the social-psychological context of TRC narratives,"*South African Journal of Psychology* 30 no.1 (2000): 23-45; Molly Andrews, "Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis," *Media, Culture and Society* 25 no.1 (2003): 45-65; Beth Dougherty, "Searching for Answers: Sierra Leone's Truth & Reconciliation Commission," *African Studies Quarterly* 8 no. 1 (2004): 40-58. In her article, Dougherty touches upon the truth-telling experiences of some of the stakeholder groups (e.g: women) in the context of the Sierra Leone's Truth and Reconciliation Commission (p. 50).
[134] Parlevliet, "Considering truth."

expression of feelings such as grief, anger and of personal experiences that have, too often, been kept silent.[135] Both types of truth contribute to the creation of a common truth, a common version of the past and collective memory. Both are needed, in that they shed light on different facets of the past.

One ought also to be clear about the expected outcomes and goals of the process of truth-telling. Addressing only forensic truth will not achieve the same result as providing a forum for narrative truth. It is equally important to address the conditions under which truth may be sought. Victims of rape and torture may not feel comfortable sharing their experiences in a public place, with individuals of the opposite sex also in attendance. As a result of this, personal accounts may be changed, even by the victim herself, so as not to have to share particularly traumatic events. The scope and mandate of the institutions through which truth is sought are likely to affect the quality and kind of truth. All these are need to be considered when discussing truth and the exercise of truth-telling in transitional societies.

Transitional Societies

Another consequence of the newness of the transitional justice scholarship is its lack of critical evaluation of the cases that are being examined. Transitional justice focuses on the search for justice in transitional moments and seeks to address the political, judicial and human challenges such transition raises. Yet, the idea of a transitional moment is problematic, for it assumes the existence of a delimited period of time

[135] Daly, "Truth Skepticism," 26.

spanning two stages.[136] Unfortunately, the boundaries of transitions are often too murky to be identified that clearly. Of particular interest here is the question of the *end goal* of transition. In other words, there is little assessment of what a transition tends to and precisely entails. Transitions necessarily involve change from one state or condition to another. However, until recently, there has been little discussion regarding the desirable outcome or nature of the transitions presupposed by the scholarship.

To a large extent, scholars of the field focus their analysis on post-conflict situations and countries transitioning out of unrest towards democratic rule. The language of the field reflects this bias, and the first part of this chapter clearly illustrated this tendency. In her seminal work, Teitel purported that "debates about transitional justice are generally framed by the normative proposition that various legal responses should be evaluated on the bias of their prospect for democracy."[137] To this extent, Ní Aoláin, and Campbell are right to argue that the transitional justice discourse is intimately tied to democratic ideals.[138]

Kritz's famous three-volume study on transitional justice, for instance, depicts the field as an academic domain devoted to the study of "how emerging democracies reckon with former regimes."[139] The foreword of the first volume, written by Nelson Mandela, sets the tone with a clear reference to how these books make an invaluable

[136] I am grateful to Tim Vine, Ph.D. Candidate in the Department of Political Science at The University of Western Ontario, for our discussions about what constitutes a 'transitional moment.'
[137] Teitel, *Transitional Justice*, 3.
[138] Fionnuala Ní Aoláin and Colm Campbell, "The Paradox of Democratic Transitions," *Human Rights Quarterly* 27 no. 1 (2005), 173.
[139] Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes I* (USA: United States Institute for Peace, 1995).

contribution to the study of how countries "make their road to democracy."[140] In fact, while research conducted in the transitional justice scholarship is applied to wide array of situations spread across the globe, a large majority of cases are usually emerging from a violent past, such as warfare or authoritarian rule and moving towards democratic rule.

Nagy notes that "transitional justice has typically appeared salient only after massive direct violence has been brought to a halt."[141] This is reflected in much of the literature. In her book on confronting past human rights violations, Sriram supports her investigation with examples from five countries, Argentina, Honduras, El Salvador, South Africa and Sri Lanka, all of which are emerging from either oppressive military rule, civil war or severe repression.[142] Chayes and Minow focus their research on countries emerging from violent ethnic conflict, such as Rwanda and Bosnia[143] while Dougherty investigates the hybrid experiment in Sierra Leone.[144] Others, including Govier,[145] Baines,[146] Brown,[147] Hayner,[148] Quinn,[149] Finnström,[150]

[140] Nelson Mandela, "Foreword," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes I*, ed. Neil Kritz (USA: United States Institute for Peace, 1885), xiii
[141] Nagy, "Transitional Justice as Global Project," 278.
[142] Chandra Sriram, *Confronting Past Human Rights Violations: Justice Vs. Peace in Times of Transition* (London: Taylor & Francis, 2004).
[143] Chayes and Minow, *Imagine Coexistence.*
[144] Beth Dougherty, "Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone," *International Affairs* 80 no. 2 (2004).
[145] Trudy Govier, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998).
[146] Erin Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda," *The International Journal of Transitional Justice* 1 no.1 (2007): 91-114.
[147] Brown, "The Rule of Law."
[148] Hayner, *Unspeakable Truths*.
[149] Quinn, "Comparing Formal and Informal Mechanisms."
[150] Sverker Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda* (Durham: Duke University Press, 2008).

Lanegran,[151] Drumbl,[152] Chapman and Bell,[153] Thomson,[154] and Roth-Arriaza[155] reproduce a similar bias in their choice of case studies.

That scholars of transitional justice generally focus their attention on post-conflict and deeply divided societies transitioning to democracy is not entirely surprising. As explained earlier, transitional justice is often considered a subset of peacebuilding, and therefore shares a number of assumptions with the peacebuilding literature. Another reason for this assumption can be identified in the fact that the field of transitional justice came together as academics from different disciplines, including Political Science, Law, Anthropology, and Sociology among others, in reaction to the third wave of democratization, during which some thirty countries across Latin America and Eastern Europe transitioned to democratic rule.[156] The first years of the field of transitional justice were therefore largely defined by a specific experience of transition from oppressive rule to liberal market type democracies. Transition, implicitly understood as transition to peace and democracy, became "the dominant normative lens" of the field.[157]

[151] Kimberley Lanegran, "First Two Years of the Special Court for Sierra Leone," a paper presented at the International Studies Association, Montreal, 2004.
[152] Mark Drumbl, "Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide," *Contemporary Justice Review* 5 no. 1 (2002).
[153] Chapman and Ball, "The Truth of Truth Commissions."
[154] Thomson, "The Unity-Generating Machine."
[155] Naomi Roht-Arriaza, *Transitional Justice in the Twenty-First Century: Beyong Truth Versus Justice* (Cambridge: Cambridge University Press, 2006).
[156] Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (USA: University of Oklahoma Press, 1993), xiii.
[157] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 no. 2 (2009), 325-326.

The belief that democracies do not go to war with one another surely also plays its part in the scholarship's preference for post-conflict cases.[158] The assumption underpinning much of the writing in transitional justice is that a regime that commits grave human rights violations must be "to a greater or lesser degree, illegitimate."[159] The idea of democracies taking part in or allowing civil strife or gross violations of human is simply not envisaged, because a democracy is supposed to represent the will of its people. Moreover, democratic states are expected to have the necessary institutional safeguards in place to protect their citizens and redress abuses.[160]

However, authoritarian regimes are not the only kind of governments which can partake in serious and systematic human rights violations. That human rights violations in alleged democratic countries are rarely addressed in the field of transitional justice does not mean they do not take place. Human rights violations can and do take place in democratic states, but are often ignored. This is a result of a "dichotomy of standards," whereby the international community chooses to remain blind to the abuses taking place in wealthy democratic states.[161] In turn, failing to address the violations taking place within democratic states sustains the belief that these kinds of violations simply do not occur. Orford criticizes the field of transitional justice precisely for creating "the sense that large-scale human rights violations are

[158] Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12 no. 3 (1983): 205–35; Immanuel Kant, *Perpetual Peace, and Other Essays on Politics, History and Morals* (UK: Hackett, 1983).
[159] Ní Aoláin and Campbell, "The Paradox of Democratic Transitions," 174.
[160] See for instance, "Guidance Note of the Secretary-General on Democracy," The United Nations, 2009, [report online]; accessible at http://www.un.org/democracyfund/Docs/UNSG%20Guidance%20Note%20on%20Democracy.pdf
[161] Fionnuala Ní Aoláin, "The Emergence of Diversity: Differences in Human Rights Jurisprudence," *Fordham International Law Journal* 19 (1995), 142.

exceptional" and that they do not happen in liberal democratic states.[162] She also brings attention to the "everydayness and bureaucratization of genocide and of massive human rights violations," in referring to Australia's legacy of human rights violations with regard to the forcible removal of indigenous children from their families.[163] Similar human rights violations have been committed against indigenous populations around the world. Canada's Indian Residential School system, which was designed to "eradicate Aboriginal people's culture and rights," is but one of many example.[164]

That the transitional justice literature fails, to a large extent, to examine the legacies of human rights violations in democratic states represents a major downfall of the field. It also renders its findings and theories in many ways inaccurate, since they do not take into consideration the full range of challenges that surface when seeking justice, peace and accountability in both democratic and non-democratic societies. Bell, Campbell and Ní Aoláin advocate for the broadening of the field of transitional justice, and contend that only within a broader context can "debates about dealing with the past…be fully understood."[165] Both Jung and Arthur note that the transitional justice framework, while originally devised to deal with transitions to democracy, is only just starting to be used "to respond to certain types of human rights violations against indigenous peoples, even in cases where there is no regime

[162] Anne Orford, "Commissioning the Truth," *Journal of Gender and Law* 15 no. 3 (2006), 863.
[163] Orford, "Commissioning the Truth," 854.
[164] Beverley Jacobs and Andrea Williams, "Legacy of Residential Schools: Missing and Murdered Aboriginal Women," in *From Truth to Reconciliation Transforming the Legacy of Residential Schools*, ed. Marlene Castellano, Linda Archibald and Mike Degagne (Manitoba: Aboriginal Healing Foundation, 2008), 142.
[165] Bell, Campbell and Ní Aoláin, "Justice Discourses," 305.

transition."[166] In Canada, for instance, the government chose to employ transitional justice tools, including a truth commission and a national apology to address the historical injustices against its Aboriginal population.[167]

Ní Aoláin and Campbell encourage scholars of transitional justice to pay more attention to democracies that have experienced "prolonged, structured, communal, political violence."[168] They go on to set specific criteria for what they call "conflicted democracies," which are considered too narrow, in this thesis. Both researchers claim that "conflicted democracies" are to be identified on the basis of "deep-seated ethnic, religious, class or ideological…[divisions] so acute… as to have resulted in or threaten significant political violence."[169]

While Ní Aoláin and Campbell put forth an interesting suggestion, this thesis argues that the scholarship needs to be broadened still further. Adopting Ní Aoláin and Campbell's categorization leaves out a number of instances of human violations in states espousing democratic values. Countries like Canada, Australia, and New Zealand do not fit within Ní Aoláin and Campbell's definition of "conflicted democracy." Yet, each of these countries is actively seeking to acknowledge and redress former state-sponsored human rights violations against their indigenous populations. Canada, for instance, established a Truth and Reconciliation Commission to acknowledge the experiences of those who survived the Indian

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[166] Courtney Jung,"Transitional Justice for Indigenous Peoples in a Non-Transitional Society," research brief, International Centre for Transitional Justice, 2009, 1, [research brief online]; accessible at http://ictj.org/sites/default/files/ICTJ-Identities-NonTransitionalSocieties-ResearchBrief-2009-English.pdf; Paige Arthur, "Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies," research paper, International Centre for Transitional Justice, 2009, [research paper]; accessible at http://ictj.org/sites/default/files/ICTJ-Global-Divided-Societies-2009-English.pdf
[167] Arthur, "Identities in Transition,"17.
[168] Ní Aoláin and Campbell, "The Paradox of Democratic Transitions," 174.
[169] Ibid., 176.

Residential Schools system, and to recognize the Residential Schools system's impact and consequences on aboriginal communities.[170] This creation of a truth-seeking body is part of a larger attempt to facilitate, although questionably, in my view, "reconciliation among former students, their families, their communities and all Canadians."[171] The Indian Residential School Settlement Agreement, as of September 2007, also provided for a compensation scheme called the Common Experience Payment (CEP), which consists of a lump sum payment to former students.[172] An Independent Assessment Process (IAP) has also been set up to deal specifically with claims of sexual and other physical abuses perpetrated in the Indian Residential Schools.[173] The Australian government chose to launch an inquiry into the past violations of human rights in question. In 1997, it published a report documenting the abuses and violations carried out by the government against Aborigines and the Torres Strait Islanders.[174] In 2008, the Australian Prime Minister, Kevin Rudd, also formulated a national apology for past wrongs committed by successive governments against the nation's Aborigines.[175] New Zealand adopted yet another approach, by setting up the Waitangi Tribunal to investigate land claims alongside the launch of a

[170] Truth and Reconciliation Commission of Canada, "Our Mandate," [website]; accessible at http://www.trc.ca/websites/trcinstitution/index.php?p=7#one; accessed October 9th 2008.
[171] Truth and Reconciliation Commission of Canada, "Our Mandate."
[172] Service Canada, "The Common Experience Payment," [website]; accessible at http://www.servicecanada.gc.ca/eng/goc/cep/index.shtml; accessed February 11th 2011. This webpage contains further information regarding the Common Experience Payment (eligibility, application procedure and amount).
[173] Aboriginal Affairs and Northern Development Canada, "Indian Residential Schools," [website]; accessible at http://www.aadnc-aandc.gc.ca/eng/1100100015576 accessed November 29th 2011.
[174] Government of Australia, *Bringing Them Home*.
[175] Parliament of Australia, "Apologies to Australia's Indigenous Peoples," speech by Paul Rudd, 13th February 2008, [speech online]; accessible at http://www.aph.gov.au/house/rudd_speech.pdf

number of other policies aiming at cultural accommodation.[176] All three countries are actively dealing with their difficult pasts, in their own different ways.

For this reason, it is argued, in this research, that even though neither Canada nor Australia nor New Zealand is experiencing "significant political violence," as Ní Aoláin and Campbell require in their definition, the aboriginal population in all three countries, has experienced significant political violence at the hands of the government. Each country and government is also seeking, more or less successfully, to face what wrong have been committed against its indigenous population. The national apologies formulated by governments, along with the truth-seeking bodies set up, demonstrate a commitment to acknowledging past wrongs and moving away from formerly assimilationist policies. While the success, intentions and degree of commitment of each government can be legitimately questioned, the fact that the public discourse is changing, to different degrees in each country, cannot be ignored.[177] Reconciliation is a lengthy process, which will require further commitment to addressing the inequalities resulting from colonization. But, reconciliation based on acknowledgment of the past is also most likely to trigger a

[176] "The Waitangi Tribunal,"[website]; accessible at http://www.waitangi-tribunal.govt.nz/; accessed May 1st 2010. This is the official webpage of the Waitangi Tribunal where further information can be found on the history and work of the Tribunal.

[177] This thesis recognizes that the changes are still, in the cases of Australia and Canada, largely symbolic (e.g. public apologies). See, for instance, Andrew Gunstone, *Unfinished Business: The Australian Formal Reconciliation Process* (Melbourne: Australian Scholarly Publishing, 2007), who puts forth a critique of the Australian reconciliation process. Further substantial and structural changes are required for reconcililation to really be possible and a transition to move forward. However, it is important not to disregard the steps taken by respective governments to acknowledge past wrongs, and see these steps as, hopefully, the beginning of a greater societal shift. This is the case in New Zealand, where following the 1970 Māori renaissance movement, societal and governmental attitudes towards the Māori started to shift. While, as this thesis illustrates, much remains to be done regarding inequalities, the social, economic and cultural status of New Zealand's indigenous population has drastically changed.

real change and renewal of relationships between the parties involved.[178] Jung argues that, in these cases, transitional justice measures are "designed in part to reinscribe a common national identity, legitimate the government and re-establish the moral authority of state sovereignty."[179] It is argued, here, that a transition does not necessarily have to be tied to a regime change, but can also be defined in terms of the acknowledgement of past wrongs and acceptance of new discourse regarding national history. Moreover, in all three countries, indigenous communities have suffered severe human rights violations and continue to be economically, socially and culturally marginalized. All three countries have since made a conscious decision to address some of these circumstances. New Zealand, for instance, chose to incorporate Mãori values in various social policies in order to be more culturally sensitive but also to better address some of the structural inequalities that affect Mãori. While these countries are not transitioning towards democracy, they are starting their journey toward acknowledgment, inclusion and reconciliation. Again, this varies to different degrees, in each case. However, these governments are seeking to re-establish or consolidate their moral authority and legitimacy. Transitional justice, it is argued, is relevant to cases where there is no obvious regime transition. Indeed, while transitions to peace and democracy may be a *sufficient* condition to qualify for that status of transitional societies, they are in no way a *necessary* condition.

In conclusion, this research stresses the need to reshape the boundaries of transitional justice so as to include a wider array of cases and transitions. It suggests that transitional justice scholarship would strongly benefit from broadening its inquiry

[178] Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* (Cape Town: David Philip Publishers, 1997), 47.
[179] Jung, "Transitional Justice for Indigenous Peoples," 3.

to include democratic countries dealing with legacies of past violations of human rights and the necessities of historical redress. Lessons regarding the dilemma of transition can be learnt from both post-conflict *and* settler societies. This is only part of the work that still needs to be undertaken for the transitional justice scholarship to become more comprehensive and relevant to the realities of transitional societies. As has been shown, a number of the central concepts of the field, including reconciliation and truth, also and still need to be further analyzed and conceptually refined. As a fast growing field of inquiry, transitional justice presents a number of inconsistencies and uncertainties that need to be questioned.

CHAPTER THREE

TRANSITIONAL JUSTICE: A COLONIZING FIELD?

The transitional justice scholarship raises a number of contentious issues and is the subject of ongoing debate regarding how to best come to terms with the past in transitional societies. This usually involves, for instance, the creation of specific judicial institutions to carry out justice and hold individuals accountable in the aftermath of conflict or grave violations of human rights. As noted by Thomson and Nagy, the field of transitional justice has only recently started to pay attention to "more localized, traditional mechanisms as a corrective to the shortcomings of internationalized, 'one-size-fits-all' approaches."[180] This chapter contends that the transitional justice literature is defined by a Western, legalistic[181] approach to doing justice which affects the ability of the scholarship to account for indigenous and customary mechanisms of justice that do not espouse this legalistic lens. Here, two things are discussed. First, this chapter examines how transitional justice scholars and practitioners favor the implementation and development of certain institutions, at the detriment of others, in transitional societies. These are usually based on a neo-liberal democratic framework. This, in turn, leads to a discussion about how this preference for particular institutions and

[180] Susan Thomson and Rosemary Nagy, "Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's Gacaca Courts," *The International Journal of Transitional Justice* 5 (2011), 13.

[181] Here, the idea of legalism is understood as defined by Shklar as " the ethical attitude that holds that moral conduct is to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." See, Judith Shklar, *Legalism*, Cambridge, Harvard University Press, 1964, 1. It manifests itself as a belief amongst transitional justice scholars in the need to promote a universal standard of justice. See, Vinjamuri and Snyder, "Advocacy and Scholarship," 346.

mechanisms reveals latent assumptions about the primacy of the rule of law, as well as about the societies where the creation of these types of institutions is promoted.

Transitional Justice and the Rule of Law

As noted earlier, transitional justice shares close ties with the literature on conflict resolution and peacebuilding where the promotion of the rule of law is perceived as an essential element in sustaining peace and security. In fact, it appears that a legalistic approach to justice has come to dominate the field of transitional justice.[182] McEvoy, for instance, contends that "transitional justice has become over dominated by a narrow legalistic lens which impedes both scholarship and praxis."[183] This is clearly visible in the sort of institutions favored by transitional justice scholars and practitioners. The international push to do justice,[184] or what Oomen calls "the judicalization of international relations,"[185] has led the international community to respond to the call for accountability by setting up major legal institutions, including the Tokyo and Nuremberg Tribunals, the ICTY and ICTR, and other, more recent, hybrid models such as the Special Court for Sierra Leone.[186] The creation of the ICC is certainly the most significant illustration of this global move towards judicalization. In recent years, the crimes committed in Sudan, the Democratic Republic of Congo, Uganda and the Central African Republic have been referred to the ICC.[187]

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[182] Leslie Vinjamuri and Jack Snyder, "Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice," *Annual Review of Political Science* 7 (2004), 345.
[183] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 43, no. 7 (2007), 16.
[184] Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly* 29 no. 2 (2008), 275.
[185] Barbara Oomen, "Donor-Driven Justice and Its Discontents: The Case of Rwanda," *Development and Change* 36 no. 5 (2005), 893.
[186] These institutions are discussed in more length in the following chapter.
[187] The International Criminal Court, "Situations and Cases," [website]; http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ accessed April 23rd 2011.

This push to do justice is also visible outside of the prerogative of the ICC. In 2003, for instance, under pressure from the United States government, the Iraqi Special Tribunal for Crimes Against Humanity was set up to investigate crimes committed under the government of Saddam Hussein.[188] The creation of such judicial institutions, according to Amnesty International, is an "international responsibility," which the international community must carry out.[189] Today, the idea that persons who "commit international crimes are internationally accountable for them has now become an accepted part of international law."[190]

Transitional justice strategies, however, have quickly expanded to encompass a range of activities that are not directly about making those responsible for violations of human rights accountable for their acts, but, rather, encompass such things as the "institutional reform of judiciaries, training of judges, reformulation of military and other security doctrines…and institutions, which are indistinguishable from peacebuilding efforts."[191] The 2010 Annual Report of International Center for Transitional Justice illustrates and confirms this tendency. The document lists security sector reforms and criminal justice reforms as part of the activities that comprise the field of transitional justice.[192] These reforms include the restructuring of national security forces, intelligence and the reorganization of the justice sector, alongside measures to strengthen civil society.[193] Transitional justice strategies have generally supported the development of institutional measures that are mapped onto a neo-

[188] Parliament of Australia, "Iraq's Special Tribunal for Crimes against Humanity," (2004) [website]; http://www.aph.gov.au/library/pubs/rn/2003-04/04rn34.htm accessed February 14th 2011.
[189] Amnesty International, "Iraq: Iraqi Special Tribunal-Fair Trials Not Guaranteed," (MDE 14/007/2005) 2005, 1, [report online]; accessible at http://www.amnesty.org/en/library/info/MDE14/007/2005
[190] Arthur, Watts, "The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers." *Recueil des cours de l'Academie de droit international de La Haye* 247 (1994), 82-84.
[191] Chandra Sriram, "Transitional Justice and the Liberal Peace." In *New Perspectives on Liberal Peacemaking*, edited by Edward Newman, Roland Paris and Oliver Richmond, 112-130. New York: UN University Press, 2009, 120.
[192] The International Centre for Transitional Justice. "Annual Report 2010." 3, [report online]; accessible at http://ictj.org/sites/default/files/ICTJ_AnnualReport_2010.pdf
[193] Ibid.

liberal understanding of peace and peacebuilding. This is not entirely surprising, given that transitional justice is often considered a subset of peacebuilding.[194] To a great extent, many officials equate transitional justice with the establishment of human rights and peacebuilding activities.[195] Sriram contends that the fields of transitional justice and peacebuilding "share key assumptions about preferable institutional arrangements, and a faith that other key goods - democracy, free markets, 'justice' – can essentially stand in for, and create, peace."[196] This belief has clear roots in the neo-liberal doctrine,[197] which encourages the "opening up of political space, including improvement regarding contestations, participation and human rights."[198] Teitel adds that the "justice seeking phenomena…is intimately tied to the fashioning of a liberal political identity."[199]

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

Ethical challenges

That the transitional justice scholarship is "steeped in western liberalism"[200] is problematic for a number of reasons. First, this tendency makes it difficult for the scholarship to account for mechanisms and approaches to doing justice that do not fit within its legalistic and

[194] Thallinger, "The UN Peacebuilding Commission," 693.
[195] Hurst Hannum, "Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding," *Human Rights Quarterly* 28 (2006): 1-85.
[196] Sriram, "Transitional Justice and the Liberal Peace," 112.
[197] Thania Paffenholz, *Civil Society and Peacebuilding: A Critical Assessment* (London: Lynne Rienner Publisher, 2010), 43.
[198] Anna Jarstad, and Timothy Sisk, *From War to Democracy: The Dilemmas of Peacebuilding* (Cambridge: Cambridge University Press, 2008), 17.
[199] Ruti Teitel, *Transitional Justice*, 225.
[200] Nagy, "Transitional Justice as Global Project," 275.

individualistic framework. Indeed, liberalism conceives of the individual as the basic and irreducible unit of society, and finds it difficult to accommodate practices that do not correspond to this view.[201] This liberal principle of individuation, although culturally and historically specific, serves to shape much of existing international humanitarian, peacebuilding efforts in transitional societies.[202] Nagy, who is highly critical of what she refers to as the "global project," accuses transitional justice of seeking to "produce subjects and truths that align with market democracy and are blind to gender and social justice."[203] Lundy and McGovern, who denounce international efforts for promoting "a pattern of development determined by the dominant ideology of neo-liberalism," echo Nagy's concern.[204] Transitional justice, just like peacebuilding, with which it is often associated, is informed by a given "epistemic knowledge base and ontological view of the world" which influences the social, economic, political strategies employed.[205] Orford warns of the fact that the establishment of transitional justice institutions and mechanisms is informed by "powerful ideas of the international human rights movement, part of the forward march of liberal internationalism."[206] This chapter draws attention to how transitional justice strategies are designed and channeled to fit a specific ontological view of society embodied in the deontological liberal tradition. In fact, apart from a handful of scholars,[207] the transitional justice literature has remained silent on the issue.

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[201] This idea is discussed in more depth in the next chapter's discussion of deontological liberalism.
[202] Bhikhu Parekh, "The Cultural Particularity of Liberal Democracy." In *The Prospects for Democracy*, edited by David Held, California: Stanford University Press, 1993, 157.
[203] Nagy, "Transitional Justice as Global Project," 275.
[204] Patricia Lundy and Mark McGovern, "The Role of Community in Participatory Transitional Justice." In *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, edited by Kieran McEvoy and Lorna McGregor, 99-120. Oxford: Hart Publishing, 2008, 104.
[205] Oliver Richmond, "Beyond Liberal Peace? Responses to Backsliding." In *New Perspectives on Liberal Peacemaking*, edited by Edward Newman, Roland Paris and Oliver Richmond, 54-77. New York: UN University Press, 2009, 69.
[206] Anne Orford, "Commissioning the Truth," *Journal of Gender and Law* 15 no. 3 (2006), 862.
[207] For instance, see Nagy, "Transitional Justice as Global Project," Sriram, "Transitional Justice and the Liberal Peace," and David Hoogenboom, and Stephanie Vieille, "Transitional Justice and the Neoliberal Discourse," paper presented at the Canadian Political Science Association, Ottawa, May 2009.

This one-size-fits-all approach has been most clearly visible through the uninhibited promotion of the rule of law and the institutional arrangements that support its development in transitional societies. The last couple of decades have seen a "surge in American and international efforts to promote the rule of law around the globe, especially in post-crisis and transitional societies."[208] European and North American foreign policies, as well as the UN, the World Bank, and a number of philanthropic foundations, have all engaged in the promotion of the rule of law, based on a given standardized understanding of it. This research adopts the UN's definition of the rule of law, which refers to:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[209]

It is, therefore, clear that the rule of law is associated with certain institutions, such as an independent judiciary, which embody and promote specific values, including respect for human rights, social responsibility and democratic governance.[210] The UN's definition is representative of the definitions and rationale adopted by a number of other international institutions such as the Organization for Security and Co-operation in Europe (OSCE)[211] and the Organization of American States (OAS).[212] Both embrace a very similar and detailed understanding of the institutional and procedural elements of the rule of law, which they link, more or less openly, with peace and democratic governance. This corresponds to what

[208] Rosa Brooks, "The New Imperialism: Violence, Norms, and The "Rule of Law," *Michigan Law Review* 101 no. 7 (2003), 2276.
[209] Report of the Secretary-General, "The Rule of Law and Transitional Justice," 4.
[210] Richard Fanthorpe, "On the Limits of Liberal Peace: Chiefs and Democratic Decentralization in Post-War Sierra Leone," *African Affairs* 105 (2005), 27-8.
[211] Office for Democratic Institutions and Human Rights OSCE, "Rule of Law," [report online]; accessible at http://www.osce.org/node/66395 accessed on April 12th 2011.
[212] Organization of American States, "Justice and the Rule of Law," [website]; accessible at http://www.summit-americas.org/sisca/justice.html. accessed March 21st 2011.

Carothers calls the "Rule of Law Assistance Standard Menu," which guides the work of the international community in developing countries and transitional societies.[213] This international emphasis on the rule of law and legal institutions has become one of the main ways in which countries deal with one another.[214] Over the years, international efforts in transitional societies have increasingly focused on the building of courts, the punishment of human rights violations, and the writing of laws.[215] Justice has become one of the main areas of international assistance and cooperation.[216] In order to obtain funding, a number non-western states have had to conform to donors' priorities and therefore adopt such standardized practice and understanding of the rule of law, as in the case of the African Union (AU) and its leading members.[217]

One of the striking elements of this globally unbridled promotion and adoption of the rule of law is the lack critical examination of its underlying assumptions. The concept of the rule of law is "rarely examined or understood by key international decision makers."[218] The rule of law, justice, and law itself are naively associated with order and a source of societal peace. It is also prescribed on the basis of being inherently good, coherent, and independent from society.[219] The rule of law is perceived as existing "beyond culture," and is therefore thought to be easily applicable to different contexts through the creation of written laws and formal judicial structures.[220] Accordingly, law is considered a foundational element that precedes all other factors, including culture and religion. As a result, courts and legal texts are seen as the embodiment of this universal and impartial rationality. It is generally accepted

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[213] Tim Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington: Carnegie Endowment for Peace, 1999), 168.
[214] Oomen, "Donor-Driven Justice and Its Discontents," 890.
[215] Lundy and McGovern, "The Role of Community in Participatory Transitional Justice," 99.
[216] Oomen, "Donor-Driven Justice and Its Discontents," 888.
[217] Robert MacGinty, "Indigenous Peace-Making Vs Liberal Peace," *Journal of the Nordic International Studies Association* 43 no. 2 (2008), 144.
[218] Brooks, "The New Imperialism," 2283.
[219] Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), 34.
[220] Brooks, "The New Imperialism," 2285.

that courts, as neutral instruments of the law, are well able to provide an "official version of reality to which a majority would subscribe."[221] In transitional societies, where abuses of power and violence were rampant, the advent of the rule of law not only symbolizes a breakaway from a difficult past, but is most importantly seen as "capable to construct liberalizing change."[222]

The problem, therefore, does not lie with the rule of law itself but, rather, with the way it is presented and promoted. As Oomen writes, one of the reasons that justice and the rule of law have become a major area of international cooperation is that law is presented as "neutral, universal and apolitical."[223] This approach to law and justice, as apolitical and easily abstracted from its social context, is itself an exclusively Western and ethnocentric notion.[224] Seeing law as an unbiased and impartial instrument is highly problematic, for it fails to recognize the cultural contingency of legal practices and understandings. Yet, the concept of the rule of law continues to be used and remains unquestioned. International legal norms and theory are defined by this discourse, which informs language about what is 'right' or 'wrong,' or in other words what is legal and illegal. The main difficulty becomes how this understanding of law guides much of the ongoing international efforts to do justice and the kind of institutions transplanted into transitional societies, with no appreciation of the cultural embedded-ness of such conception of law. This thesis does not reject the rule of law, nor does it claim that legal institutions, such as courts and tribunals, are the wrong mechanisms to use in all situations. Rather, it draws attention to the fact that the rule of law is placed on a

[221] Jaime Malamud-Goti, *Game without End: State Terror and the Politics of Justice*, (London: University of Oklahoma Press, 1996), 184.
[222] Teitel, *Transitional Justice*, 213.
[223] Oomen, "Donor-Driven Justice and Its Discontents," 893.
[224] James Donovan and Edwin Anderson, *Anthropology and Law* (Oxford: Berghahn Books, 2003), 175-189.

pedestal, and is typically considered a "heightened legal reference point."[225] This narrow legal focus "produces a parochial perspective that limits the range of conceivable remedies."[226] The crux of such a challenge, according to Nagy, is that "the West arrogates the universal to itself and then brings all others into its fold of humanity."[227]

Transitional justice is a field highly defined by legal norms.[228] It is an active promoter of judicalization and it is a prime site for this universalizing tendency. Scholars of the field of transitional justice appear to remain unaware of the fact that the institutions and mechanisms the literature endorses in transitional societies are "held together by common concepts, practical aims, and distinctive claims for legitimacy," embedded in a specific intellectual tradition.[229] The scholarship is driven by given norms and assumptions about the nature of law. The rule law is viewed a "set of benchmarks rather than a lived ethos within society."[230] That is, the rule is seen as a value-free standard to be sought out and achieved. This, in itself, is contrary to a number of indigenous traditions that see law and justice as a lived experience, always reflecting the needs and preferences of those involved, as opposed to a rigid body of rules disconnected from local realities.[231] As a result, the field transitional justice emerges as a "site where conflicting social rationalities test the limits of law order, guaranteeing peace

[225] Bell, Campbell and Ní Aoláin, "Justice Discourses in Transition,"307.
[226] Hiram Chodosh, "Reforming Judicial Reforms Inspired by Us Models," *De Paul Law Review* 52 (2003), 361.
[227] Nagy, "Transitional Justice as Global Project," 5.
[228] Peer, Zumbansen, "Transitional Justice in a Transnational World: The Ambiguous Role of Law," *CLPE Law Research Paper Series* 2008, 8-9; and Christine Bell, "Transitional Justice, Interdiciplinarity and the State of the Field of Non-Field," *The International Journal of International Justice* 3 no. 1 (2009), 1.
[229] Paige,Arthur, "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009), 324.
[230] Rosemary Nagy, "Centralizing Legal Pluralism? Transitional Justice and Traditional Mechanisms," paper presented at the International Studies Association, New Orleans, 2010, 13.
[231] See for instance, Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Canada: Penguin, 2006); Juan Tauri and Allison Morris, "Re-Forming Justice: The Potential of Maori Processes." In *Restorative Justice: Critical Issues*, edited by Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmarland, 44-54. London: The Open University, 2003; nd Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice* (London: Kingsley, 2009).

and sustaining integrity."[232]

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

Strategic challenges

The assumed impartiality and universality of the rule of law is most visible in the transfer of certain legal practices and judicial institutions to transitional societies. This is referred to by Bell as a transitional justice "toolkit," whereby a specific array of mechanisms is chosen and delivered to address the legacies of mass violations of human rights.[233] This usually includes the establishment of domestic criminal trials, truth seeking bodies, and other hybrid or restorative mechanisms. Oomen also argues against the implementation of "prefabricated justice packages," dictating the appropriateness of specific criminal codes and procedures in countries emerging from a variety of situations.[234] This was the case, for instance, in Afghanistan, Iraq, and Liberia, where the international community intervened and pushed for the creation of specific judicial institutions that mirrored international legal preferences.[235]

Again, transitional justice and peacebuilding efforts are blended together and bear the brunt of similar criticism vis-à-vis their use of 'IKEA type, flat-pack peace made from

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[232] Zumbansen, "Transitional Justice in a Transnational World," 1.
[233] Bell, "Transitional Justice, Interdiciplinarity and the State of the Field of Non-Field," 22.
[234] Oomen, "Donor-Driven Justice and Its Discontents," 891.
[235] Alice Henkin, *Honoring Human Rights under International Mandates: Lessons from Bosnia, Kosovo and East Timor. Recommendations to the United Nations* (Washington: The Aspen Institute, 2003), 5; and International Development Research Centre, "The Responsibility to Protect," 2001, [report online]; http://web.idrc.ca/en/ev-9436-201-1-DO_TOPIC.html accessed September16th 2010.

standardized components."[236] So while, as discussed earlier, the ontological and ideological assumptions that underpin the rule of law remain largely unaddressed, the practice of the international community in promoting specific mechanisms and patterns is often disparaged. The sharing of information and best practices for dealing with grave violations of human rights is certainly to be encouraged. Yet, there exists a very real danger that transitional justice interventions and practices become both non-reflexive and homogenized across the board.[237] As noted by Duggan, transitional justice mechanisms are too often "transferred across settings with insufficient reflection given to contextual relevance and appropriateness."[238] In this respect, they risk being ineffective, or, worse, detrimental to the societies where they are implemented.

The implementation of this one-size-fits-all approach lacks the social, historical and cultural connection to the people who are primarily affected by the transition. It is based on the faulty belief that what has worked in a few developed and industrialized countries will work elsewhere.[239] As a result, local ownership of these processes and engagement in the rebuilding of a just society is not always optimal. This is troublesome, for it is well known that ignoring local needs and failing to engage local actors is likely to undermine the anchoring of a lasting peace.[240] Local actors and communities must be involved in the design and implementation of transitional efforts for the process to work at all,[241] which is not

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[236] MacGinty, "Indigenous Peace-Making,"145.
[237] See for instance, Adrian Guelke, *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Basingstoke: Palgrave, 2004), 168-83; and John Darby, "Borrowing and Lending in Peace Processes." In *Contemporary Peacemaking: Conflict, Violence and Peace Processes*, edited by Roger Mac Ginty, 245–55. Basingstoke: Palgrave, 2003.
[238] Colleen Duggan, "Editorial Note," *The International Journal of Transitional Justice* 4 (2010), 317.
[239] A.H Somjee, "Non-Western Theories of Development: Critiques and Explorations." In *New Directions in Comparative Politics*, edited by Howard Wiarda, 119-140. Boulder: Westview Press, 1991, 135.
[240] Alex Austin, Martina Fischer, and Norbert Ropers, *Transforming Ethnopolitical Conflict: The Berghof Handbook* (Wiesbaden: Berghoff Research Center for Constructive Conflict Management, 2004), 388 .
[241] Hannah Reich, *Local Ownership in Conflict Transformation Projects Partnership, Participation or Patronage?* (Wiesbaden: Berghoff Research Center for Constructive Conflict Management, 2006), 6; and Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-*

always the case with the top-down creation of judicial institutions. This is particularly needed in societies that have been scared by deep social and cultural divides, such as in Rwanda.[242] Recreating dialogue between parties, via locally led and owned programs, is often the best way to bridge differences and restore trust.

Unfortunately, the international community continues to concentrate much of its efforts around the strengthening of state institutions.[243] Often, the kinds of judicial institutions and reforms promoted in transitional societies reflect a specific understanding of the source of law and order, as well as the role of the state in maintaining both. Typically, a majority of governmental and non-governmental donors target their funding towards a given array of programs that support the strengthening of state legislature.[244] The general tendency of the international community is to "see justice and justice delivery as quintessentially the business of the state or state-like institutions."[245] The Belgian Development Agency, the United Kingdom's Foreign and Commonwealth Office, and the Swedish International Development Cooperation Agency, for instance, partnered in a 3 year *Projet D'Appui Institutionel et Operationel à la Justice* in Burundi, whereby 8.7 million Euros were devoted to the strengthening of the country's judicial institutional capacities.[246] Activities include such things as the establishment of a Judicial Training Institute, the publication of legal texts and documentation, and the training of state lawyers, as well as the provision of material support and legal expertise to the Ministry of Justice.[247] Similar projects have been launched by a number of countries including, France, Germany, and Canada amongst others. The European

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Building (Oxford: Oxford University Press, 2004), 182.
[242] Edomwonyi Oghogho, "Rwanda. The Importance of Local Ownership of the Post-Conflict Reconstruction Process," *Conflict Trends, Journal of African Centre for Constructive Resolution of Disputes* 4 (2003): 43-47.
[243] Makau Matua, "Savage, Victims, Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* 41 no. 1 (2001): 201-46.
[244] Oomen, "Donor-Driven Justice and Its Discontents," 899.
[245] McEvoy, "Letting Go of Legalism," 28.
[246] The Belgian Development Agency, "Renforcement a l'Etat Du Droit Au Burundi," [website], accessible at http://www.btcctb.org/fr/countries/burundi accessed March 21st 2011.
[247] Ibid.

Union, for instance, also requires and assists in the creation of stable institutions guaranteeing democracy, the rule of law and human rights, as a condition of accession in the European Union.[248]

This one-size-fits-all approach effectively limits the space for alternative modes of doing justice and making peace. According to MacGinty, the "template style intervention" of western donors and the ensuing structural power that it endows them with, contributes to the "marginalization of traditional and indigenous approaches."[249] Even though the international community has adopted a discourse of accommodation of traditional and other non-state approaches, the standardizing practices put in place often confine alternative processes within a legalistic framework.[250] Some organizations, like the UK Department for International Development, believe that customary mechanisms can serve to complement formal judicial and state mechanisms, and continues to promote this idea in their development aid and programs.[251] In fact, some even argue that international efforts have "simultaneously enabled and disabled attempts by indigenous people to gain greater control" over the policies and institutions that target them.[252] Yet, the international community's position vis-à-vis customary justice mechanisms is clearly spelled out in the UN Secretary General's Report on the Rule of Law and Transitional Justice. The document talks about *conforming* indigenous and traditional processes with international standards.[253] This means that customary mechanisms are to be tolerated so long as they can be judicialized to correspond to

[248] This is currently the case for Turkey and Croatia. See, The European Commission, "How Does a Country Join the EU," [website], accessible at http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/index_en.htm accessed November 11th 2009. http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm.
[249] MacGinty, "Indigenous Peace-Making,"139.
[250] See for instance, Agnes Hurwitz and Kaysie Studdard, *Rule of Law Programs in Peace Operations* (New York: International Peace Academy, 2005).
[251] DFID, "Non-State Justice and Security Systems," policy division briefing (May 2004), 1, [briefing online]; accessible at http://www.gsdrc.org/docs/open/SSAJ101.pdf
[252] Lindsey Te Ataotu Macdonald and Paul Muldooni, "Globalisation, Neo-Liberalism and the Struggle for Indigenous Citizenship," *Australian Journal of Political Science* 41 no. 2 (2006), 209-210.
[253] See, Report of the Secretary-General, "The Rule of Law and Transitional Justice," 12.

international legal norms and expectations. As MacGinty explains, the relationship between international law and local traditional justice practices is more often one of "co-option rather than a co-existence of equals."[254]

A quick look at the existing research on customary mechanisms of justice clearly illustrates this tendency. Rwanda's *gacaca* courts are a prime example of how the international interest and support of customary mechanisms led to their co-option. Drumbl, for instance, exposes the call for *gacaca* courts to become "as legal as possible" so as to emulate the trial model and thereby conform to the international law paradigm.[255] The overall coordination and organization of *gacaca* courts was in the hands of the Rwandan state and its Department of Gacaca Jurisdiction within the Ministry of Justice.[256] The intervention of the state and the international community has, in fact, radically altered the traditional Rwandan process of doing justice,[257] removing the voluntary and grassroots aspects of the process. This has resulted in *gacaca* courts having little authenticity in the eyes of those who knew how these processes were traditionally (in the sense of pre-genocide) conducted.[258] A similar conclusion can be drawn in the case of New Zealand, the government's ongoing attempt to include Maori practices within its judicial framework has produced, at best, mixed results. To a large extent, many Maori remain suspicious of the government's attempts, which they view as mere tokenism.[259]

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[254] MacGinty, "Indigenous Peace-Making,"158.
[255] Mark Drumbl, "Sclerosis: Retributive Justice," 16.
[256] Amnesty International, "Rwanda: Gacaca, a Question of Justice," (AFR 47/006/2002) 2002, 21, [report online]; accessible at http://www.amnesty.org/en/library/info/AFR47/007/200221.
[257] Fergus Kerrigan, *Some Issues of Truth and Reconciliation in Genocide Trials* (Stockholm: Stockholm International Forum, 2002), 3.
[258] Oomen, "Donor-Driven Justice and Its Discontents," 904.
[259] For further information, see for instance, Moana Jackson, "Justice and Political Power: Reasserting Mãori Legal Processes," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen Hazlehurst, 243-65. Aldershot: Avebury, 1995, 253; And Michael Belgrave, "Maori Customary Law: From Extenguishment to Enduring Recognition," (The New Zealand Law Commission Library, 1996).

Concluding thoughts

Judicial reform has become a hallmark of transitional justice, and an "enabling condition or precondition" of the field.[260] There is no doubt that the unquestioned faith of the transitional justice scholarship and the international community in the rule of law influences the type of interventions led in transitional societies. The nature and underlying assumptions of the rule of law are, however, rarely assessed. The kinds of institutions transplanted, and the legal assistance provided to transitional societies is often based on a given, preconceived template borrowed from the European legal tradition. As a direct consequence of this clear preference for the rule of law and its state institutions, non-state, local and customary approaches are often marginalized, if not assimilated within the push for judicalization. As noted by Nagy, tensions between international norms and local context "is and will continue to be an increasing challenge for the project of transitional justice."[261] The difficulty, therefore, lies in finding ways to accommodate differences, without one way of knowing being subservient to the other. There is a real danger that the field of transitional justice simply serves to promote, maybe even involuntarily, a biased approach to doing justice, which fails respond to local needs and realities. It is crucial, therefore, that the transitional justice scholarship recognizes that its promotion of a specific legal tradition and institutions is akin to a "form of unconscious eradication of alternative understandings of the world."[262] Transitional justice scholars absolutely need to interrogate their own way of understanding law, if they are to even start to comprehend different ways of knowing.[263] The scholarship's unquestioned preference for and promotion of the rule of law and its judicial institutions, regardless of

[260] Muna Ndulo, and Roger Duthie, "The Role of Judicial Reform in Development and Transitional Justice," In *Transitional Justice and Development: Making Connections*, edited by Pablo De Greiff and Roger Duthie, 250-82. New York: Social Science Research Council, 2009, 263.
[261] Nagy, "Transitional Justice as Global Project," 288.
[262] Bradley Bryan, "Property as Ontology: An Aboriginal and English Understanding of Property," *Canadian Journal of Law and Jurisprudence* 13 no. 1 (2000), 29.
[263] Allan Norrie, "From Law to Popular Justice: Beyond Antinomialism." In *Laws of the Postcolonial*, edited by Darian-Smith Eve and Peter Fitzpatrick, 249-76. USA: University of Michigan Press, 1999, 249.

context, risks rendering the work carried out in the field grossly inapplicable and disconnected from a variety of other local realities. Worse yet, by continuing to blindly promote its own legal framework and institutions, the transitional justice scholarship runs the risk of being perceived as illegitimate and dangerously homogenizing.

CHAPTER FOUR

ENGAGING CONCEPTIONS OF JUSTICE

The history of transitional justice has been marked by a variety of efforts to promote peace and achieve justice in the aftermath of mass violations of human rights. The majority of mechanisms used since the Second World War have primarily sought redress through retribution and punishment via the use of tribunals and courts. The Nuremberg Trials and the Tokyo Tribunal, as well as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), are examples of this approach to justice. More recently, attempts to bring about justice have been complemented by less-retributive mechanisms, such as truth commissions, and adapted customary mechanisms of justice. These mechanisms of justice are often described as promoting a combination of retributive, reparative, and restorative justice.

Transitional justice tends to classify existing mechanisms as falling within these three categories. Each of these three approaches to justice is used and understood within an individualistic framework that is representative of the Western legal tradition. This chapter explores how the framework used by transitional justice scholars to make sense of justice is unsuitable to account for the type of justice that is embodied in customary mechanisms of justice. It is also suggested that a

communitarian approach,[264] which emphasizes the centrality of the community to the individual, would be better equipped to discuss alternative mechanisms and conceptions of justice.

Justice

Justice is an elusive concept, which can be difficult to capture. There exist a number of approaches and theories of justice, spanning across different schools of thought, starting with the works of ancient Greek philosophers such as Plato and Aristotle. Both were interested in the nature of justice and its importance to life in society. In The Republic, for instance, Plato defined justice as the greatest good, or a form of social harmony whereby all members of society perform their duties and, as a result, live the good life.[265] Aristotle, on the other hand, identifies two types of justice: distributive justice, which is concerned with the distribution of resources to be shared amongst all; and rectificatory justice, which governs personal transactions between individuals.[266]

For practical reasons, this cursory glance at justice focuses only on how the concept has been articulated in the literature on global justice and transitional justice. For instance, one of the most famous definitions of justice is the one put forth by John

[264] The author purposefully chose to adopt a communitarian approach to emphasize the intersubjective construction of the self. In other words, it draws attention to how identities and beliefs are shaped through interaction and association. See for instance, Charles Taylor, *Philosophy and the human sciences: Philosophical paper 2* (Cambridge: Cambridge University Press, 1985). In addition, the research draws extensively from the writing of postcolonial and feminist scholars such as Seyla Benhabib, *Situating the Self: gender, community, and postmodernism in contemporary ethics* (London: Routledge, 1992); Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999) and Achille Mbembe, *On the Postcolony* (London: University of California Press, 2001). Please note that commumitarianism is defined later on in this chapter.
[265] Plato, *The Republic* (UK: Dover Publication, 2000).
[266] Aristotle, *A New Translation of the Nicomachean Ethics of Aristotle* (UK: Hesperides Press, 2006).

Rawls, who defines justice as fairness, anchoring his definition around two principles: liberty and equality.[267] Accordingly, while all individuals ought to benefit from equal liberties and opportunities, the system ought to be set up in such a way as to alleviate social and economic inequalities in favor of the least advantaged.[268] Justice, in his view, is, therefore, about ensuring some degree of social and economic fairness. Rawls distinguishes between three types of justice: *perfect procedural justice*, which functions according to a specific standard regarding what is a just outcome, and which procedurally ensures that this just or fair outcome is reached; *imperfect procedural justice*, which functions according to this same specific standard regarding what is a just outcome, but which does not guarantee fair process; and *pure procedural justice*, where only the fairness of the procedure matters--regardless of the outcome.[269] Amartya Sen adds that justice cannot be measured in terms of just institutions, but, rather, in terms of social outcomes, and the satisfaction of public reason.[270]

Others also describe justice as "distributive," that is, in terms of the distribution of goods and services. This is the case with Frankena, who sees justice as "the allotment of something to persons-duties, goods, offices, opportunities, penalties, punishments, privileges, roles, status and so on."[271] In other words, justice seeks the equal and fair distribution of goods and services. Some feminist scholars, like Susan Mollar Okin, go further by arguing that existing theories of justice "neglect women

[267] John Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1971).
[268] Ibid., 60-65.
[269] Rawls, *A Theory of Justice*, 74-75.
[270] Amartya Sen, *The Idea of Justice*, (Harvard: Belknap, 2009).
[271] William Frankena, "The Concept of Social Justice," in *Social Justice*, ed. Richard Brandt, (New Jersey: Prentice-Hall, 1962), 5.

and ignore gender."[272] In her view, it is necessary to question the ontological and experiential positions adopted by contemporary theorists when attempting to define justice.

As noted by Daly and Stubbs, "a sketch of existing theorizing about justice, even a highly selective one, is daunting because the term justice has many referents."[273] The existing literature rarely discusses justice devoid of attributes, or what Amartya Sen calls "materials of justice."[274] Often, justice is described as being retributive, reparative, restorative, social or distributive, thereby putting emphasis on different facets of justice. The difficulty in defining justice may come from the fact that the concept is inherently paradoxical. Like reconciliation, discussed earlier, justice is both an end goal and a guiding moral principle. In other words, we seek justice in the name of justice.

The root of the word justice can be identified in the Latin *jus*, which means "right" or "fair."[275] These notions of "rightness" and "fairness" often guide human actions. We do certain things in the name of "fairness," and, therefore, justice. Likewise, after a crime has taken place, we seek to make things better, and "fair" in the name of justice. In this sense, justice is *procedural*. It is a process or a set of arrangements, that differ in various contexts, and that are used to redress a wrong. But justice is also an *ideal* and an end it itself. It is neither "just" nor "fair" to have one's car stolen without the issue being addressed, the offender identified and the victim, compensated. We seek justice for wrongs committed and harm done. When an

[272] Susan Mollar Okin, *Justice, Gender and the Family* (USA: Basic Books, 1989), 171.
[273] Kathleen Daly and Julie Stubbs, "Feminist Engagement with Restorative Justice," *Theoretical Criminology* 10 no. 9 (2006), 11.
[274] Sen, *The Idea of Justice*, 225.
[275] Concise Canadian Oxford Dictionary, 2nd ed., "Justice."

individual's rights have been violated, we want to re-establish the value of these rights and the individual who holds them, and ensure this will not happen again. By seeking justice, we want to establish this moral principle of "rightness" and "fairness." In other words, we want to make things right, as a way to 'correct' wrongdoing. Deterrence theorists would add that the value of justice also comes from the fact that it can help discourage wrongdoing, simply by outweighing the benefits of criminal action.[276] In other words, Deterrence theory is founded on the belief that, if the consequence of committing a crime offsets the benefit of the crime itself, individual will be deterred from carrying criminal action.[277]

Broadly speaking, justice is the end goal that governments, courts, truth commissions and other mechanisms seek to achieve, when dealing with crimes that have been committed. And while the ideal of justice is the same, the means to achieve it differs. Practices take different shapes and forms, depending on varying circumstances and needs, as this chapter will show in its exploration of the approaches to justice within the field of transitional justice.

For the purpose of this research, this discussion of justice is limited to the understanding of justice as a means to address and redress the impact of crimes. It is recognized, nonetheless, that this definition of justice is, in and of itself,

[276] Classical deterrence theorists include Cesera Beccaria, *An Essay on Crimes and Punishment* (USA: Kessinger Publishing, 2007) and Jeremy Betham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1970). Deterrence thoery is based on the idea that individuals are rational beings, acting out of free will, and capable of differentiating right from wrong and understanding the consequences associated with wrongdoing.

[277] There exists some nuances to the concept of deterrence. Stafford and Warr, for instance, talk about *specific* and *general* deterrence. While *specific* deterrence refers to the deterrent effect of directly experiencing punishment (i.e. imprisonment), *general* deterrence refers to the deterrent effect of indirectly experiencing punishment (i.e. fear of imprisonment). Mark Stafford and Mark Warr, "A Reconceptualization of General and Specific Deterrence," *Journal of Research in Crime and Delinquency* 30 no.2 (1993): 125-135.

fundamentally exclusive and reflects the bias of a certain legal tradition. Adopting this narrower definition of justice serves two purposes: First, looking at justice in relation to crime and violations of rights is directly relevant to the transitional justice scholarship, which is the focus of this research. Second, adopting this intrinsically legal understanding of justice helps to demarcate alternative and indigenous philosophies of justice examined in this research.[278] As this research will show later on, other traditions and indigenous approaches to justice do not distinguish between such things as criminal and social justice, and therefore move beyond the legal understanding of justice that is adopted in much of the transitional justice scholarship.

Of particular interest to this study is the way justice is conceptualized in the field of transitional justice. The literature on transitional justice tends to think about how to *do* justice in different ways, by using retributive, reparative, and restorative approaches. Each approach, in essence, seeks the same thing, which is to make things right after a crime, but tries to do so using different means. The retributive approach, for instance, favors the use of tribunals and courts, while the reparative approach encourages the enactment of material and symbolic reparations. Restorative justice sees truth-telling as an important element in its pursuit of justice. So, while the end goal of justice remains the same, views of how to *do* justice, in the field of transitional justice, vary.[279] Here, further clarification is needed. This study does not

[278] While this research uses the term 'indigenous approaches to justice,' it does not intend to collapse all indigenous approaches to justice and legal traditions into one. Rather, it uses this term in reference to Linda Tuhiwai Smith, who defines indigenous peoples as 'an international group that has had to challenge, understand and have a shared language for talking about the history, the sociology, the psychology and the politics of imperialism and colonialism.' (Tuhiwai Smith, *Decolonizing Methodologies,* 19). In this sense, this research refers to the some of the commonlities and traditions of this international group.

[279] Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (New York: Pringer, 2009), 117.

reject altogether the use of these paradigms, for each has its own merits and downfalls. Rather, it is critical of the way they are used and understood in the transitional justice scholarship. As will become clear, the individualistic and legalistic confines of the framework used by transitional scholars influence the kind, and nature of institutions used in transitional societies. Moreover, the inability of transitional justice scholars to think about these paradigms of justice outside of the individualistic, legalistic, and Western framework severely affects the validity and applicability of the scholarship to the needs of transitional societies.

Doing "Justice" in Transitional Justice

A large proportion of the literature on transitional justice is based on three different approaches that take root in deontological liberalism.[280] This study adopts Sandel's definition of deontological liberalism, which, in his view, is very much indebted to Kant's writings.[281] He explains that:

> Deontological liberalism is above all a theory about justice and in particular about the primacy of justice among moral and political ideals. Its core thesis can be stated as follow: society, being composed of a plurality of persons, each with his own aims, interests and conceptions of the good, is best arranged by principles that do not *themselves* presuppose any conception of the good: what justifies these regulative principles above all is not that they maximize social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it.[282]

[280] Michael Sandel, *Liberalism and The Limits of Justice* (Cambridge: Cambridge University Press, 1998), 1.
[281] It is important to note that this is a specific strand of liberalism which differs, for instance, from other liberal approaches influenced by thinkers such as John Stuart Mill. Indeed, Mill adopts a more utilitarian approach to justice, one based on the desirability or good of the outcome of justice. See, John Stuart Mill, *Utilitarianism* (UK: Dover Publishing, 2007).
[282] Sandel, *Liberalism and The Limits of Justice*, 1.

What is problematic with this approach to justice is its reliance on the assumption that there exists some form of foundational ethic, or *right* that can universally accessed through human reason, and can be defined independently of one's perception and conception of the utility, or good of something. That is, justice is guided by principles that are independent of anyone's understanding of what is useful, and beneficial for themselves or society. Rather, it assumes a "first-order ethic containing certain categorical duties and prohibitions which take unqualified precedence over other moral and practical concerns."[283] In other words, the principles that justify and guide justice are prior to any social, cultural, practical considerations and directly defined by higher, foundational, and guiding moral principles.

Each of the three approaches to justice used by transitional justice scholars, that is, the retributive, reparative and restorative approaches,[284] is anchored in a view of justice which gives precedence to the rational self, and conceives of the individual as a holder of rights, regardless of any other factors that may be involved. Cultural differences and backgrounds come only second to this assumed universal moral law or ethic. Conceptions of justice can be "justified independently of particular conceptions" of what is good or bad.[285] Again, it is important to reiterate that it is the manner in which these paradigms are used within this framework rooted in deontological liberalism, rather than the paradigms themselves, that is problematic.

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[283] Sandel, *Liberalism and The Limits of Justice*, 3.
[284] For examples, see Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability after War* (Cambridge: Polity, 2007); Lucia Zedner, "Reparation and Retribution: Are They Reconcilable?" *The Modern Law Review* 57 no. 2 (1994): 228-50; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Joanna R. Quinn, "Constraints: The Un-Doing of the Uganda Truth Commission," *Human Rights Quarterly* 26 (2004): 401-27; Dennis Sullivan and Larry Tifft, *Handbook of Restorative Justice: A Global Perspective* (London: Routledge, 2006).
[285] Benhabib, *Situating the Self,* 76.

As discussed later in this research, alternative conceptions and mechanisms of justice sometimes do comprise some elements of retribution, reparation and restoration. The difficulty lies with the way these approaches are being framed, used, and implemented in transitional justice.

This research argues that this understanding of how justice ought to be carried out, and also of the understanding of the role of the individual, has clear roots in the Western, Judeo-Christian tradition, which views human beings as imperfect reflections of God.[286] The deontological-liberal approach to justice embodied in the restorative, reparative and retributive modes of justice is "the creation of a specific legal tradition,"[287] that of the West, and can be considered "a cultural artifact… masquerading as universal, immutable values."[288]

These approaches to carrying out justice traditionally shaped liberal thinkers, including Kant and Nozick.[289] In the liberal approach, individuals are conceived as morally autonomous, and fully rational beings. As such, individuals are the bearers of rights.[290] Justice is seen as a "foundational priority" that precedes other considerations, preferences, and cultural particularities.[291] The majority of the literature in transitional justice is embedded within this deontological liberal approach. As a result of the way transitional justice frames these three approaches, the individual remains the primary source of concern, and the need for justice is justified either in the restoration, reparation, or retribution for individuals, whose rights have

[286] Patrick Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2000), 133.
[287] Anthony Padgen, "Human rights, natural rights and Europe's imperial legacy," *Political Theory* 31 no. 2 (April 2003), 173.
[288] Padgen, "Human rights, natural rights," 173.
[289] Benhabib, *Situating the Self, 78.*
[290] Sandel, *Liberalism and The Limits of Justice*, 2.
[291] Benhabib, *Situating the Self*, 176.

been violated. A more in-depth discussion of the three dominant views and categories of justice, within which most accounts on theories of justice and reconciliation fit, follows.

Retributive Justice

Micheal Moore defines the retributive approach as "the view that punishment is justified by the moral culpability of those who receive it."[292] Accordingly, the retributive theory is normatively grounded and justifies the use of punishment on moral grounds. Simply put, individuals who violate the social order ought to be punished.[293] Duff holds that retributivism's "central slogan punishment can be justified only as being deserved."[294]Wrongdoing merits punishment.[295] Yet, various proponents of the retributive approach put forth different justifications for punishment.

According to classical theorists, such as Kant, punishment in response to wrongdoing as inherently good, and represents an end, in and of itself.[296] This view is premised on the idea that all individuals are endowed with equal moral worth and act as autonomous moral agents. By acting in violation of the law, a person is choosing to put himself and his interests above that of others. As a result, it is morally sound that

[292] Michael Moore, "The Moral Worth of Retribution," in *Responsibility, Character and the Emotions*, ed. Ferdinand Shoeman (Cambridge, University Press: 1987), 747.
[293] Ted Honderich, *Punishment: The Supposed Justification* (Harcourt, Base and World, New York: 1970), 9; and Naomi Roht-Arriaza, *Impunity and Human Rights: International Law and Practice* (Oxford: Oxford University Press, 1995), 14.
[294] Anthony Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2011), 3.
[295] Andrew Von Hirsch, "The Politics of Just Desert" *Canadian Journal of Criminology* 32 (1990), 397.
[296] Immanuel Kant, *The metaphysics of morals* (Cambridge, Cambridge University press: 1996).

a person who has caused harm should suffer in proportion to his wrongdoing.[297] John Finnis explains that "punishment is essentially a matter of removing from wrongdoers a kind of advantage they gained, precisely in preferring their own will to the requirement authoritatively specified for that community's common good."[298] In this sense, punishment is a "self-evident obligation" that ensures that wrongdoers repay their debt to society.[299] By willfully engaging in wrongful action, and therefore knowingly violating rules in spite of consequences, an individual deserves punishment. In fact, "the moral culpability of an offender also gives society the *duty* to punish."[300] It is a moral obligation. Murphy explains:

> In receiving punishment, he [offender] pays a kind of debt to his fellow citizens – to those other members of the community who, unlike him, have made the sacrifice of obedience that is required for any just legal system to work. Since all men benefit from the operation of a just legal system, and since such system requires general obedience to work, it is only fair or just that each man so benefiting make the sacrifice (obedience or self-restraint) required…Those who do not must pay in some other ways (receive punishment).[301]

The concept of desert is intrinsically linked to those of equality and reciprocity.[302] The principle of equality requires that all members of society be treated in a fair, proportional and equivalent manner. As such, an individual who commits a crime causes an imbalance, by treating other members of the society in an unequal manner. Wrongdoing denies the equal moral worth of those who suffered from it. Retributive

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[297] Herbert Morris, "Persons and Punishment, " *The Monist* 52 (1968), 475
[298] John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press: 1998), 212.
[299] Dan Markel, "What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism" in *Retributivism*, ed. Mark White, 49-72 (Oxford, Oxford University Press: 2011).
[300] Moore, "The Moral Worth of Retribution," 747. Original emphasis
[301] Jeffrey Murphy, *Punishment and Rehabilitation* (USA: Waldworth Publishing, 1973), 7.
[302] Jamie Anderson "Reciprocity as a justification for retributivism," *Criminal Justice Ethics* 16 (1997): 13-25.

justice, according to Govier, symbolizes a moral attempt to redress wrongs, and seeks to go beyond the initial crime committed.[303] In this respect, it is about re-asserting the moral value and dignity of the victim, rather than vindication and revenge.[304] It would be *unjust* to leave wrongdoing unpunished for both the community and the wrongdoer. The purpose of punishment is, in some sort, to restore the balance.[305] As such, the retributive approach seeks to negate the advantage acquired through criminal behavior, while maintaining the equal moral value of all community members. It would be wrong to assume that the retributive approach seeks to diminish the moral worth of wrongdoers. In fact, legal practices limit and define the kind of retribution, and, therefore, punishment, through the consideration of such things as mitigating circumstances and prosecutorial discretion, which provide opportunities for leniency and the granting of clemency.[306] Finally, some prefer to highlight the communicative or "expressive" dimension of retribution. By punishing wrongdoers, society is effectively communication its condemnation of criminal action.[307]

There are, however, a number of difficulties with the way the retributive approach is approached, and its application throughout history. Dzur and Wertheimer, for instance, criticize what they call "abstract proceduralism"[308] and the "use of controlled vocabulary"[309] that result in this highly institutionalized approach to justice. The retributive approach limits the ability of victims to truly express their

[303] Trudy Govier, *Forgiveness and Revenge* (New York: Routledge, 2002), 20.
[304] Ibid., 20.
[305] Morris
[306] For a discussion of retributive justice and mercy, read Martha Nussbaum, "Equity and Mercy, " *Philosophy and Public Affairs* 22 (1993): 83-125.
[307] Joel Feineberg, "The expressive function of punishment," in *A reader on punishment*, ed. Anthony Duff and David Garland, 71-92 (Oxford, Oxford University Press: 1994).
[308] Albert Dzur and Alan Wertheimer, "Forgiveness and Public Deliberation: The Practice of Restorative Justice," *Criminal Justice Ethics* 21 no. 1 (2002), 4.
[309] Dzur and Wertheimer, "Forgiveness and Public Deliberation," 4.

grievances and needs, thereby preventing them from coming to terms with their past. Through the practice of retributive justice, as embodied in the retributive judicial system, neither victims nor offenders have the opportunity to express their feelings and frustrations. In the case of Sierra Leone, the media and local non-governmental organizations (NGOs) complained about the lack of access to information and communication about the SCSL trials, which severely affected the process and its impact on national recovery and reconciliation.[310] As a result, the general population often felt angered and cheated.[311] Furthermore, legal proceedings focus on the central and basic elements such as the "who" and "when" of the event investigated. Factual and forensic evidence is key to the investigation.[312] This type of investigation is designed to render an objective history of what happened, and rejects the idea of relativity in truth seeking.

Critics argue that the findings and knowledge produced by legal proceedings are limited, as they only reveal immediate factors, but do not address the human dimension of the conflict, its origin and its effects on individuals as well as the wider community. These proceedings, it is argued, contribute to a second victimization of both victims and offenders by limiting their autonomy and recovery.[313] Drumbl adds that retributive justice, in the form of trials, does little to promote justice in cases of genocide, which must consider mass participation rather than isolated acts of deviance, with which retributive justice is usually better equipped to deal.[314]

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[310] Cruvellier, "From the Taylor Trial to a Lasting Legacy," 17.
[311] Beth Dougherty, "Transitional Justice on a Shoestring: The Case of Sierra Leone," a paper presented at the International Studies Association, Hawaii, 2005, 4.
[312] Dzur and Wertheimer, "Forgiveness and Public Deliberation," 5.
[313] Dzur and Wertheimer, "Forgiveness and Public Deliberation," 5.
[314] Mark Drumbl, "Sclerosis: Retributive Justice and the Rwanda Genocide," *Punishment and Society* 2 no. 3 (2000), 292. Drumbl favors the use of restorative justice in cases of genocide.

Reparative Justice

Reparative justice often comes into play when a government decides to provide some sort of repair and acknowledgment for crimes committed in the past or in the immediate aftermath of conflict. Reparative justice seeks to repair what has gone wrong, to the benefit of the victims. Restitution and apology are two means through which reparative justice is carried out.[315]

Spelman explains the act of repairing what wrong has been committed using the analogy of a bicycle.[316] She explains that when a bicycle has been damaged, it can be taken to the shop for repair. Parts that have been affected will be mended so that the bike can be returned to its previous condition and used again. Thompson defends the idea of reparative justice on the ground that this approach is fundamentally rights centered.[317] In her view, regardless of the circumstances and period the crime was committed, society has a duty to seek to repair it.[318]

Reparative justice is fundamentally victim-oriented and does not exclude punishment. Roht-Arriaza concedes that reparative justice is as forward-looking as it is backward looking, and notes that moral, rather than material, reparation is essential for victims.[319] Reparation, in her view, is a delicate balancing act that seeks to

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[315] Elizabeth Spelman, *Repair: The Impulse to Restore in a Fragile World* (Boston: Beacon Press, 2002), 13.
[316] Ibid., 13.
[317] Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Cambridge: Polity Press, 2002), 38. According to Thompson, there exists an obligation and moral duty to repair. She explains, by referring to historical redress that obligations and entitlements are, respectively, duties and rights. When an entitlement (given through promise of land for instance) is denied or taken away, there is an *automatic right* to reparation. This is why, in her view, reparative justice is rights centered. Thompson refers specifically to settler societies and inter-generational obligations, surrounding the loss of land ownership.
[318] Ibid., 37.
[319] Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey Weinstein (Cambridge: Cambridge University Press, 2004), 122.

acknowledge the wrong committed without furthering victimization of one of the parties to the dispute.[320] Roht-Arriaza discusses collective reparations as a community development paradigm,[321] which, she argues, is more likely to diminish the moral and symbolic effect of reparation when targeted at specific individuals. De Greiff adds that the act of providing reparation for past crimes is "the most tangible manifestation of the efforts of the state to remedy the harms" suffered by victims.[322] Most importantly, in contrast to retributive justice, which embodies the society's "struggle against perpetrators," reparative justice is an "effort on behalf of the victims."[323]

Reparative justice, however, presents major difficulties. Waldron, for instance, warns against the use of the "counterfactual method" in evaluating what would have been, had the wrong not been committed.[324] He explains that while it is crucial and essential to recognize past injustices, it can become difficult to repair injustices when they took place a long time ago. The counterfactual method requires imagining what life would have been like for the victims of a crime, had the crime not taken place. Based on this calculation, reparations are made to correct the present to resemble a situation in which the injustice had not occurred. When the redress of historic injustices goes against the principles of justice by creating further injustices, however, Waldron argues that such historic injustices should be superseded.[325] That is to say, if redressing past injustices is likely to affect the current well-being of the population,

[320] Roht-Arriaza, "Reparations in the Aftermath of repression," 123.
[321] Ibid., 130.
[322] Pablo De Greiff, *The Handbook of Reparations* (Oxford: Oxford Univeristy Press, 2006), 2.
[323] Ibid., 2.
[324] Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 no. 1 (1992), 12.
[325] Waldron, "Superseding Historic Injustice," 12.

then redress should not take place. Waldron's approach to reparation focuses on the outcome of redress, rather than on its symbolic nature.

This thesis argues that it is difficult, if not outright impossible, to repair and return something to a pre-crime situation. It is questionable whether one can ever go back to the way one lived his or her life prior to the crime. This research is critical of the attempt of reparative justice to repair something that cannot, in fact, be repaired. Seeking to return to a pre-crime situation would risk denying the suffering that has taken place. Such an approach, it seems, misses the point of justice, since it seeks to repair something that cannot be fixed, and to return to a situation that has forever been changed. However, as noted by Hamber, while it is impossible to "undo" what has been done, one has to concede to the psychological contribution and value stemming from the symbolic dimension of the will to repair.[326]

Restorative Justice

Restorative justice is often presented as a philosophy and understanding of communal life, as much as a conception and "comprehensive theory of justice."[327] It can be described as a forward-looking, collaborative and inclusive approach to justice. Contrary to retributive justice, which focuses on the crime, and reparative justice, which claims to focus on the victims, restorative justice focuses on broken

[326] Hamber, *Transforming Societies after Political Violence,* 98.
[327] Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice," *The University of Toronto Law Journal* 52 no. 3 (Summer, 2002), 256.

relationships and the mending of them. Stovel explains that it is "the form of justice most directly concerned with reconciliation."[328]

Zehr contends that the very first concern of restorative justice is the identification of the harms and needs of the victims, offenders and the wider community.[329] Each is given an opportunity to express her feelings and identify what she needs in order to move forward.[330] The community is empowered, in that it is provided with the opportunity to participate in the process.[331] This approach is anchored in the belief that a crime committed is often the result of a perceived injustice or actual structural, societal imbalance. This conception of justice "reflects an ethic of care which argues that people are ethically responsible for those around them."[332] Restoration is all the more relevant in cases of long-term, protracted conflicts, which are embedded within a cycle of revenge and generational grievances.[333] In such cases, injustices and the oppression of a certain portion of the population have sometimes even been institutionalized. Restorative justice requires that the roots of oppression be redressed. Reasons for the crime need to be examined and tackled in order to prevent the crime from occurring again, and truly achieve justice. This involves "looking deeply at a situation to determine the web of forces

[328] Laura Stovel, "When the Enemy Comes Home: restoring justice after mass atrocity," a paper presented at the 6th International Conference on Restorative Justice, Vancouver June 2003, 1.
[329] Zehr, *The Little Book,* 23.
[330] Ibid., 23; John Braithwaite, "Restorative justice: Assessing Optimistic and Pessimistic Accounts," *Crime and Justice* 25 no. 1 (1999): 1-97.
[331] Gerry Johnstone, *Restorative Justice Reader: Ideas, Values, Debates* (Portland: Willan publishing, 2002), 151.
[332] Stovel, "When the Enemy Comes Home," 2.
[333] Nicholas Frayling,"Towards the Healing of History: An Exploration of the Relationship between Pardon and Peace," in *Reconciliation(s): Transitional Justice in Post-Conflict Societies*, ed. Joanna R. Quinn (Montreal: Mc Gill-Queen's University Press, 2009), 31.

which contribute to harming behavior."[334] The restoration of offenders contributes to the restorative process, by recognizing that the cause of the dispute is not one-sided and that all are responsible.

The focus of restorative justice is on the transformation and restoration of the broken relationships that constitute the community.[335] However, restorative justice also encourages offenders to take responsibility and possibly also to make amends for the wrongful act committed.[336] This is usually done through the recognition of the effect(s) a crime has had on a victim and the community, as well as some form of material restitution and apology.[337] In this respect, the restorative and reparative approaches share some similarities. Just like the reparative approach, restorative justice encourages that reparations, whether symbolic or material, be made. Where they both differ, however, in "the significance placed upon the victims, the offender and the community."[338]

Indeed, the process of restorative justice, as fundamentally inclusive, requires the engagement of community members in holding the offender accountable, recognizing the pain caused, and recognizing their own failure in preventing the crime from occurring.[339] In the case of re-introducing past offenders to a community, the community must be engaged in genuine effort to welcome him back and give him a real chance to return to a stable life rather than let him be ostracized. This is visible in

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[334] Jarem Sawatsky, *The Ethic of Traditional Communities and the spirit of Healing justice* (London: Kingsley, 2009), 69.
[335] Llewellyn, "Dealing with the legacies," 38; Ruth Morris, *A Practical Path to Transformative Justice* (Toronto: Rittenhouse, 1994).
[336] Zehr, *The Little Book,* 23.
[337] Dean Peachey, "Victim/Offender Mediation: The Kitchener Experiment," in *Mediation in Criminal Justice*, ed. Martin Wright and Burt Galaway (London: Sage, 1988), 98.
[338] P 166 Gill McIvor « reparative and restorative approaches im A Bottoms, S Rex et al Alternatives to Prison : Options for an Insecure Society (Portland : Willan Publishing, 2004)162-194.
[339] Daniel Van Ness and Karen Strong, *Restoring Justice* (Cincinnati: Anderson Publishing, 1997).

the active involvement of community members in providing opportunities to past offenders, such as employment.

Johnstone and Van Ness identify six elements which, in their view, help characterize the restorative approach to justice.[340] These six elements are also strongly reminiscent of the various aspects touched upon by various proponents of restorative justice. They help us put together a clearer picture of what restorative justice entails. First, Johnstone and Van Ness contend that the restorative approach is often embodied in relatively informal processes, which aim to involve the victims, offenders and those affected by the crime.[341] Second, the emphasis is put on the empowerment of individuals, which they describe as active involvement.[342] Third, Johnstone and Van Ness explain that the way the restorative approach seeks to respond to a crime is less stigmatizing than the retributive approach. Rather than punishment, the restorative approach seeks to give an opportunity to the offender for taking responsibility and making amends.[343] Fourth, restorative justice is also fundamentally inclusive.[344] Fifth, Restorative justice also seeks to pay close attention to the victims' needs in order to address them. Sixth, it focuses on the mending of broken relationships.[345]

Restorative justice, therefore, seeks the restoration of broken and damaged relationships, based on the recognition of the harm that has been caused. Unlike retributive justice, it focuses on individuals and their relationships, and seeks to give

[340] Gerry Johnstone and Daniel Van Ness, *The Handbook of Restorative Justice* (London: Willan, 2006), 7.
[341] Ibid., 210.
[342] Ibid., 42.
[343] Ibid., 77.
[344] Ibid., 6.
[345] Van Ness and Strong, *Restoring Justice*, 2.

them an active role in bringing about justice.[346] Unlike reparative justice, restorative justice builds upon past wrongs, rather than attempting to erase any trace of that wrong. Instead of denying the harm caused, it draws lessons from it order to enhance and strengthened the network of relationships. It is equally important to note that the process of restorative justice is not limited to, and not always associated with judicial proceedings. It is usually accompanied and supported by other social programs that seek to address needs and encourage social healing and restoration.

One of the major difficulties with the restorative approach to justice is that it lacks clear boundaries and is often very context-specific. There exist no clear standards to evaluate or guide the process and implementation of this kind of approach to justice.[347] Concepts such as community involvement and collaboration, which are central to the process, are difficult to define. The nature of the collaboration that is sought, as well as the degree of community involvement and participation desired, remains unclear and often context-specific. While the restorative justice approach claims to 'restore relationships,'[348] it is often unclear which relationships are targeted and whether they include relationship to the wider community or are restricted the relationships between the parties to the dispute. As a result, a large portion of the literature of transitional justice resorts to defining restorative justice as just about anything that retributive justice is not.[349] This lack of conceptual

[346] Zehr, *The Little Book,* 23.
[347] Audrey Chapman and Hugo Van der Merwe, *Truth and Reconciliation in Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania Press, 2008), 242.
[348] Jennifer Llewellyn and Robert Howse, "Restorative Justice: A Conceptual Framework," Ottawa: Law Commission of Canada, 1999, 39.
[349] Correctional Service of Canada, [website]; accessible at http://www.csc-scc.gc.ca/text/rj/index-eng.shtml; accessed 27th February 2009.

boundaries and clear definition problematic for restorative justice in theory, but also, for the application of restorative justice practices themselves.

This is highly problematic since restorative justice simply becomes a category into which all alternative, customary and indigenous practices are swept. The transitional justice scholarship uses the restorative approach within the same individualistic, and deontological framework that it uses for the reparative and retributive approaches to justice, thereby rendering the restorative approach even less applicable to customary mechanisms and conceptions of justice.

There has also been much debate about the risk that truth-telling mechanisms, such as truth commissions, may forsake justice for truth. Gutman and Thompson are very critical of truth-seeking mechanisms, which, they argue, "sacrifice the pursuit of justice… for the sake of promoting other social purposes, such as historical truth and social reconciliation."[350] Both authors specifically denounce the "amnesty for justice" trade-off of the South African Truth and Reconciliation Commission, which, in their view, is "morally problematic."[351]

Political circumstances also have a great impact on the nature, mandate and product of truth commissions. Hayner, for instance, stresses the fact that truth commissions are sometimes created to legitimize a new government and possibly also to manipulate the national and international perception of the past, and sometimes, even the present.[352] Hayner vehemently insists on the fact that time constraints, staff, funding, political pressure, and "the information management system that collects,

[350] Amy Gutman and Dennis Thompson, "The Moral Foundation of Truth Commissions," in *Truth Vs. Justice*, ed. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 22.
[351] Ibid., 24.
[352] Hayner, "Fifteen Truth Commissions," 608.

organizes and evaluates the information"[353] all affect the final version of the truth adopted in various truth bodies. An illustration of this can be found in the failure of a large number of truth-seeking bodies to address and document widely-experienced sexual abuses perpetrated against women, as they are not deemed to be political and are often relegated to a lower category of crimes. As noted by Slyomovic, a large number of the torture, rapes, violence and hardship suffered by Moroccan women during the so-called "years of lead" were often kept silent, simply because such crimes were not considered a priority.[354] As a result, restorative justice was not fully enacted. A significant portion of the Moroccan population and the abuses they suffered did not receive the attention they deserved. Women's suffering was relegated to a lower category of crime, hereby contributing to further victimization of women.

Each of the three types of justice presented above has demonstrated different flaws and merits. Each is the embodiment of a different approach and understanding of the role of the community and individuals within it. Each also uses a different language, focuses on different aspects, and identifies different justifications for justice. This research, however, contends that the transitional justice literature anchors these paradigms within deontological liberalism and rights centered lens, which as a result, limits the ability of these three approaches to justice to properly account for the philosophy of justice embodied in customary mechanisms of justice. It argues that one of the dangers in using this framework is that it appears to ignore the influence that cultural, social and historical circumstances may wield on the conceptions of

[353] Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions*. London: Routledge, 2002, 80.
[354] Susan Slyomovic, "The Argument from Silence: Morocco's Truth Commission and Women Political Prisoners," *Journal of Middle East Women's Studies* 1 no. 13 (2005): 73-93.

justice, by presupposing that the principle of justice derives from some higher moral law or ethic. This will become evident in my investigation of the Mãori approach to justice, and how the New Zealand government has decided to deal with it.

This study contends that transitional justice scholars use these approaches to justice within a Western liberal framework, which "rests on an overly individualistic conception of the self."[355] For this reason, this thesis argues that the way these paradigms are presented and used, in the transitional justice scholarship, renders them ill-suited to discuss the type of justice that is embodied in customary mechanisms of justice. Attempts to discuss customary mechanisms of justice within the existing deontological-liberal framework are inscribed within what Nagy notes to be a "worrisome tendency to impose a one-size-fits-all technocracy and decontextualized solutions" to all experiences."[356] Yet, deontological approaches are the framework employed by nearly all transitional justice scholars.

One of the main difficulties with approaches to justice that are rooted deontological liberalism is that they assume too much commonality amongst individuals, regardless of their social, historical and cultural context. As noted by Yack, these approaches presuppose that individuals are moral agents *a priori* of their

[355] Daniel Bell, *Communitarianism and its Critics* (USA: Oxford University Press, 1993), 4. This thesis acknowledges the fact that there exists disagreement over this idea. While the argument made here is based on the literature, and the writing, for instance, of Bell, McIntyre, and Yack, some liberal thinkers, such as Kymlicka, reject the idea that liberalism is anchored around an atomistic and individualistic conception of the self. See Bell, *Communitarianism and Its Critics*; Alasdair MacIntyre, *Whose Justice? Which Rationality* (Notre Dame: Notre Dame University, 1988); Bernard Yack, "The Problem with Kantian Liberalism" in *Kant and Political Philosophy: The Contemporary Legacy*, ed. Ronald Beiner and William Booth (USA: Yale University Press, 1996); and Will Kymlicka, *Liberalism,Community and Culture* (Oxford: Clarendon Press, 1991). For further discussion on this debate, refer to the collection of essays in Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Oxford : Blackwell Publisher, 1996).

[356] Nagy, "Transitional Justice as a Global Project," 275.

membership to any kind of community.[357] Individuals are seen as endowed with a "shared identity" or moral self, inherent to all human kind, which can be abstracted from each individual regardless of her situated-ness. The authority and legitimacy of these approaches, therefore, stems from the understanding that these deontological conceptions and categorizations of justice are impermeable to cultural variations.

Deontological liberal approaches consider individuals as the sole unit and moral agent in any social interaction. So, while the restorative approach to justice is preferable, when presented with a choice between retributive, reparative and restorative justice, in that the restorative conception stretches as far as it can to include the community and recognize the web of relationships that it comprises, it is still deontologically driven, and is, therefore, limited in its application and relevance to non-Western cases. Despite all efforts made in the existing literature on reconciliation and theories of justice to account for alternative mechanisms of justice, it is necessary to question and challenge the lens through which conceptions of justice have been examined. What is necessary is a move beyond this deontological liberalism point of reference to consider justice outside of the legal sphere.

Furthermore, this study contends that this tendency of the transitional justice scholarship to use this framework to explain a wide range of mechanisms of justice contributes to a kind of "epistemic violence of commensurability," which seeks to silence other subaltern ways of knowing.[358] As will become clear throughout the following chapters, customary practices are often tolerated only to the extent that they

[357] Yack, "The Problem with Kantian Liberalism," 238.
[358] Diane Otto, "Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference," in *Laws of the Postcolonial*, ed. Eve Darian-Smith and Peter Fitzpatrick (USA: University of Michigan Press, 1999), 167.

can imitate and adopt tenets of the legalist tradition. In his examination of the Aboriginal and English understandings of property, Bryan explains that "we enframe Aboriginal reality in a particular way in order to structure it according to the dictates of our own society."[359] In other words, we create space for the other—in this case, the Aboriginal way of knowing, *within* our conceptual framework and language.

Mbembe notes that the Western philosophical and political tradition "has long denied the existence of any 'self' but its own."[360] As a result, and in response to this inability to see other ways of knowing in their entirety, we constantly seek to redefine them. According to Frantz Fanon, this is emblematic of colonialism, which relentlessly reminds "the others" of their difference and the need to re-define themselves in opposition to the dominant society.[361] Referring to the Mãori, Moana Jackson explains, "colonization has damaged the wholeness of who we are."[362] In an exploration of Mãori traditional knowledge and identity, Jackson discussed the constant challenge that is being brought against the wholeness of Mãori identity, which has constantly had to adapt itself in order to be "accepted" and understood by the settler society. This has also very clearly been the case with Mãori customary mechanisms of justice, which have had to be redefined to absorb elements of the legalist paradigm in order to be tolerated.[363]

[359] Bryan, "Property as Ontology," 28.
[360] Achille Mbembe, *On the Postcolony* (London: University of California Press, 2001), 2.
[361] Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963), 203.
[362] Moana Jackson, "Power, Law and the Privilege of Difference," a paper presented at the 4th International Indigenous Conference on Traditional Knowledge, Auckland, June 2010.
[363] This is explored in depth in Chapters Six and Seven.

Transitional Justice Mechanisms

These three approaches to justice are embodied in variety of judicial mechanisms and institutions. Courts and tribunals, for instance, are often described as embodying retributive values. Other mechanisms of justice, such as truth commission and customary mechanisms of justice[364] are said to represent either the reparative or restorative approach.[365] However, various mechanisms rarely embody a single approach to justice. As this section illustrates, retributive, reparative and restorative principles sometimes overlap in various judicial processes.[366] Moreover, mechanisms often operate alongside other justice processes and serve to complement each other. A consideration of these mechanisms is necessary to gain a fuller understanding of how these approaches to justice feature and interact.

Mechanisms such as international and domestic trials are often the first response to dealing with the legacies of mass violations of human rights and feature predominantly in the history of transitional justice. It is argued that the post-World War II tribunals at Nuremberg and Tokyo gave birth to international criminal law and enforcement, as we know it today.[367] Both the Nuremberg Trials and the Tokyo Tribunals[368] were created by Allied forces and formerly occupied nations,

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[364] Customary mechanisms of justice are examined in detail in Chapter Six.
[365] Joanna Quinn, "Transitional Justice," in *Human Rights: Politics and Practice*, ed. Michael Goodhart, 354-367 (Oxford: Oxford University Press, 2009).
[366] See for instance, Joanna R. Quinn, "Tried and True: The Role of Informal Mechanisms in Transitional Justice," a paper presented at the International Society of Political Psychology, Toronto, 6 July 2005; and The Beyond Juba project Working Paper no.1*: Tradition in Transition: Drawing on The Old to Develop a New Jurisprudence for Dealing with Uganda's Legacy of Violence* (July 2009), 19. [Report online]; accessible at http://www.refugeelawproject.org/working_papers/BJP.WP1.pdf Accessed 12th September 2009.
[367] Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability After War* (Cambridge: Polity Press, 2007), 18.
[368] A series of trials was conducted at Nuremberg, in 1945-1946. The first trial was conducted against major war criminals, followed by the prosecution of lesser war criminal (ie : doctors). The Tokyo

immediately following the Second World War, to deal with the atrocities committed by the Axis powers, and sought to hold individuals accountable for specific crimes, in times of war.[369] The Nuremberg Trials, officially known as the International Military Tribunal at Nuremberg, specifically aimed at uncovering and making public the heinous nature of the acts that had been carried out by Nazi supporters during the war.[370] A similar tribunal, the International Military Tribunal for the Far East, known as the Tokyo Tribunals, was established to try Japanese war criminals for crimes committed during the Second World War. Their establishment and conduct, however, were the target of much criticism. The tribunals, and their subsequent sentences were perceived as being victors' justice.[371] All of the judges came from Allied nations, and the trials excluded the abuses that had been committed by the winning side.[372] The tribunals focused their attention on crimes that were alleged to have been committed by a handful of high-ranking individuals who supported and contributed to war efforts in Germany and Japan. Most importantly, the Nuremberg and Tokyo tribunals clearly established the fact that there existed crimes of international concern, under which persons could be held individually, and criminally responsible for their actions, even in times of war.[373] Nuremberg and Tokyo also set legal precedents, and established

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Tribunal was set up in 1946 and adjourned in 1948. See Kenneth Galant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009).

[369] Galant, *The Principle of Legality*, 68.

[370] Kerr and Mobekk, *Peace and Justice*, 22.

[371] Minow, *Between Vengeance and Forgiveness,* 27.

[372] Ibid., 27.

[373] Kerr and Mobekk, *Peace and Justice,* 23.

the basis for the creation of two *ad hoc* tribunals, namely those of the former Yugoslavia (ICTY), established in 1993, and Rwanda (ICTR) created in 1994.[374]

The ICTY was the first international tribunal of its kind, established by the United Nations (UN) as an independent organ. It was remarkable in that it introduced further nuance to the understanding of individual criminal responsibility by introducing the concept of "level of knowledge."[375] Article 7 of the ICTY Statute, for example, distinguishes between different levels of responsibility in relation to the level of knowledge of the act that was perpetrated.[376] It established the notion of individual responsibility as distinct from command responsibility. So, while an explicit order to commit a crime constitutes individual responsibility, the omission of reasonable measures to prevent such an act further constitutes, in itself, another type of responsibility, equally deserving of condemnation.

The ICTR was, likewise, established by the UN to hear cases of those accused with committing crimes during the 1994 Rwandan genocide. The ICTR was created in 1994 at the request of the Rwandan government, although that government was subsequently disappointed by the lack of power and control it had over the institution.[377] Most importantly, the ICTR held the first trial based on charges of

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[374] The term *ad hoc* is a Latin phrase which means 'for this purpose.' *Ad hoc* tribunals, therefore, are created for a specific purpose and specific sitiations. In this case, the ICTY and ICTR were temporary bodies created to investigate certain crimes, during a period of time and under a specific mandate.
[375] International Criminal Tribunal for the former Yugoslavia, [website]; http://www.icty.org/; accessed 11th August 2009.
[376] Ibid.
[377] Kerr and Mobekk, *Peace and Justice*, 33.

genocide held at an international tribunal,[378] and was also the first to establish rape as an act of genocide.[379]

These mechanisms contributed to the development of a norm of "international judicial intervention," in that they demonstrated that some acts could not remain unpunished, and deserved international attention.[380] They also exemplified the international community's commitment to retributive principles, which were further institutionalized with the establishment of the International Criminal Court (ICC). While there existed a general consensus that an independent, permanent criminal court was needed, various nations were initially reluctant to engage in the establishment of a body that could prosecute its own nationals. After the drafting of several statutes between 1951 and 1998,[381] the ICC finally came into force in 2002 with the ratification of the Rome Statute. As of September 2003, 92 countries were party to the Rome Statute, and by 2009, the number had risen to 110 signatories.[382]

Teitel explains that retributive justice is an effective means through which public condemnation of events and public legitimation of the rule of law can be expressed.[383] Orentlicher adds that victims of human rights abuses sometimes thirst for justice in the form of judicial prosecution more than anything else.[384] States often choose to pursue retributive justice by conducting domestic trials when facing the

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[378] Kerr and Mobekk, *Peace and Justice*, 45.
[379] Valerie Oosterveld, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court," *New England Journal of International and Comparative Law* 12 no. 1 (2005): 119-33.
[380] David Scheffer, "International Judicial Intervention," *Foreign Policy* (Spring 1996), 38.
[381] Robert Tucker,"The International Criminal Court Controversy," *World Policy Journal* 18 no. 2 (2001), 72.
[382] The International Criminal Court, [website]; http://www.icccpi.int/Menus/ICC/Situations+and+Cases/; accessed 27th August 2009.
[383] Ruti Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation," *Yale Law Journal* 106 (1997): 2009-80.
[384] Diane Orentlicher, "Accounts Revisited: Reconciling Global Norms with Local Agency," *International Journal of Transitional Justice* 1 no. 1 (2007), 22.

legacies of a difficult past. Establishing justice through domestic trials, however, is often difficult, since the infrastructure of the state apparatus, and its judicial system, have often been severely affected and weakened by years of conflict and corruption.[385]

As a result of this distrust of state judicial institutions in transitional societies, local tribunals and institutions are sometimes used as a part of a larger process and are internationalized, in that they incorporate international laws and sometimes invite foreign prosecutors.[386] Hybrid or mixed courts occupy a middle ground between the purely international model and aspirations adopted by the ICTY, the ICTR, the ICC, and domestic courts and trials.[387] Hybrid courts "hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other,"[388] and embody "the best of both worlds."[389] These kinds of hybrid courts were established in Sierra Leone and Timor Leste.

The Special Court for Sierra Leone (SCSL) was borne out of an agreement between the UN and the Sierra Leonean government. It relied on a mixture of international and domestic law, but only dealt with the most serious crimes.[390] It was

[385] Rama Mani, *Beyond Retribution: Seeking Peace in the Shadows of War* (Cambridge: Polity Press, 2002), 75. In the case of settler societies, while official jusdicial institutions are well-established, the indigenous populations sometimes remain critical and suspicious of the state's judicial apparatus. In the case of New Zealand, Māori communities continue to use, to some extent, their customary mechanisms of justice, rather than the official judicial system.
[386] Kerr and Moebekk, *Peace and Justice*, 81.
[387] Sarah Nouwen, "Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts," *Utrecht Law Review* 2 no. 2 (2006), 191.
[388] Laura Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo," *New England Law Review* 34 no. 7 (2003), 1060.
[389] Neil Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights," *Law and Contemporary Problems* 59 no. 4 (1997), 149.
[390] Nahla Valji, "Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence," Center for the Study of Violence and Reconciliation, 2009, 13, [report online]; accessible at

mandated to try individuals who had violated international humanitarian law (Art. 2) and Sierra Leonean law (Art. 5) through crimes committed in Sierra Leone from 30 November 1996.[391] The court was also fully independent from the government and the UN, and was managed by a committee made up of representatives from funding countries.[392] As a hybrid court, the SCSL was staffed by "internationally and domestically appointed judges, prosecutors, and registrars."[393] Hybrid courts, in Sikkink and Walling's view, represent a "third generation criminal body."[394] Drumbl argues that the "infusion of international officials within a process that is vested with and anchored in local capacity may augment credibility."[395] The hope was that these hybrid courts would affect reconciliation more broadly and effectively in societies.[396] By using local infrastructure and laws, these mechanisms have a better chance at winning the trust of society. They are also more likely to reflect local, social and cultural values and needs. Cruvellier adds that these hybrid courts are best equipped to act as a catalyst for the strengthening of the domestic judiciary institutions and confidence building.[397]

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http://www.humansecuritygateway.com/documents/CSVR_TrialsTruthCommissions_SeekingAccountability_AftermathViolence.pdf

[391] The Special Court for Sierra Leone, [website]; accessible at http://www.sc-sl.org/; accessed August 21st 2009.

[392] The Special Court for Sierra Leone. Althought the Special Court for Sierra Leone was supposed to complete all appeals by the end of 2009. However, at the time of writing (2011), it is still functioning.

[393] Lanegran, "First Two Years of the Special Court for Sierra Leone," 17.

[394] Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America," *Journal of Peace Research* 4 no. 4 (2007), 434.

[395] Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 132.

[396] Chandra Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (London: Routledge, 2005), 105.

[397] Thierry Cruvellier, "From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test," research paper for the International Center for Transitional Justice, 2009, 48, [paper online]; accessible at http://ictj.org/publication/taylor-trial-lasting-legacy-putting-special-court-model-test

These judicial mechanisms are sometimes complemented by other, less retributive means to enact justice. Truth commissions or customary mechanisms of justice, for instance, often operate alongside tribunals, and serve to supplement weak judicial systems.[398] This was the case in Latin America where nearly all countries where truth commission had been set up, also conducted criminal trials to hold former government officials accountable for their actions.[399] These countries enacted retribution through criminal prosecutions, without entirely negating restorative justice, by engaging in a truth-telling exercise.

While some consider the exercise of truth-telling, engendered by truth commissions, an instrument of repair,[400] others, such as Llewellyn, Villa-Vicencio and Verwoerd, believe truth commissions and other truth-telling mechanisms to be central elements of restorative justice.[401] Hayner identifies four aspects that are common to all truth commissions and truth seeking bodies, which, in her view, often represent the first sign of the acknowledgment of a victim's past.[402] (1) Truth commissions focus on the past; (2) they investigate a pattern of events over a certain period of time rather than one single and specific event; (3) they are temporary

[398]Hayner, *Unspeakable Truths*, 88; and Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" in *Human Rights Quarterly* 24 no. 3 (2002): 573-639.
[399]Noel Muchenga Chicuecue, ''Reconciliation: The Role of Truth Commissions and Alternative Ways of Healing'' *Development in Practice* 7 no. 4 (1997): 483-486.
[400] De Greiff, *The Handbook of Reparations*, 552.
[401] Charles Villa-Vicencio and William Verwoerd. *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town, 2000, 68; Jennifer Llewellyn, "Doing Justice in South Africa: Restorative Justice and Reparations," in *Repairing the Unforgiveable: Reparations and Reconstruction in South Africa*, ed. Charles Villa-Vicencio and Erik Doxtader (South Africa: David Philip Publishers/New Africa Books, 2004).
[402] Hayner, *Unspeakable Truths*, 16.

bodies; which are, (4) officially sanctioned and authorized by states.[403] The first truth commission was created in Uganda in 1974,[404] but it is the South African Truth and Reconciliation Commission that has triggered the most interest, by far. In 1994, Hayner compared fifteen truth commissions at work in Africa (Uganda, Zimbabwe, Rwanda, Ethiopia, South Africa), Latin America (Bolivia, Argentina), and Europe (Germany). Since then, the existence of truth commissions has multiplied. In 2007, 32 countries had established truth commissions to deal with the legacies of their pasts.[405] At the time of writing, this number had increased to 40, and will, no doubt, continue to do so. In April 2011, for instance, Ivory Coast's President Alassane Outtara promised the creation of a Truth Commission to investigate abuses committed during regime transition.[406]

Former UN Secretary General Kofi Annan noted that truth commissions could positively complement any effort at bringing about justice.[407] They occupy a space, between amnesty and broad scale criminal prosecutions for those who committed crimes,[408] and are generally the product of political compromise.[409] Truth-telling is a central element of the process. Victims are often, although not always, invited to tell their stories. Sharing their stories and having their experiences validated by society may induce and contribute, to a certain degree, to the emotional healing of individuals

[403] Hayner, *Unspeakable Truths*, 14.
[404] Priscilla Hayner, "Fifteen Truth Commissions-1974-1994: A Comparative Study," *Human Rights Quarterly* 16 no. 4 (1994), 611.
[405] Vasuki Nesiah, "Truth Commissions and Gender: Principles, Policies and Procedures," Gender Justice Series, The International Center of Transitional Justice, 2006, 17, [paper online]; accessible at http://ictj.org/publication/truth-commissions-and-gender-principles-policies-and-procedures
[406] Times Live, "SA-Style Truth Commission to Probe Ivory Coast Killing," April 12th 2011.
[407] Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," The United Nations (S/2004/616), 2004, 1.
[408] Valji, "Trials and Truth Commissions," 4.
[409] David Dyzenhaus, "Justifying the Truth and Reconciliation Commission," *Journal of Political Philosophy* 8 no. 4 (2000), 471.

who have suffered injustices.[410] Dignity is restored to the victims.[411] Minow also notes, with particular reference to the South African Truth and Reconciliation Commission, that "the creation of a setting quite distinct from court held a special value."[412] The fact that a different setting from the court system, which had been used to reinforce the apartheid regime, was used, was a strong signal and symbolic break from the past regime.

Truth commissions have a wide range of mandates and operating procedures, and as such, vary case by case.[413] Argentina, for instance, was one of the first countries to establish a truth commission with its National Commission on the Disappearance of Persons (CONADEP). CONADEP functioned behind closed doors and recorded testimony from victims in private.[414] The South African Truth and Reconciliation Commission preferred to hold public hearings.[415] Both commissions, however, sought to create a national public record of their country's pasts, through the publication of a publically accessible report.[416]

Despite their wide ranging mandates, the work carried out by truth commissions can have a social, emotional and healing impact.[417] It is argued, for instance, that the healing and acknowledgment provided by truth commissions may

[410] Charles Villa-Vicencio and Fanie Du Toit, *Truth and Reconciliation in South Africa: 10 Years On* (South Africa: Claremont, 2007), 6.
[411] Kritz, *Transitional Justice.*
[412] Martha Minow, "The Hope for Healing: What Can Truth Commissions Do?" in *Truth Vs Justice*, ed. Robert Rotberg and Dennis Thompson (USA: Princeton University Press, 2000), 238.
[413] Hayner, *Unspeakable Truths,* 50.
[414] Ibid., 34.
[415] Ibid., 40.
[416] Ibid., 34.
[417] Alfred Allan and Marietjie Allan, "The South African Truth and Reconciliation Commission as a Therapeutic Tool," *Behavioral Sciences and the Law* 18 no. 5 (2000), 463.

play a crucial role in the democratization process.[418] Or it may contribute to the creation of a national narrative that may enhance national efforts at reconciling.[419] Allowing victims and their families to learn about the 'when,' 'why', 'how,' and 'who' of an event brings about closure, and, in this sense, justice.[420] In the South African case, it was generally believed that the objective of national unity and reconciliation could be achieved only if truth about the past was publicly known.[421] This belief was anchored around the assumption that a society cannot reconcile itself, and, therefore, cannot achieve justice on the grounds of a divided memory.[422]

As explained earlier, the restorative and reparative traditions share some similarities, notably their emphasis on repair. Truth Commissions, as restorative justice mechanisms, in fact, offer a perfect illustration of this overlap. Reparations policies and measures sometimes result from the work carried out by truth commissions, which are "quasi-judicial mechanisms focused on providing a

[418] Mike Kaye,"The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: the Salvadorean and Honduran Cases," *Journal of Latin American Studies* 29 no. 3 (1997), 705.
[419] Molly Andrews, "Grand National Narratives and the Project of Truth Commissions: a Comparative Analysis," *Media, Culture & Society* 25 no. 1 (2003): 45-65.
[420] Mark Freeman, "From the Outside: Truth Commission in Africa: A Story to be continued," *Hechos del Callejón* (Special English Edition), United Nations Development Program in Colombia (26 Sep. 2007), [article online]; accessible at http://74.125.93.132/search?q=cache:OtUimhjAL-0J:www.pnud.org.co/img_upload/9056f18133669868e1cc381983d50faa/Outside__TRUTH_COMMISSIONS_IN_AFRICA.pdf+Truth+Commission+in+Africa+:+A+Story+to+be+continued&cd=1&hl=en&ct=clnk&client=safari (accessed 26th October 2009).
[421] Alex Boraine and Janet Levy, *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: Institution for Democracy in South Africa, 1997), 13.
[422] Ibid., 13; For a discussion of the role of truth-telling in the creation of a common memory and in achieving reconciliation and justice, read Michelle Parlevliet, "Considering Truth: Dealing with a Legacy of Gross Human Rights Violations," *Netherlands Quarterly of Human Rights* 16 no. 2 (1998); David Mendeloff, "Truth Seeking, Truth Telling and Peacebuilding: Curb the Enthusiasm?" *International Studies Review* 6 (2004); Richard Goldstone, "Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals," *New York University Journal of International Law and Politics* 28 (1999), 491; and Judith Herman, *Trauma and Recovery* (New York: Basic Book, 1997). With respect to the truth-telling exercise in South Africa, read James Gibson, "Overcoming Apartheid ? Can Truth Reconcile a divided Nation, " *Politikon* 31 no.2 (2004): 129-155. Using empirical evidence gathered through fieldwork, Gibson argues that the truth-telling process of the South African Truth and Reconciliation Commission was successful in creating a national narrative around the apartheid.

framework for truth-telling."[423] This is because the work conducted by truth commissions allows the identification of individuals deserving reparations.[424] They also facilitate access to information regarding the wrongs committed, through its truth-telling process. In this respect, truth commissions can sometimes be useful instruments for enacting reparations policies.

While this is not common practice, it is interesting to note that in a few cases, reparation programs followed the lead of truth commissions that had been previously established. This was the case in Morocco, where a National Forum on Reparations, an initiative of the Equity and Reconciliation Commission, was held in October 2005.[425] The Forum relied on the findings and work conducted by the Commission to fine tune its reparation measures. One decision, for instance, was to include gender mainstreaming as a priority its reparations policy.[426] South Africa is another example, wherein the work conducted by the Truth and Reconciliation Commission (TRC) to deal with the legacies of the apartheid was crucial. The TRC provided a list of individuals to be considered by the South African state for individual financial reparations. This list was made up of individuals who had provided testimony to the South African Truth and Reconciliation Commission.[427]

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[423] Nahla Valji, "Ghana's National Reconciliation Commission: A Comparative Assessment," Report, The International Center for Transitional Justice, 2006, 10. [Report online]; accessible at http://ictj.org/publication/ghanas-national-reconciliation-commission-comparative-assessment

[424] Lisa Magarrell, "Reparations in Theory and Practice," Reparative Justice Series, International Center for Transitional Justice, 2007, 2, [report online]; accessible at http://ictj.org/static/Reparations/0710.Reparations.pdf

[425] Correa, Guillerot and Magarrell, "Reparations and Victim Participation," 16.

[426] Lisa Magarrell, "Outreach to and Engagement of Victims on Reparations: Lessons Learned from Truth and Reconciliation Processes," a paper presented at the Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making, The Hague, 2007, 7.

[427] Correa, Guillerot and Magarrell, "Reparations and Victim Participation," 20.

Reparations may entail both a material and a symbolic dimension, and can be implemented on a national, community or individual level. They are sometimes enacted as part of a national policy of acknowledgment, and in isolation of any other judicial process. Apologies, for instance, are a form of symbolic reparation. One example is the apology given by the Canadian government to Canada's First Nations people, in 2008, for the Indian Residential Schools policies that were in place from the late 1900s until the last school was closed in 1996.[428] A similar step was taken, in the same year, by the Australian Prime Minister Kevin Rudd, who made a public apology for the wrongs caused to the Australian Aboriginal population by successive governments in the forcible removal of Aboriginal children from their families from 1869 to the 1970s.[429] A National Sorry Day is observed every May in Australia, to commemorate the harms perpetrated against the "Stolen Generations."[430] The act of taking responsibility and making amends is a central aspect of reparative justice. For those who suffered under the Canadian government's policies, this is widely seen as a first step towards the acknowledgment of a painful history, and the harm that it caused First Nations people. Essentially, this kind of symbolic reparation "constitutes a message to victims from the rest of society, recognizing that victims belong, and expressing solidarity in the face of unjust suffering."[431] It is important to note, that these reparations are still largely individualistic in nature. Indeed, while apologies and

[428] CBC News, *PM apologies to First Nations*, [website]; accessible at http://www.cbc.ca/canada/story/2008/06/11/aboriginal-apology.html; accessed 5th November 2009.
[429] BBC News, *Australia's apologies to Aborigines*, [website]; accessible at http://news.bbc.co.uk/2/hi/7241965.stm; accessed 10th January 2010.
[430] Government of Australia, *Bringing Them Home*.
[431] Cristián Correa, Julie Guillerot and Lisa Magarrell, "Reparations and Victim Participation: A Look at the Truth Commission Experience," research paper, The International Center for Transitional Justice, 2009, 3, [research paper online]; accessible at http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Participation-2009-English.pdf

reparations may be offered to a specific group, the concern in not for the fabric and wellbeing of the relationships that make up that community, but rather for individual members themselves. This is evident is the examples below.

Reparation can also take a material or monetary form. In Chile, for instance, families received financial compensation in the form of monthly cheques from the government for the loss of a family member under Pinochet's military rule, which was characterized by the systematic disappearances and/or imprisonment of anyone suspected of opposing Pinochet.[432] This financial gesture was seen as a means to ensure some form or reparation in the form of revenue. The belief was that reparations could "reestablish to the extent possible the situation that existed before the violation took place."[433]

In 2006, the Canadian government publicly apologized for the wrongful implementation of the Chinese Head Tax policy that was charged to Chinese immigrants to Canada between 1885 and 1923.[434] As an added gesture, the Canadian government handed out $20,000 CAD as compensation and repair to those who had paid the tax, and their families.[435] In both cases, it is argued that reparations are an essential dimension of transitional justice, which "focuses most specifically on the recognition of victims' rights and the harms they suffer."[436] Reparations are not aimed at punishing offenders, even though offenders sometimes, themselves, contribute to

[432] Hayner, *Unspeakable Truths,* 172.
[433] Hayner, *Unspeakable Truths,* 171.
[434] Government of Canada, "Chinese Head Tax Redress," [website]; accessible at http://www.cic.gc.ca/english/multiculturalism/programs/redress.asp; accessed April 19th 2011.
[435] Ibid.
[436] The International Center for Transitional Justice, "Reparations," [website]; accessible at http://www.ictj.org/en/tj/782.html; accessed November 14th 2009.

repairing the wrong they have caused. Rather, reparations are aimed at redressing the negative impact of the wrong committed.

In fact, there exists an obligation on the part of states to provide reparations, which is set out in the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[437] In its Preamble, the document states the importance in "honoring the victims' right to benefit from remedies and reparation." This commitment to reparation is reiterated throughout the document, with particular emphasis on "adequate, effective and prompt reparation," which can take the form of public apologies, judicial sanctions, commemorations, the inclusion of accurate account of violations of human rights in national history, restitutions, where possible, and compensation, as well as guarantees of non-repetition.[438] The Guidelines, therefore, provide a rather long list of options from which states can choose to deal with legacies of past violations of human rights.

It is important to note that these measures are not exclusive of each other. In fact, they are often mutually supportive. Public apologies, for instance, contribute to the documentation of historical events and abuses. Publicly acknowledging past wrongs contributes to the recognition of a period of history that may have been, until then, ignored, whether voluntarily or not.[439] This kind of acknowledgment and recognition is also, in its own way, a type of reparation and directly contributes to

[437] Office of the United Nations High Commissioner for Human Rights, "United Nation's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian," 2005.
[438] Office of the United Nations High Commissioner for Human Rights, "United Nation's Basic Principles and Guidelines."
[439] In this regard, read, for instance, Louis Bickford, "Unofficial Truth Projects," *Human Rights Quarterly* 29 no. 4 (2007): 994-1035; Borer, *Telling the truths.*

doing justice.[440] Prior to its apology to Canada's First Nations people in 2008, for instance, the Canadian government had committed to providing a forum for the critical re-evaluation of Canadian history and the implication of its residential schools policy for the First Nations people. As a result, the Aboriginal Healing Foundation of Canada was set up in 1999, with a $350 million CAD grant to "encourage and support Aboriginal people in building and reinforcing sustainable healing that address the legacy of physical abuse and sexual abuse in the residential school system."[441]

Toward a Communitarian Approach

In attempting to move outside the legal sphere, communitarian approaches to justice can make a significant contribution. While this research is clearly influenced by the work of a number of postcolonial and feminist indigenous and non-indigenous scholars,[442] it adopts a communitarian approach to bypass the deontological liberal lens through which to view justice, because of the approach's primary focus on the idea of community and its relationship to the self. Indeed, there is merit in the communitarian approach, as outlined by Stephen Mulhall and Adam Swift, which emphasizes "the relation between the individual and her society and community, and,

[440] Goldstone, "Justice as a Tool for Peacemaking," 491.
[441] The Aboriginal Healing Foundation, [website]; accessible at http:///www.ahf.ca/about-us/mission; accessed 9th November 2009. It is worth noting that in 2010, funding for the Aboriginal Foundation was cut out, hereby severely affecting any real attempt at healing. This gesture also seriously undermines national reconciliation, since it symbolizes a lack of interest and commitment on behalf of the Canadian government.
[442] See for instance, Moana Jackson, "Power, Law and the Privilege of Difference"; Tuhiwai Smith, *Decolonizing Methodologies*; Homi Bhabha, *Nation and Narration* (London: Routledge, 1990); Dipesh Chakrabarty, "Universalism and Belonging in the Logic of Capital," *Public Culture* 12 no. 3 (2002): 653-678.

more specifically, …the extent to which it is the societies in which people live that shape who they are and the values that they have."[443] The idea and sense of community, as it will become clear in the subsequent exploration of *Ubuntu*, Canadian Aboriginal healing justice and *tikanga* is often central to non-Western approaches to justice.

It may well be that different understandings of the role and purpose of justice are embedded within cultural particularities. Communitarianism, in this respect, is useful, in that it gives precedence to the community as a provider of values and norms. Human beings cannot be moral subjects outside of a community, as it is the community that provides them with notions such as good, bad, just and unjust.[444] Selznick adds that "individuals are enculturated,"[445] which is to say that individuals are educated and socialized to think and adopt certain values and conceptions of human interaction. More specifically, individuals are socialized into an "understanding of why the established way of doing things is the right way of doing them."[446] Every community devises its own moral standards,[447] and sets parameters of what to believe and practice.[448] Communities provide a "social support for individual identity and fulfillment."[449]

Essential to the communitarian approach is the belief that the community ought to be taken as a central unit of analysis to understand various conceptions of

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[443] Mulhall and Swift, *Liberals and Communitarians*, 13.
[444] Charles Taylor, *Philosophy and the human sciences: Philosophical paper 2* (Cambridge: Cambridge University Press, 1985).
[445] Phillip Selznick, *The Communitarian Persuasion* (London: Johns Hopkins University Press, 2002), 100.
[446] Peter Cordella and Larry Siegel, *Readings in Contemporary Criminological Theory* (Boston: Northeastern University Press, 1996), 379.
[447] Selznick, *The Communitarian Persuasion*, 99.
[448] Drummond, *Incorporating the Familiar,* 22.
[449] Barbara Hudson, *Justice in the Risk Society* (London: Sage Publication, 2003), 84.

justice, which are considered the reflection of societal values.[450] Understandings of justice are in no way impartial and unbiased, but are embedded within specific moral values and experiences, and are therefore contextually bound. Indeed, "as an integrative ideal and as a foundation of community, justice is necessarily contextual and historical."[451] Conceptions of justice are what underlie all social interactions and provide a basis upon which a society is organized, such as the distribution of goods and access to services and opportunity. In an analogy of justice, Drummond notes that "there is no claim to truth beyond the common, ordinary, historical world into which we were born, no language unendowed with an accent to utter it."[452] In this respect, there is not one meaning. Instead, there are a number of ways to understand and carry out justice; deontological-liberal approaches are one of the many ways to do this, and cannot claim any universality. Deontological-liberal conceptions of justice are merely a way to categorize our thinking about justice but tend to dominate our thinking about reconciliation and transitional justice.

The existing transitional justice scholarship emerged out of a Western concern for the transition to democracy in postwar Europe.[453] The field of transitional justice grew rapidly to include democratization efforts in Latin America, as well as theorizing about peace building and reconciliation in Eastern Europe and Africa. The range of cases addressed also widened to include issues that grew out of post-war rebuilding, and deeply divided societies.

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[450] The concept of 'community' here is meant as communities within which one is born and raised rather than networks of voluntary, role, preference, leisure and occupation-based association.
[451] Selznick, *The Communitarian Persuasion*, 431.
[452] Drummond, *Incorporating the unfamiliar*, 25.
[453] Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003), 70.

The scope of transitional justice also matured from a purely legalistic concern for the re-establishment of the rule law to include social, political and psychological aspects of dealing with the legacies of past violations of human rights. Christine Bell alludes to the decolonization of the field of transitional justice, through the inclusion of interdisciplinary work, in an attempt to reduce "law's hold on the discourse" of the field.[454] McEvoy warns against the over-legalization of transitional justice, which would narrow its potential for development.[455] Facing old injustices requires more than just a legalistic endeavor and necessitates input from a range of other disciplines. Although interdisciplinary, the scholarship of transitional justice remains true to its roots and espouses a Western, deontological, and legalistic focus. It is, as yet, unable to contemplate alternative approaches, and most particularly alternative mechanisms of justice, outside of its own legal and deontological-liberal framework.

A Disciplinary Shift

While the majority of the literature on transitional justice deals exclusively with state-centered modes of dispute resolution, more attention is starting to be paid to grassroots, non-Western conceptions and mechanisms of justice.[456] This is visible in the work of Quinn,[457] Baines[458] and Finnström[459] on Uganda, for instance, or the

[454] Christine Bell, "Transitional Justice, Interdisciplinarity and the state of the field of non-field," *The International Journal of International Justice* 3 no. 1 (2009), 21.
[455] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 43 no. 7 (2007), 412.
[456] Again, by 'non-Western conceptions,' this thesis broadly refers to any mechanism or conception of justice that falls outside of the state-centered, legalistic, heavily institutionalized, and liberal judicial framework in place in a number of countries and which takes in roots in the European intellectual tradition.
[457] Quinn, "Comparing Formal and Informal Mechanisms."

work of Drumbl on the *gacaca* courts in Rwanda,[460] and Huyse and Salter in Sierra Leone, Mozambique and Burundi.[461] The transitional justice scholarship theorizes extensively about the best approach to bring about some form of justice, but remains confined within a deontological, and consequently, inherently Western, liberal framework. To this point, it has been unable to account for alternative understandings of justice that do not conform to the deontological-liberal lens through which justice is perceived in the West, and are, as a result, dominant in the field of transitional justice. So while transitional justice recognizes and tolerates the existence of alternative conceptions and mechanisms of justice, it is yet unable to consider it in its wholeness and difference.

This study argues for a movement toward the communication and understanding of alternative mechanisms of justice. It does not seek to funnel reflections on customary mechanisms of justice and their conceptions of justice through a Western, deontological-liberal approach. Rather, this research seeks to allow alternate viewpoints to blossom in their entirety. "An ethic of communication… works towards a cosmopolitan ethic from the communitarian premise that life is constituted within particular, concrete webs of meaning."[462] As such, it does not endorse cultural relativism in any shape or form, but, rather, adopt a minimal universalistic approach. It does so recognizing the existence of a universal yearning for justice, while at the same time acknowledging the existence of multiple views and

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[458] Erin Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda," *International Journal of Transitional Justice* 1 no. 1 (2007): 91-114.
[459] Finnström, *Living with Bad Surroundings.*
[460] Drumbl, "Sclerosis," 289.
[461] Huyse and Salter, "Traditional Justice and Reconciliation," 3.
[462] Maria Lensu and Jean-Stefan Fritz, *Value Pluralism, Normative Theory and International Relations* (London: MacMillan Press, 2000), 124.

conceptions of justice. As explained above, while this research is influenced by postcolonial and feminist approaches, it uses a communitarian lens that will allow the identification of differing views of justice, while at the same time engaging these views in a conversation, "which in itself contributes to the building of a community, of shared understandings and practices."[463] While recognizing the universal yearning for justice, the use of a communitarian approach will allow for a different understanding of customary mechanisms of justice. It does so by emphasizing the primacy of the community in shaping one's values and beliefs. This approach facilitates the consideration of the field of transitional justice and the issues it deals with, from a radically different standpoint. At the same time, this research hopes to engage the field of transitional justice in the exploration of alternative conceptions of justice, which ought not to be ignored when addressing the legacies of mass violations of human rights.

[463] Lensu and Fritz, *Value Pluralism, Normative Theory*, 125.

CHAPTER FIVE

PHILOSOPHIES OF JUSTICE

This research argues for the need to engage with customary mechanisms and the approaches to justice they embody. This particular chapter carries out an investigation of two philosophies of justice, namely the Bantu concept of *Ubuntu* and the Canadian Aboriginal notion of "healing justice." It examines these approaches for two reasons. First, the Bantu concept of *Ubuntu* and the Canadian Aboriginal notion of "healing justice" have been the subject of more systematic investigation than almost any other approaches to justice. Secondly, both are representative of indigenous, non-Western, and alternative conceptions and mechanisms of justice. As such, they are likely to provide important clues regarding the ways to think about justice, outside of a deontological-liberal lens.

There is a real risk in my trying to capture these philosophies and convey them in a manner that is understandable to individuals "outside" of their cultures. "It is one kind of activity to speak or write about indigenous philosophy; it is quite another to weave indigenous thinking into Western philosophical thinking…Any hopes for a rich dialogue must be articulated in the language of the dominant culture."[464] It is essential, therefore, to keep in mind that capturing the meaning and essence of such philosophies is a challenging task, particularly since some of the concepts discussed are not always directly translatable. Secondly, this research does

[464] Dale Turner, *This is not a peace pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), 101.

not presuppose, in any way, that *all* customary mechanisms and approaches to justice are the same. Rather, it seeks to illustrate some of the commonalities that they share, and which set them apart from the legalistic and individualistic framework used by transitional justice scholars. Exploring these two approaches give us important cues about what other customary mechanisms and approaches to justice, such as *tikanga*, may look like and the common challenges they face.

Ubuntu

Ubuntu is often described as "a foundational component of African conflict resolution and peacemaking,"[465] which has been rendered popular by Archbishop Desmond Tutu's use of the concept within the context of the South African Truth and Reconciliation Commission. It is, however, much more than that. Generally speaking, *ubuntu* is a form of African humanism that significantly differs from its Western counterpart. It is attributed to the Bantu people, generally, who inhabit the southern and eastern part of the African continent and make up two thirds of the African population.[466] While Bantu people live in different countries across the African continent, they share some similar social characteristics.[467] And despite the diversity of cultures and languages, the ethic of *ubuntu* remains similar. Desmond Tutu spelled out his own definition of the intricate term, as follows:

> *Ubuntu* is very difficult to render into a Western language. It speaks to the very essence of being human. When you want to give high praise to someone we

[465] Mechthild Nagel, "Ubuntu and Indigenous Restorative Justice," *Africa Peace and Conflict Network*, 2008, 1.
[466] Thaddeus Metz, "Toward an African Moral Theory," *The Journal of Political Philosophy* 15 no. 3 (2007), 321.
[467] Ibid.

> say,'*Yu, u Nobuntu'*; he or she has Ubuntu. This means that they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means that my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life. We say, 'a person is a person through other people' (in Xhosa *Ubuntu ungamntu ngabanye abantu* and in Zulu *Umuntu ngumuntu ngabanye*). I am human because I belong, I participate, and I share.[468]

Ubuntu designates a number of characteristics, including a way of being, a human trait or quality or a view of the self and its relationship with others. It is "the root of African philosophy."[469] Many others have tried to identify and define the concept of *ubuntu*. Some characterize any feature that exemplifies this humanity, such as caring, tolerance, and generosity. It exemplifies group solidarity and interdependence. Mokgoro prefers to define *ubuntu* as a "philosophy of life, which…represents personhood, humanity, humaneness and morality."[470] Prinsloo contends that *ubuntu* represents an African collective consciousness.[471] A person who has *ubuntu*, according to Mthembu displays a full range of virtues, such as sharing and compassion, but also discipline, hard work, generosity, kindness, respect, and the ability to live in harmony.[472] The individual and his relationship with the community, and the strong interconnectedness is strongly emphasized in the concept of *ubuntu*.

Dirk Louw identifies Descartes' Cogito Ergo Sum (I think therefore I am) as the best illustration of Western humanism, whereby the "individual exists prior to, or

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[468] Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999), 34-35.
[469] Mogobe Ramose, "The Philosophy of Ubuntu and Ubuntu as a Philosophy," in in *The African Philosophy Reader*, ed. Pieter Coetzee and A.P.J Roux, 2nd Ed. (London: Routledge, 2003), 230.
[470] Yvonne Mokgoro, "Ubuntu and the Law in South Africa," *Potchefstroom Electronic Law Journal* 1 (1998), 2.
[471] Erasmus Prinsloo, "Ubuntu Culture and Participatory Management," in *The African Philosophy Reader*, ed. Pieter Coetzee and A.P.J Roux, (London: Routledge, 2003), 41.
[472] Dan Mthembu, "African Values: Discovering the Indigenous Roots of Management," in *Sawubona Africa: Embracing Four Worlds in South African Management*, ed. Richard Lessem and Barry Nussbaum (South Africa: Zebra Press, 1996), 217.

separately and independently from, the rest of the community or society."[473] Other individuals in society are simply complementary to what is already a self-sufficient person.[474] By contrast, the traditional African conception of a person is of one that is intrinsically connected to the wider community.

Roughly translated, *ubuntu* stands for "I am, because we are, and since we are, therefore I am."[475] People are only people through other people. Personhood is defined by the web of the relationships to which a person belongs. *Ubuntu* identifies and defines a person's connection to the community through a means of constant interaction and feedback between personhood and the community.[476] It is important to keep in mind that the principle of *ubuntu* departs from any form of oppressive communalism with which it may wrongly be associated. Indeed, "every person gets an equal chance to speak up until some kind of an agreement, consensus or group cohesion is reached."[477] This is an important element, which not only characterizes social behavior and interaction, but also influences the way justice is carried out. "The African conception of man does not negate individuality,"[478] but rejects the view that the person should take precedence over the community. Teffo explains that the aim of

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[473] Dirk Louw, "Ubuntu and the Challenges of Multiculturalism in post-apartheid South Africa," The University of the North, Dept. of Philosophy, South Africa, [website]; http://www.phys.uu.nl/~unitwin/ubuntu.html; accessed September 11th 2009.
[474] Ibid. See also Phillip Higgs, "African Philosophy and the Transformation of Educational Discourse in South Africa," *Journal of Education* 30 (2003), 12.
[475] Louis Teffo,"The Other in African Experience," *South African Journal of Philosophy* 15 no. 3 (1993), 102.
[476] Michael Battle, *Reconciliation: The Ubuntu Theology of Desmond Tutu* (London: Pilgrim Press, 1997), 51.
[477] Louw, "Ubuntu and the Challenges of Multiculturalism."
[478] Ibid.

Ubuntu is to maintain "the other in his (or her) otherness, in his (or her) uniqueness, without letting him (or her) slip into the distance."[479]

The philosophy emphasizes the collective responsibility shared by community members. It is concerned with maintaining "harmony in all spheres of life."[480] All members have a responsibility towards the well-being of the network of relationships that make up the community. Each individual is unique, but part of a whole. Taking away a piece of the whole would weaken the community and the individual since neither would be complete without the other. This conception is roughly translated back within traditional justice mechanisms whereby the loss of an individual (e.g. through murder) is a loss to the community as well as to the direct family. While the link to the family may be a sentimental one, that to the community is more functional. As Turnbull explains, what matters is the "social import of that death for society."[481] Justice must address and weigh the damage caused to the social fabric and the loss of a healthy child, functionally equates the loss of the contribution that child could have made to the well-being and functioning of the society.

Canadian Aboriginal Justice

Canadian aboriginal communities, despite their variety of traditions and history, also often have a strong sense of community-based justice, which, in some ways, reflects

[479] Teffo, "The Other in African Experience," 112. Original quote.
[480] Ramose, "The Philosophy of Ubuntu," 237.
[481] Colin Turnbull, "The Individual, Community and Society: Rights and Responsibilities From An Anthropological Perspective," *Washington Law Review* 41 (1984), 80.

some of the same elements as *ubuntu*.[482] One of the striking resemblances lies in the common emphasis on interdependence. Relationships between community members are what matter.[483] A healthy, peaceful community is defined by respectful and peaceful relationships between its members. The community is understood as the sum of the relationships it encompasses. In this sense, when a crime takes place, it is not only the relationship between a number of given individuals that is affected, but the balance of the whole community. From this results a different conception of wrongdoing and how best to treat it. A crime is either perceived as a misbehavior, which requires some form of teaching, or an illness, which requires healing.[484] Justice is about healing the parties involved.[485] It is all the more a "holistic vision of justice which draws from the wisdom of the elders and traditional teachings."[486]

All victims, their families, offenders, and the community are engaged in the process of healing, and, therefore, justice.[487] They take an active role in the process. Rather than being the object of justice, community members carry out justice themselves. Elders often play the role of mediators, while victims, their families and offenders have the opportunity to disclose their experiences, anger and pain.[488] Observers note that victims often receive a great deal of support in dealing with the

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[482] For a cursory look at the variety of community-based justice initiatives in Canadian aboriginal communities, refer to the Native Law Centre of Canada, [website]; http://www.usask.ca/nativelaw/; accessed January 5th 2011.
[483] Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Canada: Penguin, 2006), 96.
[484] Ibid., 96.
[485] Ibid.
[486] Jarem Sawatsky, *The Ethic of Traditional Communities and the spirit of Healing justice* (London: Kingsley, 2009), 33.
[487] Berma Bushie, "Community holistic circle healing: A community approach,"(1999), [paper online]; accessible at http://www.iirp.org/library/vt/vt_bushie.html; accessed August 12th 2009).
[488] Emily Mansfield, "Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific NorthWest," *Mediation Quarterly* 10 no. 4 (1993), 341.

trauma of their abuse.[489] Yet, the emphasis is on the responsibility of all. As Ross notes, "we are all assembled to help make life better for the next generation."[490] All community members are actively engaged in the healing process, since all are responsible for the well-being of their community. In aboriginal communities throughout Canada, Australia, and New Zealand, there exists a common concern and attempt to return responsibility for problem-solving and dispute resolution to those directly involved with the issue, rather than putting it in the hands of powerful strangers.[491] As noted by Ross, there is a strong sense of collective responsibility centered on the idea of interdependence. Human communities "are not, as the Western view seems to hold, fundamentally a collection of rights *against* others, but a bundle of responsibilities *towards* others."[492]

Generally speaking, throughout Aboriginal communities, rehabilitation is preferred to punishment, which is merely viewed as a Western and external mechanism of control.[493] Punishment is generally looked upon with distrust, since incarceration is viewed as bringing only further imbalance to the individual and the community instead of addressing and redressing this imbalance.[494] Theft, for instance, requires that community members get together to discuss and teach the offender about the harmful effects of such acts. Sexual abuse, on the other hand, requires healing for both offenders and victims. Victims may be helped, through various counseling

[489] Bushie, "Community holistic circle healing."
[490] Ross, *Returning to the Teachings,* 43.
[491] Ross, *Returning to the Teachings,* 57.
[492] Rupert Ross, "Exploring Criminal Justice and the Aboriginal Paradigm," discussion paper, 2010, 24, [paper online]; accessible at http://www.lsuc.on.ca/media/third_colloquium_rupert_ross.pdf. Original emphasis.
[493] Denise Breton and Stephen Lehman, *The Mystic Heart of Justice: Restoring Wholeness in a Broken World* (USA: Swedenborg Foundation Publishers, 2001), 152
[494] Ross, *Returning to the Teachings,* 39. Original Emphasis.

programs, to deal with what they have suffered. Sexual offenders may also be counseled and helped to deal with the psychological dimensions that spurred the violence, but also those that follow such acts, to better prevent them.

It is interesting to note that in a large proportion of the literature on Aboriginal justice, the term "offender" is rarely used. Rather, the term "victimizer" is preferred. This choice of word reveals an important aspect of the aboriginal view of "justice" and wrongdoing. By shunning the term "offender," and favoring "victimizer," the complexity involved in the identification of wrongdoing is exposed. Wrongdoing is seen as the symptom of a deeper malaise, or the result of a perceived injustice. Therefore, the focus of justice is not on the crime itself, but rather on understanding the reasons behind it.[495] It is only by addressing the underlying cause of the misbehavior that the latter can be properly dealt with and prevented.[496]

A Holistic Justice

Customary mechanisms of justice have been largely under-researched. As a result, the scholarship and practitioners of the field of transitional justice have "failed to acknowledge, and thus comprehend, how the systems…[that are] idiosyncratic to specific sub-regional and cultural contexts…by which many people …[and] order their lives, function."[497] When acknowledged, however, customary mechanisms are often regarded as "unaccountable, opaque and contradictory to enlightened intentions

[495] Ross, *Returning to the Teachings,* 91.
[496] Judie Bopp, *The Sacred Tree* (Twin Lakes: Lotus Publisher, 1989), 26.
[497] Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," World Bank, 2005, 1, [report online]; accessible at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf

of liberal peace."[498] They are also generally described as embodying a mix of restorative and retributive values.[499] Yet, describing customary mechanisms of justice as embodying a mix of restorative and retributive values is a mistake, since the way these approaches are framed in the field of transitional justice is inappropriate and ill-suited to capture the essence of these mechanisms. This is, first, because, as explained earlier, the concern for retribution is entirely absent in the conception of justice that is embodied in customary mechanisms of justice. When a penalty is chosen by both the victim and the offender, it is viewed as a means to make amend and rejoin society.[500] Because both parties to the dispute agree on the penalty, it is often perceived as holding more weight and legitimacy in the eyes of both.[501] The points of view, experiences and needs of both sides are taken into consideration, and the penalty is more likely to reflect these. The focus is placed on the rehabilitation of both victims and offenders. Second, the term restorative justice and subsequent conception of it "emerged as a movement in response to the shortcomings of the Western criminal judicial system."[502] Yet, it is applied to ancient traditions of informal methods of social control and dispute resolution that were predominant in non-state, and pre-state societies.[503] As explained in the previous chapter, this restorative approach to justice

[498] Robert MacGinty, "Indigeneous Peace-making Vs Liberal Peace," *Journal of the Nordic International Studies Association* 43 no. 2 (2008), 139.
[499] Joanna R. Quinn, "The thing behind the thing: The role and influence of religious leaders in the use of traditional practices of justice in Uganda," a paper presented at the Canadian Political Science Association, Ottawa, May 2009, 8.
[500] Turnbull, "The Individual, Community and Society," 79.
[501] Ibid., 79.
[502] Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmarland, *Restorative Justice: Critical Issues* (London: Sage Publication, 2003), 2.
[503] Heather Strang and John Braithwaite, *Restorative Justice and Civil Society* (Cambridge: Cambridge University Press, 2001), 2.

remains individually focused and fails to capture the spirit of such alternative conception of justice.[504]

This research argues that in some cases, customary and indigenous mechanisms have been re-appropriated and repackaged to suit the needs of the non-aboriginal world. When discussing Mãori family group conferencing, for example, Blagg explains that these customary practices have been "appropriated, denuded of context and employed to meet the interests of the status quo"--in other words, the policy agenda of the government.[505] This view strongly echoes that of Tauri, who discusses what he calls the "indigenization of New Zealand's criminal justice system."[506] Tauri explains that customary mechanisms have been taken out of their context, and annexed of their indigenous landscape to be introduced in the government's policies and legislations.[507] This has certainly been the case in a number of countries, such as Australia and Canada, whereby these mechanisms have been used to provide an "avenue for reform with an element of Aboriginal culture onto an essentially unreconstructed white system."[508]

Far from empowering indigenous communities and promoting their approaches to justice, the indigenization of criminal justice has stripped these

[504] Elizabeth Elliott and Robert Gordon, *New Directions in Restorative Justice: Issues Practice and Evaluation* (USA: Willan Publishing, 2005), 92.
[505] Harry Blagg, *Crime, Aboriginality, and the Decolonization of Justice* (Sydney: Hawkins Press, 2008), 79.
[506] Juan Tauri, "Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand." In *Justice as Healing: Indigenous Ways*, edited by Amanda McCaslin, 313-23. Minnesota: Living Justice Press, 2005, 1-2.
[507] Ibid.
[508] Blagg, *Crime, Aboriginality, and the decolonization of justice*, 153.

practices of their meaning.[509] Customary law and practices have sometimes been "collapsed into restorative justice," which is essentially a Eurocentric image and appropriation of traditional mechanisms and justice.[510] Finnström refers to this tendency as the "imperial dialogue," which is more of a "one-sided appropriation of meaning" whereby observers have "applied their assumptions concerning others, uncritically," and, reached a "conclusion based on ideological hypothesis already designed."[511] Blagg even argues that what has been done to the study of customary mechanisms of justice is akin to Edward Said's "Orientalism."[512] Said explained that the idea of the Orient was constructed for Western consumption, for which the "actualities of the modern orient were systematically excluded,"[513] and its actual, real "identity withered away into a set of consecutive fragments."[514] Blagg argues that the same thing has happened to customary mechanisms of justice with the concept of restorative justice, which portrays "highly derivative and sanitized representations" of these mechanisms.[515] The type of justice that customary mechanisms embody has been taken out of context, and as such rendered universal and ahistorical through its representation as restorative justice.

Customary law and customary mechanisms, and, more particularly, the type of justice they embody, is difficult to appreciate and make sense of within a Western, individualistic and legally based approach to justice. This may be due to the fact that

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[509] Jane Dickson-Gilmore and Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005), 57-86.
[510] Blagg, *Crime, Aboriginality, and the decolonization of justice*, 74.
[511] Sverker Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda* (Durham: Duke University Press, 2008), 51, 52.
[512] Blagg, *Crime, Aboriginality, and the decolonization of justice*, 36.
[513] Edward Said, *Orientalism* (USA: Vintage Book, 1979), 177.
[514] Ibid., 179.
[515] Blagg, *Crime, Aboriginality, and the decolonization of justice*, 86.

justice, in the case of *ubuntu* and Canadian Aboriginal approaches, "represent[s] a grammar for living and an intricate set of religious principles that make the world intelligible."[516] It is not just legal institutions that differ, but entire social structures and beliefs, which, in turn, get lost and sanitized in the restorative justice texts.

These approaches fundamentally antithetical to the individual-focused and based approaches to justice that inform the transitional justice scholarship's way to think about mechanisms of justice. Moreover, they provide a context and a framework for thinking about alternative conceptions of justice in general, as well as in the particular case of the Mãori in New Zealand.

Interconnectedness

At the crux of both philosophies of justice are notions of interdependence and connectedness. In both instances, communities are conceived as a network of relationships, rather than a mere collection of individuals. This is most obvious in the following Xhosa proverb, which embodies *ubuntu*: "A human being is a human being only through its relationship to other human beings."[517] Accordingly, not only are individuals essential elements of the sustainability and well-being of the community, but they also play an important role in thinking about the self. It is through others that one is, meaning that one's identity and self-perception are either confirmed by or influenced by one's relationship with others. While self-respect, for instance, is inherently an individual feeling, respect can only be granted by others towards

[516] Ibid., 154.
[517] Christopher Marx, "Ubu and Ubuntu: on the dialectics of apartheid and nation building," *Politikon* 29 no. 1 (2002), 52.

oneself. Most importantly, one's life is supported by the existence of others within the community, and vice-versa. Individual members of the community work together to contribute to its wellbeing and sustainability.[518]

This influences conceptions of justice and its value and role in the community. When a crime takes place, it is not only the relationship between a number of given individuals that is affected, but the balance of the whole community. It is the entire network of relationships that is damaged. From this results a different conception of wrongdoing and how best to treat it. A crime is perceived as an illness, which requires healing. Justice allows healing.[519] Based on the premise that we are all related within a whole, justice is about honoring how we can each move with our relatedness in ways that are "ours to do."[520] This means that justice is also about maintaining that network of relations without which it would have no flesh. Often, and as a result, the rehabilitation of both the victim and the offender is favored. This is premised upon what Ross refers to the "law of respect," which assumes that each individual makes a vital and irreplaceable contribution to the well-being of the community.[521] While a crime may only directly affect a number of individuals, it is the well functioning of the whole community that is challenged.

From this conception of interdependence and interconnectedness, stems the notion of collective responsibility. Central to this notion of collective responsibility is the idea that if something has gone wrong and a crime has been committed, the community as a whole is responsible. When a crime is being committed, it means that

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[518] Michael Bopp and Judie Bopp, *Recreating the World: A Practical Guide to Building Sustainable Communities* (Calgary: Four World Press, 2006), 23.
[519] Breton and Lehman, *The Mystic Heart of Justice.*
[520] Ibid.
[521] Ross, "Exploring Criminal Justice," 6.

the community has been unable to prevent this crime from happening. Justice, in fact, involves much more than just redressing or dealing with the immediate consequences of a wrong. Instead, it involves "creating the social conditions that minimize such wrongdoing…it involves all the social mechanisms that teach people from the moment of their birth how to live a good life."[522] As such, the community is responsible for not creating conditions within which a crime cannot and should not happen, or, in other words, creating conditions favorable to the wellbeing of all its members. Theft for food, for instance, renders the community responsible, in that it failed to prevent any member from lacking food and starving. Justice requires identifying and addressing the root causes of the crime. Using the analogy of the body again, healing an illness or pain requires identifying what triggered it. Taking medicines will only help reducing the intensity of the pain, but will not always heal the body. It is important, for that reason, to identify what causes the pain to prevent it. Likewise, justice heals as long as it addressing the causes of the crime as well as its direct impact. Punishment or restitution is not sufficient since it only addresses the impact of the crime. Addressing what caused the crime to happen, in the first place, is more likely to allow healing and prevent re-occurrence.

Wholeness

Common to both *Ubuntu* and Canadian Aboriginal philosophies of justice is the belief that everything is interrelated. One cannot understand something if one does not understand how it is related and connected to everything else. This may, at first, be

[522] Ross, *Returning to the Teachings,* 256.

difficult to fully comprehend, but justice itself is a "constituent element of the very social fabric of the community," meaning that justice is not limited to legal proceedings as in Western conception.[523]

Interestingly, a number of communities do not have a specific word for "justice." The Mãori, for instance, use the term *tikanga Mãori* to talk about justice. Loosely translated, *tikanga Mãori* means "the Mãori way of doing things."[524] It includes conceptions of "right" and "wrong." Most importantly, it establishes the organization of community life and interaction. Likewise, the derivation of the Luo language spoken by the Acholi population of Northern Uganda, has no equivalent for the word "justice."[525] This illustrates a disjunction between the Western conception of "justice" and which is embodied in traditional mechanisms of justice, whereby the restoration of the social order and spiritual harmony take precedence.

Healing the mind is another important element of justice. The spiritual is not outside of the realm of "justice." Sawatsky explains that Aboriginal justice, for instance, tends to use "heart-thinking" rather than "head-thinking."[526] This means that Aboriginal approaches to justice emphasize the emotional aspect of justice as healing. He adds "the methods of justice reflect the virtues of justice," namely, love, caring, respect, family values.[527] Here, a different idea of what justice and restoration entails,

[523] Chirayath, Sage and Woolcock, "Customary Law and Policy Reform," 25.
[524] Juan Tauri,"Evaluation for Mãori: Guidelines for Government Agencies," Wellington: Ministry of Mãori Development, Government of New Zealand, 2004.
[525] Erin Baines, "No Word for Justice: South-North Approaches to Addressing War Crimes in Northern Uganda," paper presented at the Liu Institute for Global Issues, Vancouver, 5th June 2006.
[526] Jarem Sawatsky, *The Ethic of Traditional Communities and the spirit of Healing justice* (London: Kingsley, 2009), 70.
[527] Ibid., 70.

prevails.[528] In this case, "restoring spirituality and cleansing one's soul are essential to the healing process for everyone involved in a conflict."[529] For a healthy community to exist, its members must be whole.[530] Justice is holistic in that it seeks to address all elements of the self that need healing. Justice also permeates through all aspects of life, and is not limited to the legal sphere. Healing is initiated through an initial community gathering, but it is carried out incrementally, through counseling and community meetings and projects where offenders and victims slowly regain trust of and from fellow community members.

As explained earlier, justice seeks to identify the root causes of a crime to address them. Crimes are seen as a symptom of a deeper malaise. Accordingly, justice must be addressed in a holistic and integrated manner.[531] Problems are handled in their entirety. Justice is not fragmented into pre-adjudication, pretrial, adjudication, and sentencing stages. Rather, it is seen altogether as a path towards transformation. Justice is not a mere tool in addressing and redressing wrongs, but, as Ross notes, a way of life.[532] Justice is not solely about guaranteeing respect, rights and well-being, it is also about "enforcing customs."[533] "Justice" permeates everyday life and embodies the morals and customs of the community. As such, "justice" is "involved

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[528] Jennifer Llewellyn and Robert Howse, "Restorative Justice--A conceptual Framework," a paper prepared for the Law Commission of Canada (1999), 93, [paper online]; accessible at http://dalspace.library.dal.ca/bitstream/handle/10222/10287/Howse_Llewellyn%20Research%20Restorative%20Justice%20Framework%20EN.pdf?sequence=1

[529] Ada Pecos Melton, "Indigenous Justice Systems and Tribal Society," in *Justice as Healing: Indigenous Ways*, ed. Amanda McCaslin (Minnesota: Living Justice Press, 2005).

[530] Bopp, *Sacred Tree*, 26.

[531] Rama Mani, "Balancing Peace with Justice in the Aftermath of Violent Conflict," *Development* 48 no. 3 (2005), 27.

[532] Ross, *Returning to the Teachings,* 256.

[533] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (New Jersey: Princeton University Press, 1996), 110.

in keeping social order but most importantly harmony."[534] There is no duality between the just society where all are equal individuals within a community and the justice that redresses wrongs. In fact, "justice is not primarily about what to do when things go wrong, but about how to live so that things go right."[535] Justice is a lived experience, which is acquired and understood through traditions, ceremonies and life as part of a healthy, caring society.[536]

Concluding thoughts

Both aspects discussed provide us with a window through which scholars of transitional justice may acquire insight into the nature and role of justice that goes well beyond the legalistic framework, within which scholars have tried to make sense of these alternative conceptions and mechanisms of justice It becomes clear that the communitarian conception of justice contradicts the rights-based and legalistic confines of the deontological-liberal approaches to justice. So, while these two elements are directly drawn from the *Bantu* and the Canadian Aboriginal philosophies, they give us cues regarding what to look for, when thinking about alternative mechanisms of justice and the type of justice they seek.

Most importantly, it is argued, here, that these approaches to justice, and their emphasis on interconnectedness, require that we adopt a "relational lens,"[537] to make

[534] John Mbiti, *Introduction to African Religion* (Nairobi: Heinemann, 1991), 174.
[535] USA Department of justice, "Indigenous Justice Systems and Tribal Society," [website]; http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/perspectives/indigenous-tribal.htm; accessed September 10th 2009.
[536] Turner, *This is not a peace pipe*, 95.
[537] Rupert Ross, "Heartsong: Exploring Emotional Suppression and Disconnection in Aboriginal Canada," discussion paper, 2009, 17, [paper online]; accessible at http://www.support4northernkids.ca/uploaded/Heartsong%20Final.pdf.

sense of the nature and purpose of justice. Ross explains that "the relational lens" allows us to view the world around us as a "vast web of ever-modifying relationships," rather than a mere "collection of things."[538] In this respect, customary mechanisms of justice provide a framework where parties to a dispute, may "come together…to explore their ways-of-relating and to use that knowledge to design workable changes."[539] Justice allows the re-shaping of relationships. This "relational lens" leads us to "know" the world differently, and view the role of "justice" accordingly. Using the "relational lens" will therefore help and guide my approach to research and methodology, when exploring *tikanga Mãori*, or in other words, the Mãori way of doing things.

[538] Ibid., 18.
[539] Ross, "Heartsong," 18.

CHAPTER SIX

CUSTOMARY MECHANISMS OF JUSTICE

Understanding the nature of customary mechanisms of justice is of great importance for the argument presented in this work, regarding the inability of the transitional justice scholarship to account that the philosophy of justice that underpins these mechanisms. Customary mechanisms of justice continue to play a significant role in the lives of many communities around the world. Yet, while there exist a number of individual and regional case studies of these mechanisms, assessments of what customary mechanisms of justice generally consist of, and how they function as a whole, remain sparse. For this reason, this chapter starts by providing a typology of customary mechanisms of justice. It also touches upon the importance of the traditions that give life to these mechanisms, and addresses some of the concerns raised regarding their continued existence. However, it is important to try not to romanticize these practices. While this study argues for caution in the promotion of the rule of law and its principles, it does not, however, blindly endorse the use of customary mechanisms of justice in all cases. Concerns raised by international agencies and transitional justice scholars, *vis-à-vis* the fact that these practices may violate fundamental rights and Western principles of justice, are sometimes raised for good reasons. This chapter helps shed light on some of the difficulties encountered by international actors and scholars when trying to engage with customary mechanisms

of justice and the degree to which these processes can be accommodated. Customary mechanims of justice sometimes function in contradion to some of the values embodied, for instance, in documents such as the Universal Declaration of Human Rights.

This chapter draws particular attention to two concerns that are often raised by scholars of transitional justice and the international community at large. First, that women often face systematic gender-based discrimination that may be present in and perpetuated by customary mechanisms. Indeed, these mechanisms often function according to patriarchal traditions, which can be inconsistent with the principle of gender equality. Second, there are issues regarding the legitimacy of customary mechanisms of justice. Because these mechanisms are considered "traditional," they are sometimes perceived as inherently more legitimate than other mechanisms of justice. In fact, customary mechanisms of justice are sometimes fraught with power struggles and dynamics that threaten their ability to provide justice.

Defining Customary Mechanisms of Justice

A Typology

Local, traditional, customary mechanisms of justice have long been overlooked and under-researched in the literature on transitional justice. These mechanisms, for example, have been called "informal,"[540] "traditional," "localized,"[541] "customary," or

[540] Lucy Hovil and Moses Chrispus Okello, "Partial Justice: Formal and Informal Mechanisms in Post

"indigenous" mechanisms of justice. In Australia, customary mechanisms of justice are referred to as "indigenous justice practices,"[542] or simply "community justice."[543] In Africa, these mechanisms of justice are generally referred to as "community rituals,"[544] "traditional conflict resolution mechanisms"[545] or even "traditional conflict medicine."[546] Quinn posits that the terms "customary" or "localized"[547] are more appropriate terms to designate these mechanisms, since they embody traditional communal values, and may or may not have some kind of legal standing. Kerr and Mobekk insist on the use of the term "informal," which, in their view, is the most appropriate way to capture the essence of these mechanisms, in that it denotes the absence of "formal structure created by the state."[548] Others argue that the use of the terms "customary" and "traditional"[549] is highly problematic, since these practices are not static, and constantly evolve and adapt over time. They also criticize the use of the term "informal mechanisms" as these practices are often "state sanctioned and even state regulated."[550] More often than not, researchers prefer to refer directly to the

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Conflict West Nile," *Refugee Law Project Working Paper Series*, Working Paper no. 12, June 2007.1.
[541] Peter Hennessy, *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals* (New York: Hein, 1984), 2.
[542] Elena Marchetti and Kathleen Daly, "Indigenous Courts and Justice Practices in Australia," *Trends and Issues* no. 244, Australian Institute of Criminology, 2004, 1.
[543] Frank Brennan, *Aboriginal Customary Law and Community Justice: Mechanisms in Light of the Royal Commission into Aboriginal Deaths in Custody* (King Cross: Uniya, 1991), 1.
[544] Angela Veale and Aki Stavrou, "Violence, Reconciliation and Identity: The Reintegration of Lord's Resistance Army Child Abductees in Northern Uganda," Monograph no. 92, Institute For Security Studies, 2003, 46, [monograph online]; accessible at http://www.iss.co.za/pubs/Monographs/No92/Contents.html
[545] Eghosa Osaghae, "Applying Traditional Methods to Modern Conflict: Possibilities and Limits" in *Traditional Cures for Modern Conflicts: African Conflict Medecine*, ed. William Zartman (London: Lynne Rienner, 2000), 202.
[546] William Zartman, *Traditional Cures for Modern Conflicts* (London: Lynne Rienner, 2000).
[547] Joanna R. Quinn, "Customary Mechanisms and the International Criminal Court," a paper presented at the Canadian Political Science Association, Toronto, 2006, 5.
[548] Kerr and Mobekk, *Peace and Justice,* 153.
[549] United Nations Peacebuilding Commission, "Peacebuilding Commission Working Group on Lessons Learned Justice in Times of Transition," 2008, 5.
[550] USAID, "Customary Justice and Legal Pluralism in War-Torn Societies," Concept note, 2009, 2,

mechanism in question,[551] while a number of international or national development agencies simply think about these mechanisms of justice as "non-state justice systems."[552]

This research sympathizes with the use of the term "non-state justice system" although the term is problematic to a certain degree. Indeed, the state and its laws have, in some cases, formally recognized these mechanisms, as in Uganda[553] and Bolivia.[554] In the Rwandan case, the state has had the most striking and pervasive influence on the *gacaca* courts, which have had to absorb many of the formal and procedural aspects of the state's judicial systems. Waldorf argues that only a few of the customary practices remain, and that *gacaca* courts are now more of "an official state institution intimately linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than customary law."[555] As a result, the term "non-state justice system" is questionable. This study also disagrees with use of the term "informal," since it assumes that all formality is derived from state-centered practices. Hence, Quinn's use of the term "customary mechanisms of justice" is adopted in this research. While it is true that values evolve and change over time, these mechanisms are still the embodiment of traditional values and evolve and adapt over time accordingly. In this respect, the use of the term "customary mechanisms of justice" seems most appropriate.

[concept note online]; accessible at http://www.usip.org/files/file/usip_call_for_papers(1).pdf

[551] For instance, see Finnström, *Living with Bad Surroundings*.

[552] USIP, "The Role of Non-State Justice System in Fostering the Rule of Law in Post-Conflict Societies," [website]; accessible at http://www.usip.org/programs/initiatives/role-non-state-justice-systems-fostering-rule-law-post-conflict-societies; accessed October 22nd 2010; DFID, "Non-State Justice and Security Systems," 1.

[553] Government of Uganda, "Constitution," 1995, Section XXIV(a).

[554] Kerr and Mobekk, *Peace and Justice,* 156.

[555] Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79 no. 1 (2006), 52.

As mentioned earlier, customary mechanisms of justice have sometimes been recognized in formal state law, as in the cases of South Africa and Bolivia.[556] In Rwanda, they have been administered by the Ministry of Justice.[557] In the Ugandan case, not only have some of the country's customary values and practices been recognized in the 1995 constitution,[558] but their formal use was also discussed in the Agreement on Accountability and Reconciliation between the Ugandan government and the Lord's Resistance Army.[559] This movement toward the recognition and validation of customary mechanisms of justice coincides with what Tiemessen notes to be a shift toward "localization," as a more legitimate and effective means to engender justice by including local constituencies and traditions.[560] Often enough, such mechanisms serve to fill the vacuum left by unstable institutions and power,[561] or simply retain more authority in the eyes of the local population.[562] While these mechanisms differ according to the context and region in which they are upheld,[563] some elements, generally shared by most practices, can still be identified.

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[556] Kerr and Mobekk, *Peace and Justice,* 156.
[557] Stephen Brown, "The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda," a paper presented at the Annual Convention of the International Studies Association, New York, 2009, 8.
[558] Government of Uganda, "Constitution," 1995, Section XXIV(a).
[559] Government of Uganda, "Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement," 2007, Section 2.1 and section 3.1.
[560] Alana Tiemessen, "Transitional Justice for East Timor: Expectations and Implications of Localization," a paper presented at the International Studies Association, New York, February 2009, 3.
[561] Hovil and Okello, "Partial Justice," 22.
[562] Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," World Bank, 2005, 5, [report online]; accessible at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf
[563] Celestine Nyamu-Musembi, "Review of Experience in Engaging with Non-State Justice Systems in East Africa," paper commissioned by DFID, 2003, 1, [paper online]; accessible at http://www.gsdrc.org/docs/open/DS37.pdf

For instance, these mechanisms are often *locally situated* and *inclusive* of many community members.[564] Gatherings can take place anywhere that is considered to be at the heart of the community, in improvised halls, temporary tents, or in a field. Participation in and involvement of various community members in the process is a striking characteristic of these practices. They are usually chaired by elders, clan leaders, or community members with perceived authority.[565] All three parties to a dispute, namely victims, offenders and the wider community, may be present. The process of dispute resolution is "open and immediately accessible" to all in most cases.[566] Victims and their families or clan representatives are given a chance to voice their concerns, pain and grievances, while offenders and their families or clan representatives get an opportunity to explain their actions and make amends. The wider community is also often present in the process, and serves to bear witness to the wrongdoing and acknowledges redress. The "law is immediately applicable, by adjudicators or preferably by the parties themselves."[567] In other words, community members themselves carry out the sentencing, rather than leaving it in the hands of some faceless state institution. Through their involvement, various parties are empowered, in that they are given a central role in the redress and sustainability of community values and norms.[568]

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[564] Haroon Yusuf and Robin Le Mar, "Clan Elders as Conflict Mediators: Somaliland," in *People Building Peace II: Successful Stories of Civil Societies*, ed. Paul Van Tongeren, Malin Brenk and et al. (London: Lynne Reinner Publisher, 2005), 460.
[565] Patrick Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2000), 60.
[566] Ibid., 61.
[567] Ibid., 61.
[568] Patricia Lundy and Mark McGovern, "The Role of Community in Participatory Transitional Justice," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008).

Customary mechanisms of justice are also sometimes *non-antagonistic* and *collaborative*. They often encourage communication and exchanges between different parties to the dispute. These mechanisms aim at enacting a dialogue by "channeling retributive feelings."[569] The re-creation of social capital can only be initiated and sustained by communication and exchanges between the various sections of the community.[570] Not only does such a process serve to ease tensions between affected community members, it also invites the exploration of past events, and, therefore, gives victims and offenders the opportunity to share their experiences. The outcome and the sentencing that result from such a process is fundamentally collaborative in the sense that it encourages the exploration of various versions of what happened. This collaborative process helps offenders and victims each to acknowledge the other's experience of the same event and adopt a common understanding of it.[571] It also often engages different members to support the outcome in various ways. For instance, community members can actively take part in the deliberation process or play a role in the rehabilitation of offenders and victims.

Customary mechanisms of justice are also sometimes *rehabilitative*, in that they seek the restoration and rehabilitation of community members affected by the harm caused to the social fabric.[572] These practices embody "the preparedness of people to anticipate a shared future."[573] On a practical note, the reintegration of

[569] Albert Dzur and Alan Wertheimer, "Forgiveness and Public Deliberation: The Practice of Restorative Justice," *Criminal Justice Ethics* 21 no. 1 (2002), 5.
[570] Ibid., 9.
[571] Robert MacGinty, "Indigeneous Peace-making Vs Liberal Peace," *Journal of the Nordic International Studies Association* 43 no. 2 (2008), 149.
[572] Paul Van Tongeren, Malin Brenk, Marte Hellema and Juliette Verhoeven, *People Building Peace II: Successful Stories of Civil Societies* (London: Lynne Reinner Publisher, 2005).
[573] Andrew Rigby, *Justice and Reconciliation: After the Violence* (Boulder: Lynne Rienner Publishers, 2001), 186.

offenders within the society, rather than mere imprisonment, is generally applied.[574] Turnbull notes that punishment, in African societies as elsewhere, is often "regarded as a welcome means of making restitution and of being restored to society."[575] It is important to note that the rehabilitation of past offenders through customary mechanisms of justice, therefore, does not preclude some sort of punishment, as long as the latter does not prevent the re-introduction of the individual within the community. A rehabilitative sort of punishment, such as community service, can be favored. Equally important is the social rehabilitation of victims who often feel misunderstood and isolated from the rest of the community.

While the social and psychological rehabilitation of victims may appear logical to most, many remain sceptical regarding the reintroduction of past offenders into the wider community. Offenders often feel they have suffered an injustice and may use this alleged injustice to legitimize their offences. Reintroducing past offenders into the community implies that there will be a place for the offender within the reconstructed society. By the same token, ensuring that the offender can rejoin society, as opposed to being ostracized, contributes to her own social recovery.[576] Offenders must, therefore, be given sufficient opportunity to reintegrate into the community. This can be done, for instance, by providing them with community service as a way to repair what harm they have caused to the community. Giving a past offender a role and place in the community she is about to re-enter is a crucial part of the process. Bypassing punishment without providing offenders with sufficient

[574] Veale and Stavrou, "Violence, reconciliation and identity," 13.
[575] Colin Turnbull, "The Individual, Community and Society: Rights and Responsibilities From An Anthropological Perspective," *Washington Law Review* 41 (1984), 79.
[576] Ibid., 158.

opportunities to get involved in the community may seriously affect any attempt to bring justice. Victims, too, must be given the chance to actively engage with other community members. Their trust and confidence must be regained. This can be achieved incrementally by making sure that victims' needs are being addressed and their sense of security increased. Victims, for instance, may be invited to actively take part in communal reconstruction projects. Compensation and the restoration of relationships are both important elements of these mechanisms.[577] Although these processes, in some cases, remain un-codified, they often share some remarkable similarity.

A report published by the Australian Law Reform Commission, resulting from an investigation into aboriginal customary law, notes the existence of "sophisticated and ritualized processes,"[578] which usually include the declaration of grievances, truth-telling, evaluation of evidence and sentencing as a result of consensus.[579] When talking about customary mechanisms of justice, Wimmer, Goldstone and Horowitz identify the following four elements present in a number of these processes:[580] The first consists of the mutual acknowledgement and identification of the substance of the dispute to be settled. The second serves to reflect on the underlying fears and hopes of the participants and the community as a whole. The third is the identification of shared interest in an attempt to secure what the authors call "practical

[577] Joanna R. Quinn, "The Role of Informal Mechanisms in Transitional Justice," a paper presented at the Canadian Political Science Association, London, Ontario, 2005, 15.
[578] James Crawford, *The Proof of Aboriginal Customary Law* (Sydney: Australian Law Reform Commission, 1983), 14, 22.
[579] Crawford, *The Proof of Aboriginal Customary Law*, 23, 26.
[580] Andrea Wimmer, *Facing Ethnic Conflicts: Toward a New Realism* (Lanham: Rowman & Littlefield Publishers, 2004), 176.

cooperation."[581] Finally, the fourth phase engages all parties in a dialogue about the necessary conditions for the reestablishment of healthy relationships between community members. Each of the four phases necessitates the engagement in and participation of all parties to a conflict. The community is central in all steps, in that it serves to acknowledge, but also to take action against, what harm has been done. The recollection of past events also contributes to the creation of a common memory and recollection of events that is acceptable to all.[582]

A number of international governmental and non-governmental organizations have begun to recognize the value of customary mechanisms of justice. In a study on African customary mechanisms of justice, Penal Reform International explains that these mechanisms are often the first and only mechanisms of justice to which villagers, living in poor and remote areas, have access.[583] Penal Reform International also identifies the elements that it considers typical of customary mechanisms of justice, including the agreement that customary mechanisms of justice require community involvement, public participation, and seek to restore social harmony.[584] They also make use of rituals for the re-integration of offenders, and seek to reach compromise on all decisions taken.[585]

The Institute for Democracy and Electoral Assistance (IDEA) lists "ideal-typical attributes of informal justice systems."[586] According to IDEA, customary

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[581] Wimmer, *Facing Ethnic Conflicts*, 176.
[582] Turnbull, "The Individual, Community and Society," 79.
[583] Penal Reform International, "Access to justice in Sub-Saharan Africa: the role of traditional and informal justice systems," 2001, 1, [report online]; accessible at http://www.gsdrc.org/docs/open/SSAJ4.pdf
[584] Ibid., 24.
[585] Ibid., 28.
[586] Luc Huyse and Mark Salter, "Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences," Stockholm: International Institute for Democracy and Electoral Assistance,

mechanisms of justice focus on reconciliation and restoring social harmony.[587] They put emphasis on restorative penalties. The process, itself, is voluntary, and decisions are based on collective agreement. Arbitrators of these processes are also appointed from within the community, on the basis of status or lineage. There is a high degree of public participation and consultation.[588] Likewise, the United Nations Development Program (UNDP), which recognizes access to justice as an essential element in the promotion of peace and democratic governance,[589] describes customary mechanisms of justice as favoring community involvement and participation,[590] targeting social harmony,[591] and giving strong consideration to the community's interest and well-being.[592]

Rituals, too, are a central element in many customary mechanisms of justice and carry a strong symbolic significance for the people who carry them out, as well as for those who participate in them. In a number of communities, justice is achieved through some kind of ceremonial gathering where individual experiences are acknowledged.[593] Cleansing, for instance, may be partly achieved through the carrying out of some ritual like dancing. In the case of the Acholi people of Uganda, individuals are partly cleansed of their past and anger through the drinking of a soup

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2008, 14.
[587] Ibid., 14.
[588] Ibid., 14.
[589] United Nations Development Program, "Access to Justice," Practice Note (9/3/2004), 2004, 2, [practice note online]; accessible at http://www.undp.org/governance/docs/Justice_PN_English.pdf
[590] Ewa Wojkowska, "Doing Justice: How Informal Justice Systems Can Contribute," UNDP, 2006, 16, [report online]; accessible at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf
[591] Ibid., 16.
[592] Ibid., 16.
[593] Emily Mansfield, "Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific NorthWest," *Mediation Quarterly* 10 no. 4 (1993), 343.

made of a bitter root.[594] For the Navajo, ceremonial sweats and other purification ceremonies are used as a means to engender the healing and cleansing process for the individuals affected by a crime.[595] Through this ritual, it is believed that individuals are reborn through spiritual renewal and healing,[596] and they are thought to shed all their troubles.

Rituals, in fact, provide a certain continuity and unity amongst those who perform them.[597] A number of rituals exist for different circumstances and stages of life in most communities. In fact, rituals often "accompany the passage of an individual…from one social status to another."[598] They embody and symbolize beliefs.[599] Rituals also contribute to customary mechanisms of justice in that they provide them with some sort of grounding and elements that signal the steps to follow. The symbolic value of rituals is tightly linked to the traditions they embody.[600]

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[594] Finnström, *Living with Bad Surroundings*, 35.
[595] McCaslin, *Justice as Healing*, 327.
[596] Vancouver Coastal Health, *Aboriginal Health*, [website]; accessible at http://aboriginalhealth.vch.ca/terms.htm; accessed October 2009. This webpage contains information regarding different healing practices used by Canadian Aboriginal communities.
[597] John Mbiti, *Introduction to African Religion* (Nairobi: Heinemann, 1991), 20.
[598] Mary Douglas, *Implicit Meanings* (London: Routledge, 1999), 181.
[599] Ibid., 13.
[600] Any culture and tradition, regardless of its geographical location, carries out its own rituals, including birthdays and weddings, for instance.

Traditions

Various reports on the existence of customary mechanisms of justice across the world have noted how "remarkably resilient,"[601] and "adaptable to changing circumstance"[602] these practices have been. This is not entirely surprising, given the fact that these mechanisms of justice are themselves the embodiment of a culture, its values and traditions.[603] Every community defines its own moral standards, and what is acceptable to do or not.[604] Customary mechanisms of justice represent a society's conception of justice, its values and its ideals.[605] Their existence and justification is anchored in a society's beliefs and traditions. They are the very essence and inheritance of centuries of traditions, understood as the passing of values for peaceful life in community.[606] Indeed, traditions (and, by extension, customary practices of law) provide a "framework in which the conversation, a story of particular lives, takes its meaning."[607] They provide a particular set of values and meanings that informs and, to a certain extent, shapes communal life.[608] They can be considered "a constitutive element of societies."[609]

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[601] Susanne Schmeidl, "Successful Cooperation or Dangerous Liaison? Integrating Traditional and Modern Justice Mechanisms in Southeastern Afghanistan," a paper presented at the Annual Convention of the International Studies Association, New York, 2009, 2.
[602] Crawford, "The Proof of Aboriginal Customary Law," 21.
[603] Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985), 102.
[604] Philppe Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Oxford: The University of California, 1992), 99.
[605] Selznick, *The Moral Commonwealth,* 428.
[606] Glenn, *Legal Traditions of the World,* 25.
[607] Ralph Ellis, Norman Fishcher and Jones Sauer, *Foundations of Civic Engagement: Rethinking Social and Political Philosophy* (Lanham: University Press of America, 2006), 221.
[608] Ibid*., 221.*
[609] Glenn, *Legal Traditions of the World,* 11.

In their study of clan elders in Somaliland, Yasuf and Le Mar note the credence of traditions, which underpin customary legal practices.[610] They discuss the existence and importance played by *xeer*, an accepted code of conduct that is orally transmitted.[611] *Xeer* is a combination of Islamic Sharia law and customary law, which emphasizes the values of interdependence and inclusiveness.[612] Most importantly, *xeer*, as a communally sustained mechanism of dispute resolution, embodies communal principles and ideals of justice, social conduct and collective responsibilities.[613] It is an integrative part of traditions, their sustainability and transmission.

It is important, before going any further, to consider the way traditions are generally understood. Often enough, traditions are considered a thing of the past, and therefore are seen to have little or limited relevance to today. Traditions are "memories of memories," meaning that they are the weak reflection of past actions and beliefs.[614] The existing literature has, by and large, drawn distinctions between two types of traditions: "continuous" traditions, which date back centuries, and "invented" traditions, which "are easily tracable within a brief and dateable period."[615] While "invented" traditions rely heavily on "continuous" traditions, they are, in fact, "responses to novel situations which take the form of reference to old

[610] Yusuf and Le Mar, "Clan Elders as conflict mediators."
[611] Ibid., 460.
[612] Ibid., 460.
[613] Yusuf and Le Mar, "Clan Elders as conflict médiators,"460.
[614] Jan Vansina, *Oral tradition as History* (London: Currey, 1985), 160.
[615] Eric Hobsbawm and Terence Ranger, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1992), 1.

situations."[616] They could be considered updated and adapted versions of "continuous" traditions.

This distinction is troublesome for two reasons. First, it ignores the embedded-ness of such concept of tradition within a specific experience. Glenn notes that this understanding of tradition and its "pastness" is inherently Western.[617] He argues that the West, broadly speaking, considers traditions as "voices from the past" while a number of other cultures see them as voices of the present, "even though the owners of the voices may be absent."[618] He sees the latter as a preferable approach. Adopting Glenn's view allows us to bypass the issue raised by a number of academics regarding the difference between "invented" and "continuous" traditions.[619] Viewing traditions as voices of the present renders the debate regarding "continuous" and "invented" traditions, as well as their value and authenticity, obsolete.

In turn, this leads us to the second reason for discarding such a distinction: If we accept an understanding of traditions as "set of practices governed by overtly or tacitly accepted rules and of a ritual or symbolic nature which seek to inculcate certain values,"[620] then the distinction between the age of traditions is highly irrelevant, if people continue to value them. Shils captures the intricacy between change and continuity:

> All novelty is a modification of what has existed previously; it occurs and reproduces itself as novelty in a more persistent context. Every novel characteristic is determined in part by what existed previously; its previous character is one determinant of what it became when it became something new. The mechanisms of persistence are not utterly distinct from the

[616] Ibid., 2.
[617] Glenn, *Legal Traditions of the World*, 25.
[618] Ibid., 25.
[619] Hobsbawm and Ranger, *The Invention of Tradition*, 2.
[620] Ibid., 1.

> mechanisms of change. There is persistence in change and around change and the mechanisms of change also call forth the operation of the mechanism of persistence; without these, the innovation would fade and the previous condition would be restored.[621]

In other words, novelty and persistence are intricately linked. There can be no novelty without reference to what has been before, and there is consistency in change, which occurs continuously.[622] Traditions change and evolve to adapt to new circumstances. As argued by Finnström, cultures, and, therefore, traditions, are "socially lived."[623] In his view, it is irrelevant to try to make a distinction between traditions of the past and today's realities and practices since culture and traditions are "daily created and recreated."[624] They survive change because they have inherent value for the well-being of the entire community.[625] Traditions do not preclude innovation and change. In a number of cultures, traditions are transmitted orally, which make them more vulnerable but also adaptable to change.[626] Boyer notes that traditions and the values they transmit often become mere common sense.[627] They are resilient but also reflect values and beliefs that give essence to a community and its practices. They have, as a result, shown a great amount of adaptability and strength.[628]

Customary mechanisms of justice evolve and change over time. They were often the first casualties of colonialism. Colonial rulers disparaged such traditional

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[621] Edward Shils, "Tradition," *Comparative Studies in Society and History* 13 no. 2 (1971), 122.
[622] Shils, "Tradition," 122.
[623] Finnström, *Living with Bad Surroundings,* 54.
[624] Finnström, *Living with Bad Surroundings,* 54.
[625] Glenn, *Legal Traditions of the World*, 25.
[626] Pascal Boyer, "The Stuff 'Traditions' Are Made Of: On the Implicit Ontology of an Ethnographic Category," *Philosophy of the Social Sciences* 17 no. 1 (1987), 49.
[627] Boyer, "The Stuff 'Traditions' Are Made Of," 90.
[628] Hobsbawm and Ranger, *The Invention of Traditions*, 2.

customs.[629] For Mamdani, the imported judicial system and its courts were a "testimony to effective imperial control."[630] Establishing the rule of law was very much part of the noble *mission civilisatrice*[631] all around the world, and was seen as the hallmark of the modern state. Traditional mechanisms of justice were considered a threat to central authority and control in the eyes of some governments. This was the case in Burundi, where the *Bashingantahe* courts were abolished.[632] In the United States, the Navajo's traditional methods of dispute resolution were also discouraged, with the imposition of the state's adjudication methods in 1892.[633]

It is legitimate to fear that such state actions may have a significant impact on the existence of traditional and customary mechanisms of justice. Customary mechanisms of justice often ended up being pushed underground, and continued to be practiced in the shadow of the state. They risked losing their credence and relevance to the population.

Yet, precisely because customary laws and practices were often subordinated to a common system of law during colonial times, these local practices often hold more legitimacy and authority in the eyes of the population.[634] Sriram adds that traditional structures continued to evolve even as they were being co-opted by colonial

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[629] Joanna R. Quinn, "Here, Not There: Theorizing About Why Traditional Mechanisms Work in Some Communities, Not Others," a paper presented at the Canadian Political Science Association Annual, Saskatoon, 2007, 2.
[630] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (New Jersey: Princeton University Press, 1996), 109.
[631] This was considered the primary rationalization for colonialism. The "civilizing mission" signified France's attempt to convert its colonial subjects into French people, educating them into a way of being. *La mission civilisatrice* was the moral component or duty of the colonizer to elevate the ignorant masses of the non-Western world. For more information, see Rita Maran, *Torture: The Role of Ideology in the French-Algerian War* (New York: Praeger, 1989).
[632] Huyse and Salter, "Traditional Justice and Reconciliation," 159.
[633] Philmer Bluehouse and James Zion, "*Hozhooji Naat'aanii*: The Navajo Justice and Harmony Ceremony," *Mediation Quarterly* 10 no. 4 (1993), 327.
[634] International Council on Human Rights Policy, "Legal Pluralism Orders and Human Rights," 2008, 8, 9.

governments or during conflict.[635] In fact, central and state-sponsored judicial systems were, and sometimes still are, often perceived as foreign to the local culture and practices and therefore distant from the populations' beliefs.[636]

Customary mechanisms of justice also face renewed challenges due to the severe changes in the circumstances within which they function. While these mechanisms were often created and carried out to deal with local, intra and inter-tribal disputes over theft, beating and matrimonial issues, they are now facing challenges of a radically different nature and magnitude. This is the case in a number of post-conflict African countries, such as in Rwanda, Uganda, Sierra Leone, Mozambique and Burundi.[637] The *Bashingantahe* courts in Burundi, for instance, were initially designed to settle disputes regarding succession, property, theft and family as well as social quarrels. They were capable of dealing with disputes taking place at different strata of society.[638] Now though, the *Bashingantahe* courts have to deal with the atrocities that were committed during the inter-ethnic massacres between 1962 and 1992.[639] While, the courts were first denied their independence and authority under Belgian Colonial rule, they have regained vitality in the face of these unfortunate circumstances.[640] Yet, the *Bashingantahe* courts have had to go through a number of changes to be able to deal with the magnitude of cases they have to pursue. In 2002, the *Bashingatahe Charter* was ratified, which formalized a number of elements, such as the training of acting members of the courts. These individuals,

[635] Chandra Sriram,"(Re)Building the Rule of Law in Sierra Leone: Beyond the Formal Sector?" a paper presented at the International Studies Association, New York, 2009, 4.
[636] Chirayath, Sage and Woolcock, "Customary Law and Policy Reform," 8.
[637] Huyse and Salter, "Traditional Justice and Reconciliation."
[638] Joseph Ntamahungiro, "Burundi: Les Bashingantahe Au Service De La Paix," a paper presented at Les Manieres de Faire la Paix en Afrique, Brussels, 2007, 2,3.
[639] Huyse and Salter, "Traditional Justice and Reconciliation," 158.
[640] Francois-Xavier Fauvelle and Charles Perrot, *Le Retour Des Rois* (Paris: Khartala, 2003), 404.

rather than being chosen for their status and the respect they inspire, must now be trained in the areas of property laws, family law, and other legal matters.[641]

The Rwandan case is strikingly similar. Rwanda's *gacaca* courts were initially community courts, which operated during the pre-colonial era, and which were used to settle minor disputes over land or cattle.[642] They were generally composed of elders acting as judges.[643] *Gacaca* courts were given jurisdiction to hear cases of crimes that fit within the first three categories, which include everything from mere property offences to more violent crimes, including raping and killing. "Leaders and organizers of the genocide… notorious killers who distinguished themselves by their ferocity"[644] are adjudicated at the International Criminal Tribunal for Rwanda.[645] Attendance at the meeting of these courts is sometimes forced upon community members and this severely affected the nature of this customary mechanism of justice, which traditionally valued and relied on voluntariness.[646] *Gacaca* judges, instead of being traditional community leaders, are laymen elected by the community, and receive only seven days of legal training.[647]

In both Burundi and Rwanda, traditional mechanisms of justice have undergone significant changes to their function and procedures. Attempts to reform and incorporate customary mechanisms into national legal framework have triggered substantial debate over the changing nature and authenticity of such mechanisms and

[641] Wojkowska, "Doing Justice," 12.
[642] Ervin Staub, "Justice, Healing, and Reconciliation: How the People's Courts in Rwanda Can Promote Them," *Peace and Conflict: Journal of Peace Psychology* 10 no. 1 (2004), 27.
[643] Brown, "The Rule of Law," 8.
[644] Ibid., 10.
[645] Ibid.
[646] Ibid., 21.
[647] Susan Thomson, "The Unity-Generating Machine: State Power and *Gacaca* Trials in Post-genocide Rwanda," a paper presented at the Canadian Political Science Association, Saskatoon, May 2007, 8.

the relationship they entertain with state laws.[648] Some criticism has been directed at the format of these modified mechanisms. In the case of Rwanda, Thomson attacks the lack of training received by the judges.[649] Equally worrisome is the view that "justice is forced upon ordinary Rwandans in the name of national unity and reconciliation."[650] This view is echoed by Drumbl,[651] and also by Tiemessen, who contends that the "state-imposed approach of command justice has politicized the identity of the participants in Gacaca."[652] Participants remain divided along ethnic lines. Perpetrators remain Hutus, and Tutsis continue to be perceived as victims of the genocide. A common concern and criticism of a number of customary mechanisms concerns the of re-traumatisation and renewed hostility that may arise out of poorly planned and implemented mechanisms of justice, as it has been showed by the Rwandan case.[653] It appears, therefore, that various states' attempt at formalizing customary mechanisms of justice has severely affected the nature, ownership and impact of these mechanisms.

The root of the change of these practices can also be identified in the ongoing social change that permeates societies. Quinn notes that Ugandan youth living in the country's capital report remarkably less knowledge of, and faith in, traditional mechanisms of justice, than their rural counterparts.[654] A similar concern is echoed by Finnström, who writes that "traditional values, cultural knowledge and social

[648] Chirayath, Sage and Woolcock, "Customary Law and Policy Reform," 8-9.
[649] Thomson, "The Unity-Generating Machine."
[650] Thomson, "The Unity-Generating Machine," 1.
[651] Drumbl, "Restorative Justice and Collective Responsibility," 15, 16.
[652] Alana Tiemessen, "After Arusha: Gacaca Justice in Post-Genocide Rwanda," *African Studies Quarterly* 8 no. 1 (2004), 58.
[653] Staub, "Justice, Healing, and Reconciliation," 27.
[654] Quinn, "Here not there," 19.

institutions of everyday life are threatened."[655] The decline in the use of these practices can be attributed in part to urbanization and the resulting alteration of "social interactions, institutions, stratification systems, and the elements of culture over time."[656] However, while there is justified alarm at the decline of customary mechanisms of justice, numbers show that they still occupy an important place in communities around the world. In a number of cases, people trust and understand these kinds of practices more than they do Western imposed judicial systems.[657] These mechanisms are also locally situated, which makes them more accessible, than other judicial mechanisms, to individuals living in remote, rural areas.[658] Most importantly, they embody values and beliefs that are commonsensical to the population.[659] Tessler adds that while traditions and traditional practices have changed over time, they "retain a place of significance."[660]

Despite the changes made to the *Bashingantahe* courts in Burundi, reports claim that up to 80% of Burundians take their cases to the *Bashingantahe* courts as a first, and even sometimes only, means of dealing with disputes.[661] In Malawi, between 80

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[655] Finnström, *Living with Bad Surroundings,* 201.
[656] Margaret Andersen and Howard Taylor, *Sociology: Understanding a Diverse Society* (Belmont: Thomson Wadsworth, 2005), 618.
[657] Quinn, "The thing behind the thing," 27.
[658] Penal Reform International, "Access to Justice," 149.
[659] Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," World Bank, 2005, 5, 6, [report online]; accessible at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf
[660] Mark Tessler, *Traditions and Identity in Changing Africa* (New York: Harper and Row, 1973), 309.
[661] Kristina Thorne, "Rule of Law through Imperfect Bodies? The Informal Justice Systems of Burundi and Somalia," Geneva: Centre for Humanitarian Dialogue, 2005, 4, [paper online]; accessible at http://www.peace-justice-conference.info/download/WS6%20Rule%20of%20Law%20through%20imperfect%20bodies-Thorne.pdf

and 90% of all disputes are processed through customary justice mechanisms.[662] In Bangladesh, it is estimated that 60-70% of local disputes are solved through the *Salish*, a local mechanism of dispute resolution.[663] In Sierra Leone, the general population still relies heavily on customary law.[664] In Liberia, customary mechanisms of justice have survived the civil war and, it is said, "remain active in virtually all of Liberia's rural communities."[665] Traditional, customary mechanisms of justice have been an essential element in the lives of poor, rural population, which has sometimes lost everything else.

One justification for the survival and credence of customary mechanisms of justice may be that these mechanisms represent deeply embedded beliefs and rituals. However, as noted by Quinn, the use of customary mechanisms of justice is not yet entirely understood.[666] While some parts of the international community sees these processes as potentially useful in "fostering reconciliation and as a tool of conflict resolution,"[667] they often continue to perceive them as archaic and backward.

Weaknesses of Customary Mechanisms of Justice

Chirayath, Sage and Woolcock explain that customary mechanisms are often seen as "as undemocratic—lacking democratic accountability mechanisms to induce

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[662] Wilfried Schärf, "The Challenges Facing Non-State Justice Systems in Southern Africa: How Do, and How Should Governments Respond?" Centre for the Study of Violence and Reconciliation, 2005, [paper online]; accessible at http://www.csvr.org.za/wits/confpaps/scharf.htm
[663] Wojkovska, "Doing Justice," 16.
[664] Sriram, "(Re)building the rule of law in Sierra Leone," 4.
[665] Deborah Isser, Stephen Lubkemann and Saah N'Tow, "Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options," United States Institute for Peace, Peaceworks no.63 (2009), 25, [report online]; accessible at http://www.usip.org/files/resources/liberian_justice_pw63.pdf
[666] Quinn, "The thing behind the thing," 1.
[667] Kerr and Mobekk, *Peace and Justice,* 157.

reform—and lacking in legal legitimacy, authority and enforceability."[668] There is fear on the part of development agencies and international organizations, including the UN, that the "acceptance of such systems poses the risk of institutionalization of low quality justice for the poor."[669] International organizations and scholars worry, for instance, about the nature of punishment applied to perpetrators, which can sometimes be quite severe. Dinnen mentions the use of "cruel and inhuman forms of punishment,"[670] while the UK Department For International Development (DFID) expresses concerns regarding abuse of power, and customary mechanisms' "non-compliance with international human rights standards, such as discrimination or inhuman and degrading punishments."[671] Amnesty International is also very critical of the ability of some of these mechanisms to respect fundamentals of the rule of law. It expresses a number of concerns regarding fair trial standards and due process, and more particularly in the case of Rwanda, "questions the adequacy of … training for the majority of *gacaca* judges."[672] Thomson, as well as Reyntjens and Vandeginste, echo Amnesty International's concern vis-à-vis fair trial standards.[673]

One of the most common critiques of customary mechanisms of justice is that they are perceived as being "incompatible with economic, social and civil rights, and dominant notions of 'justice' attributed to the Western notions of law."[674] As a result,

[668] Chirayath, Sage and Woolcock, "Customary Law and Policy Reform," 4.
[669] Wojkowska, "Doing Justice," 13.
[670] Sinclair Dinnen, "Traditional Justice Systems in the Pacific, Indonesia and Timor-Leste," a paper presented at the UNICEF Conference on Justice for Children in the Pacific, Indonesia and Timor-Leste, Papua New Guinea, 2009, 3-6.
[671] Department For International Development, "Non-State Justice," 3.
[672] Amnesty International, "Rwanda: Gacaca, a Question of Justice," 26, 30.
[673] Thomson, "The Unity-Generating Machine"; Filip Reyntjens and Stef Vandeginste, "Rwanda: An Atypical Transition" in *Roads to Reconciliation*, ed. Elin Skaar, Siri Gloppen and Astri Suhrke (Lanham: Lexington Books, 2005), 120.
[674] Chirayath, Sage and Woolcock, "Customary Law and Policy Reform," 4.

the enthusiasm of the international community for these mechanisms has come at a cost. Indeed, while the international community and various non-governmental partners acknowledge the value and utility of customary mechanisms of justice in providing access to justice, they often seek to modify these practices, so that they may be "improved" to espouse basic human rights principles. As was the cases in Rwanda and Burundi, customary mechanisms have often had to conform to the principles of the Western legal tradition, in order to be tolerated.

Before going any further, it is important to reiterate that customary mechanisms of justice are useful and valuable. They also represent and embody local values and beliefs, which we must acknowledge. For this section, a number of cases where women's access to, and experiences of justice ought, rightly, to be questioned, and when the legitimacy and authority of those in power, is equally debatable, were purposefully selected. This does not mean that *all* customary mechanisms of justice function similarly and present the same challenges. It is worth noting that not all customary mechanisms of justice, for instance, marginalize women. Rather, these cases provide a selected sample of the kinds of challenges and ethical questions that transitional justice scholars must be ready to face when examining customary law and mechanisms.

Women and Customary Mechanisms of Justice

Internationally and officially in many countries, the rights of women are considered equal to those of men. The UN Declaration of Human Rights asserts that the "dignity and the equal and inalienable rights of all members of the human family is the

foundation of freedom, justice and peace in the world."[675] The Convention on the Elimination of all Forms of Discrimination Against Women further stresses that:

> discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.[676]

Other documents affirm that all persons should have equal status before the law and its institutions.[677] The International Covenant on Civil and Political Rights, for instance, clearly specifies that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[678]

Some states have also independently adopted and endorsed national provisions that ensure equal protection of men and women before the law. The 2003 Rwandan Constitution, for example, specifies that any discrimination, including those based on sex, is punishable by law.[679] The Rwandan government even voluntarily ratified, by Presidential Decree in 2004, the Optional Protocol of the African Charter on Human and People Rights Relating to Women's Rights in Africa.[680] Article 8 of this protocol states that "women and men are equal before the law and shall have the right to equal

[675] United Nations, "The Universal Declaration of Human Rights," 1948, Preamble.
[676] United Nations, "Convention on the Elimination of All Forms of Discrimination against Women," 1979, Preamble.
[677] United Nations, "International Covenant on Civil and Political Rights," 1976, Art. 14.
[678] Ibid., Art. 26.
[679] Government of Rwanda, "2003 Constitution of the Republic of Rwanda," Art. 11.
[680] Government of Rwanda, "Presidential Decree n° 11/01 of 24 June 2004."

protection and benefit of the law."[681] It also stresses the need for institutions and services that facilitate women's access to justice and the need to "sensitize everyone to the rights of women."[682] Other countries, such as New Zealand, have set up their own Ministry of Women's Affairs, in order to provide policy advice on improving women's lives and continuously monitor the governments' work in the matter.[683]

In short, there exist a number of international provisions that guarantee equality between men and women in all endeavors, not least before the law.[684] In practice, however, the experiences of women in accessing justice, particularly by customary means, are not always in accordance with these nationally and internationally agreed upon principles, and their rights are not always upheld. It is argued that women and their interests have generally been "underrepresented in transitional justice processes."[685] Both formal and informal judicial institutions present important drawbacks in the matter. Reilly notes that "because they appear to be non-adversarial, holistic, and inclusive, informal approaches to transitional justice might seem more amenable to recognizing women's experiences."[686]

Recent research, however, shows that this is not the case. In New Zealand, for instance, it appears that women's access to, and role in, traditional justice practices,

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[681] Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art. 8.
[682] Ibid., Art. 8c.
[683] Government of New Zealand, Ministry of Women's Affairs, [website]; accessible at http://www.mwa.govt.nz/; accessed November 21st 2010. This ministry is charge of advancing the well-being of women in New Zealand.
[684] See for instance, the Convention on the Elimination of All Forms of Discrimination against Women, Article 15.1.
[685] International Center for Transitional Justice, "Gender, and Transitional Justice," Fact Sheet, 2010, 2, [fact sheet online]; accessible at http://ictj.org/publication/ictj-gender-and-transitional-justice
[686] Niamh Reilly, "Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach," *International Journal of Law in Context* 3 no. 2 (2007), 157.

differs depending on their *iwi*[687] and that particular *iwi*'s traditions. In the *iwi* of Tuhoe, women do not get to talk during a *hui*.[688] Chant notes that this is not the case across the board, and that the *iwi* of Ngati Whatua has very active and strong female leaders who sit in, participate in, and sometimes chair meetings.[689]

In Latin America, Sieder and Sierra explain that both formal state institutions and indigenous justice systems discriminate against women.[690] In Yemen, Amnesty International notes that "women's rights are routinely violated because of laws, tribal and customary practices treating women as second-class citizens."[691] A similar observation can be made in Africa, where a number of "traditional systems are patriarchal in nature and often systematically deny women's rights to assets or opportunities."[692]

Limits on women's access to, and experiences of, justice can be explained both qualitatively and quantitatively. First, women are often affected disproportionately by gross violations of human rights.[693] As mothers, sisters, daughters, wives, and often primary caretakers, women are often the ones who bear of burden of the economic, social and emotional impact unrest, conflict or state-sponsored human rights violations have on communities.[694] In conflict as well as non-

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[687] The *iwi* or clan is the largest political and economic unit in Māori society.
[688] Arena Williams, Auckland youth and law student at the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand. A *hui* is a communal gathering.
[689] Lisa Chant, Professor of Māori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[690] Rachel Sieder and María Teresa Sierra, "Indigenous Women's Access to Justice in Latin America," CMI working paper 2. (Norway: Chr. Michelsen Institute, 2010), 17.
[691] Amnesty International, "Yemen's Dark Side: Discrimination and Violence against Women and Girls," (MDE 31/014/2009) 2009, 1, [report online] ; accessible at http://www.amnesty.org/en/library/info/MDE31/014/2009
[692] Chirayath, Sage and Woolcock, "Customary Law and Policy Reform," 4.
[693] Caroline Moser and Fiona Clark, *Victims, Perpetratots or Actors? Gender, Armed Conflict and Political Violence* (New York: Zed Books, 2001).
[694] Azza Karam, "Women in War and Peace-Building: The Roads Traversed, the Challenges Ahead,"

conflict settings, women are also the victims of gender-specific crimes such as rape and sexual slavery. In fact, sexual violence has become a weapon and means of oppression.[695] Rape, for instance, was widely reported during the war in Bosnia-Herzegovina,[696] and continues to be used today in a number of conflict situations.[697] It is also used in cases where human rights violations are carried out and sponsored by peaceful, democratic states. This was the case in Canada, where the Indian Residential School Survivors' Society reported that sexual violence and abuses were rampant in the state's residential school system.[698]

Second, and most importantly for this discussion, women are also disproportionately affected by traditions that often place them in a marginalized position. Nkiruka Ozoemena explains that "within the context of customary law, most women in African society are hugely affected by rules and practices that affect them adversely, thereby entrenching gender inequality."[699] In Burundi, for instance, women are usually considered the property of men, like their husbands and fathers, and draw

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International Feminist Journal of Politics 3 no. 1 (2001), 5; Erin Baines, "Body Politics and the Rwandan Crisis," *Third World Quarterly* 24, no. 3 (2003), 483; Elizabeth Rehn and Ellen Sirleaf Johnson, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building* (New York: United Nations Development Fund for Women, 2002); Swanee Hunt, *This Was Not Our War: Bosnian Women Reclaiming the Peace* (USA: Duke University Press, 2004).

[695] Meredith Turshen, "The Political Economy of Rape: An Analysis of Systematic Rape and Sexual Abuse of Women During Armed Conflict in Africa" in *Victors, Perpetrators or Actors: Gender, Armed Conflict and Political Violence*, ed. Caroline Moser and Fiona Clarke (New York: Zed Books, 2001).

[696] See, for instance, Amnesty International, "Whose Justice? Bosnia and Herzegovina's Women Still Waiting," (EUR 63/006/2009) 2009, [report online]; accessible at http://www.amnesty.org/en/news-and-updates/report/women-raped-during-bosnia-herzegovina-conflict-waiting-justice-20090930

[697] See for instance Amnesty International, "No Place for Us Here - Violence against Refugee Women in Eastern Chad," (AFR 008/2009) 2009, [report online]; accessible at http://www.amnesty.org/en/library/info/AFR20/008/2009

[698] Indian Residential School Survivors Society, "History," [website]; accessible at http://www.irsss.ca/history.html; accessed February 12th 2011. It is worthwhile noting, here, that young boys were also the victims of sexual abuse in the Indian Residential School Systems.

[699] Rita Nkiruka Ozoemena, "African Customary Law and Gender Jutice in a Progressive Democracy," M.A Thesis, Rhodes University, 2006, 39.

their rights from those of the men who possess them.[700] This understanding is reproduced in contemporary *Bashingantahe* courts whose 2002 Charter specifies that "women are invested together with their husbands."[701] A woman, therefore, has a limited role in the traditional justice process, and, then, solely in her capacity of wife. Similar patriarchal traditions have contributed to the unequal treatment of women under the law in Saudi Arabia, where, according to the system of *mehrem* or male guardianship, decisions are taken their behalf by male family members.[702] In New Zealand, protocol regarding the participation and decision-making power of women in a *hui,*[703] depends on the woman's own *iwi*. Arena Williams notes that in Tuhoe, for instance, women do not get to participate and share their views in communal meetings, beyond the initial *karanga*.[704]

Combined, these two tendencies have an enormous impact on women's experiences with, and access to, justice. Women are sometimes victims of cultural, social, physical and economic discrimination, which restrict their access to judicial mechanisms.[705] When they do have access to justice mechanisms, however, their experiences are often fraught with difficulties. Customary mechanisms of justice can be the direct embodiment of deeply rooted patriarchal traditions. Existing social

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[700] Nkiruka Ozoemena, "African Customary Law,"10. See also Huyse and Salter who explain that, traditionally, in Burundi, the status of a woman is derived from that of her husband. See Huyse and Salter, "Traditional Justice and Reconcilaition," 167-168.
[701] Government of Burundi, "Bashingantahe Charter," 2002, Article. 3.
[702] Amnesty International, "Beijing+15: Realizing Women's Right," (ACT 77/005/2010) 2010, 5, [report online]; accessible at http://www.amnesty.org/en/library/asset/ACT77/005/2010/en/0251e391-e9de-4a96-940d-34ef433b6589/act770052010en.pdf; Human Rights Watch, "Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia," 2010. [ISBN: 1- 56432-308-0], [report online]; accessible at http://www.hrw.org/en/reports/2008/04/19/perpetual-minors-0
[703] A *hui* is a communal gathering.
[704] The *karanga* is an exchange of calls that takes place during the time a visiting group moves onto the marae or into the formal meeting area. The *karanga* usually indicates the start of the formal welcoming ceremony.
[705] Sieder and Sierra, "Indigenous Women's Access to Justice."

hierarchies and power imbalances tend to be reinforced in customary mechanisms of justice.[706] As such, they often reproduce the same bias and are not always successful in providing a forum for the sharing of some of the traumatic experiences lived by women. This is visible, for instance, in Burundi, through the *Bashingantahe Charter*, which reproduced, as explained earlier, traditional patriarchal structures in its neo-traditional mechanisms of justice. The Afghan customary system of *jirga*, and the Somali system of *xeer* are another instances where traditions severely affect women experiences of justice. In cases of rape or sexual assault, both endorse, and often recommend, the transfer of young women from their families to those of their offender as a means of reparation or compensation. Young women are simply considered family property and currency.[707]

As with Afghan and Somali customary laws, Timorese local, traditional law is found equally deficient when dealing with sexual crimes. Indeed, it makes little difference between the crime of rape and adultery, which are both perceived as property offence.[708] Since women are indistinguishable from their families, amiable, consensual outcomes are often reached between the two families, in the name of honour, and with little or no consultation with the victims.[709] In these cases, the

[706] Dinnen," 'Traditional' Justice Systems in the Pacific," 3-6.
[707] Amnesty International, "Afghanistan: The International Community Must Act Immediately to Ensure Respect for the Rule of Law," (ASA 11/021/2003) 2003, 47, [report online]; accessible at http://www.amnesty.org/en/library/asset/ASA11/022/2003/en/15f42260-d6a2-11dd-ab95-a13b602c0642/asa110222003en.html
[708] Tanja Hohe, and Rod Nixon, "Reconciling Justice, 'Traditional' Law and State Judiciary in East Timor," United States Institute of Peace, 2003, 60-61, [report online]; accessible at http://www.gsdrc.org/docs/open/DS33.pdf
[709] Hohe and Nixon, "Reconciling Justice."

harmony of the community and the restoration of the social order take precedence over women's rights and existence.[710]

Human Rights Watch argues that despite the existence of laws governing Rwanda's *gacaca* courts regarding sexual violence, "deficiencies in the law and in its implementation greatly discourage reporting and proper investigation and prosecution of these crimes."[711] There is, for instance, insufficient protection of women and witnesses of crimes against women who wish to come forward. The lack of training and gender sensitivity of judges and authorities can render the process even more difficult for women testifying about sexual violence.[712] As a result, many women and girls prefer not to come forward, for fear of stigmatization or retribution. As noted by Barfield, customary mechanisms of justice are simply often inaccessible to women, since they "lack direct access unfiltered by a male representative, but also because of the unwillingness of many informal systems…to consider family and matrimonial matters."[713] Justice is not carried out when sexual violence and crimes are neither investigated, nor documented and prosecuted. More often than not, sexual offences are swept under the rug.

Legitimacy

As mentioned earlier, international law guarantees equal status to all before the law. Article 7 of the Universal Declaration of Human Rights, for instance, specifies that

[710] Wojkowska, "Doing Justice," 21.
[711] Human Rights Watch, "Struggling to Survive: Barrieres to Justice for Rape Victims in Rwanda," 2004, 1-2. [ISBN: A1610], [report online]; accessible at http://www.hrw.org/node/11976
[712] Ibid., 2.
[713] Thomas Barfield, *Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan* (Washington: United States Institute for Peace, 2006), 1.

"all are equal before the law and are entitled without any discrimination to equal protection of the law."[714] The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, for example, is one of the most detailed legal documents prescribing equal access to justice and fair treatment of all, through both formal and informal mechanisms of justice.[715] Yet, despite the existence of international and legal guarantees, customary mechanisms sometimes fall short of realizing these ideals.

It is clear that customary mechanisms of justice are no panacea. Beyond the questionable tendency of these mechanisms to reproduce patriarchal traditions that lead to the marginalization of women, customary mechanisms can also be challenged on the basis of their legitimacy. Too often, the legitimacy of these practices is based solely on their perceived "authenticity" and their perceived relevance to local customs and traditions. Yet, traditional processes are sometimes carried out by persons, who, "although at first glance, appear to be the justifiable wielders of power, may, in fact, be abusing this power."[716] In a report on non-state justice systems in Indonesia, the World Bank reveals the power imbalances that sometimes plague these processes. The report discusses how these power struggles and disparities affect the quality of the justice that is delivered, "leaving the weak open to accepting…unwanted resolutions or unable to enforce agreed outcome."[717] This has important implications

[714] United Nations, "Declaration of Basic Principles of Justice For Victims of Crimes and Abuse of Power," 1985, Art 7.
[715] Ibid.
[716] Joanna R. Quinn, "Power to the People? Abuses of Power in Traditional Practices of Acknowledgement in Uganda," a paper presented at the Canadian Political Science Association, Montreal, 2010, 1.
[717] World Bank, "Forging the Middle Ground: Engaging Non-State Justice in Indonesia," 2009, 5, [report online]; accessible at

regarding the legitimacy of these mechanisms, and for the poor and remote populations that often resort to their use.

Many have expressed similar concerns about the unequal power relations that may permeate informal processes of justice. There is, indeed, fear that customary mechanisms may reproduce and reinforce "existing power hierarchies and social structures at the expense of disadvantaged groups."[718] Research has shown that these fears are justified in some cases, where the local elite has managed to capture these processes to represent its interests. In Bangladesh, for instance, a group of influential men control customary justice practices, known as *shalish*, as part of the local governance structure and agreements.[719] These men, however, are often connected to ruling parties and, therefore, have vested interests in how local affairs are run. Next in line are village elders, who often double as moneylenders, and whose impartiality in the process must also be questioned.[720] The Madaripur Legal Aid Association, in Bangladesh, has been very active, and involved in trying to set up its own reformed *shalish* courts, using trained professionals, in an attempt to redress these power imbalances.[721] In Rwanda, Amnesty International is concerned with local power-wielders who manipulate *gacaca* courts and engineer the capture and imprisonment of certain individuals for monetary gain.[722] These same individuals also often use their power and influence to manipulate community participation, including who can talk,

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http://siteresources.worldbank.org/INTINDONESIA/Resources/Publication/280016-1235115695188/5847179-1242977239903/Full.Report.pdf

[718] Wojkowska, "Doing Justice," 20.

[719] DFID, "Non-State Justice," 5.

[720] Ibid., 5.

[721] Madaripur Legal Aid Association, [website]; accessible at http://www.mlaabd.org/; accessed February 10th 2010.

[722] Amnesty International, "Rwanda, Gacaca: A question of justice," 35-36.

and what can or cannot be said.[723] These power imbalances severely shape local justice processes, and may, in fact, undermine communal peace.

This is particularly problematic since customary mechanisms put enormous emphasis on consensus and communal decision-making. Yet, these power imbalances prevent decision-making from being truly communal and consensual when they represent the interests of the few powerful individuals that chair customary mechanisms. In those cases, the ideal of consensus often translates into the imposition of the desire of the few, and serves to "suppress dissent."[724] Customary mechanisms of justice, therefore, are not always representative of the communal will and preferences. It is important to remember that these processes are supposed to provide a forum for the expression of differing opinions with the aim of reaching a consensual decision that will satisfy all. The strength of these mechanisms, in fact, stems from this participatory and consensual dimension. The International Council on Human Rights Policy notes that in the Philippines, communal justice processes, known as *barangay*, are "dominated by lowland Christians and sometimes fail to take account of Muslim or indigenous values…leading to conflicts and misunderstandings."[725] In Somalia, Le Sage explains that minorities including Bantus and Arabs are "heavily discriminated against" within the *xeer* communal justice processes.[726] The views of these minorities are simply, and often, ignored.

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[723] Ibid., 35-36.
[724] Wojkowska, "Doing Justice," 20.
[725] International Council on Human Rights Policy, "When Legal Worlds Overlap: Human Rights, State and Non-State Law," Geneva, 2009, 54, [report online]; accessible at http://www.ichrp.org/files/reports/50/135_report_en.pdf
[726] Andre Le Sage, "Stateless Justice in Somalia Formal and Informal Rule of Law Initiatives," Geneva: Centre for Humanitarian Dialogue, 2005, 36, [report online]; accessible at http://www.ssrnetwork.net/uploaded_files/4397.pdf

Customary mechanisms of justice, it appears, tend to isolate those who are already in a marginalized position, such as the poor, women and children. As explained above, customary mechanisms of justice already have a "tendency not to include women in the decision making process."[727] In the name of communal harmony, the voices of the marginalized are often further silenced. As noted by Wojkowska, "the goal of harmony can be used to force weaker parties to accept agreements and local norms, which in turn can result in discrimination against minorities and women."[728] In Somalia, for instance, a woman who has been raped is generally forced to marry her attacker.[729] As explained earlier, this is perceived as a form of reparation for the family whose honor was violated. The views and fears of the victims are disregarded. Marrying a defiled woman to her attacker is deemed to strengthen communal bonds, and to protect the harmony and survival of the community.[730] It is, therefore, crucial and important to question who, and whose interests, these mechanisms represent. The claim, that the legitimacy of customary mechanisms of justice is rooted in the interests of "the people" and the community as a whole, is simply not always valid.[731]

Finally, the authority and legitimacy of those who chair grassroots, traditional mechanisms of justice, also needs to be questioned. The International Council in Human Rights warns about the fact that "the stereotype that "community" or "traditional" leaders know the local area and people intimately clearly no longer

[727] Kerr and Mobekk, *Peace and Justice,* 160.
[728] Wojkowska, "Doing Justice," 21.
[729] Ibid., 21.
[730] Ibid., 21.
[731] Mark Galanter and Krishnan Jayanth, "Bread for the Poor: Access to Justice and the Rights of the Needy in India," *Hastings Law Journal* 55 no. 2 (2004), 813.

applies."[732] Quinn, for instance, notes the existence of a "disjuncture…between government-appointed chiefs and traditional cultural leaders."[733] Under the colonial powers, chiefs and leaders were sometimes appointed by the state, rather than chosen by community members according to their lineage, as is traditional. According to Mamdani, "customary law consolidated the non-customary power of the chiefs in the colonial administration."[734] As a result, the responsibilities and source of authority of state-appointed chiefs very much differed. The role of clan leaders was undermined. In Somalia, "elders themselves began to be perceived as corrupted when Somali governments, beginning in the colonial era, started to pay the elders to serve state interests in maintaining public order."[735] Urbanization and modernization have also brought new challenges to the role of elders and traditional leaders. As outlined above, concerns have been raised regarding the relevance of customary mechanisms of justice in urbanized areas where the youth may not have strong knowledge of traditional practices and values, and where urbanization has severed social cohesiveness. In addition, "Westernized returnees from the Diaspora often reject their clan's authority," thereby renewing challenges to the perceived authority and legitimacy of customary law and traditional clan leaders.[736] In the face of these challenges, and in spite of the concerns raised by many international agencies, customary mechanisms of justice continue to be used across the world. The World Bank justifies this popularity in the inability of state-centered judicial institutions to

[732] International Council on Human Rights Policy, "When Legal Worlds Overlap," 54.
[733] Quinn, "Power to the People?" 10.
[734] Mamdani, *Citizen and Subject*, 110.
[735] Le Sage, "Stateless Justice in Somalia," 36.
[736] Le Sage, "Stateless Justice in Somalia," 37.

respond to populations' needs, and demand for justice.[737] Faundez explains that in Latin America, indigenous communities view state judicial institutions as the symbol and root of their longstanding social, cultural, economic and political oppression.[738] As a result, they often prefer to use their own traditional processes, as imperfect as they may be.

It is important to note that, at no point, does this thesis argue that customary mechanisms of justice need to be conditioned by basic human rights principles. Concerns raised *vis-à-vis* the marginalization of women and the powerless serve to illustrate some of the difficulties encountered by some customary mechanisms of justice, and shared with other judicial mechanisms. Some of the weaknesses identified in customary mechanisms of justice, including corruption, legitimacy, marginalization of women, lack of accountability, are, in reality "shared with the often under-resourced and over-stretched state justice systems found in such countries."[739] The fact that these mechanisms do not always embody our ideals and conceptions of justice, and rarely fully conform to international legal and human rights standards, is just another reason for engaging with them.

Customary laws, traditions and mechanisms, in fact, often have a profound respect for human life. In this instance, they are no different from any other Western-style mechanisms of justice, which are victims of poor administration, limited funding and corruption. Coomaraswamy wrote "tradition, like all memory of the past, is full of contradictions and alternatives. What we choose to highlight from the past

[737] World Bank, "Forging the Middle Ground," 4.
[738] Julio Faundez, "Access to Justice and Indigenous Communities in Latin America," in *Marginalized Communities and Access to Justice*, ed. Yash Ghai and Jill Cottrell (London: Routledge, 2009).
[739] Dinnen,"'Traditional' Justice Systems in the Pacific," 23.

often reveals more about our judgment than about our ancestors."[740] The lact of respect for women's rights or lack of legitimate authority in some of these customary practices is more often a reflection of power imbalence than of the traditional, local values, which may, in fact, hold a strong respect for women.

This research adopts Thorne's position when she writes that "if we are seeking to guarantee a quality of justice rather than just recreating a formal structure, work with the informal structures becomes an imperative."[741] Feminists scholars, such as Guerrero,[742] Gunning,[743] An'Aim,[744] for example, all underline the need for better respect of women but stress that improvement of women's situations ought to be undertaken from within communities and cultural groups. These changes should not be the subjet of the "outside" and the "universal." As noted by Coomaraswamy, "if cultures are to be evaluated and judged, it must not be from the vantage point of an arrogant outsider."[745] An'Aim maintains that there are plenty of women's groups throughout indigenous communities and developing countries, which fight for the improvement of their status. The international community's intervention, therefore, should be limited to the support of these local initiatives.[746]

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[740] Radhika Coomaraswamy, "Are Women's Rights Universal? Re-Engaging the Local," *Meridians* 3 no.1 (2002), 7.
[741] Thorne, "Rule of Law through Imperfect Bodies," 7.
[742] Maria Anna Guerrero, "Civil Rights vs. Sovereignty: Native American Women in Life and Land Struggles." In *Feminist Genealogies, Colonial Legacies, Democratic Futures*, edited by Chandra Mohanty, 101-24. New York: Routledge, 1997.
[743] Isabelle Gunning, "Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries," *Columbia Human Rights Law Review* 23 (1991-1992): 189-248.
[744] Abdullah An'Naim, "State Responsibility under International Human Rights Law to Change Religious and Customary Law." In *Human Rights of Women*, edited by Rebecca Cook, 167-188. Philadelphia: University of Pennsylvania Press, 1994.
[745] Coomaraswamy, "Are Women's Rights Universal," 4.
[746] An'Naim, "State Responsibility under International Human Rights Law."

Reaching Common Ground

Engaging with customary mechanisms of justice is crucial. Transitional justice scholarship can and must play a constructive role in the process. As this research illustrates, customary law and customary mechanisms of justice continue to be central to the lives of many around the world, by indigenous communities in democratic, peaceful settings, such as New Zealand and Australia, as well as by the general population in post-conflict situations, such as in Burundi, Somalia, Rwanda and Uganda. As a result, the effectiveness of these mechanisms in achieving justice ought to be a central concern of transitional justice research. Yet the dominant paradigm remains anchored in a top-down, legalistic, state-centered approach to doing justice.[747] Over the years, the international community has focused its assistance around the recreation, and strengthening of formal state institutions, including courts, security forces, and the rule of law. This tendency reflects our own conception, and expectations of what justice ought to look like, in other words, "formal, predictable, and equitable, with strict procedures and accountability at every level."[748]

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[747] Stephen Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," Carnegie Carnegie Paper no. 41, Endowment for International Peace, 2003, [research paper online]; accessible at http://carnegieendowment.org/2003/10/14/beyond-rule-of-law-orthodoxy-legal-empowerment-alternative/ex5 Despite efforts to move beyond the centrality of states in international law, which is visible, for instance, through the promotion and protection of universal human rights, states continue to be the primary actors and authority in the international system and laws. Indeed, states, not individuals, are the signatories of international treaties and documents, such as the UN Universal Declaration of Human Rights, and can, to a large extent, chose to abide by them or not. For a discussion of this, see Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2003); Stephen Krasner, *Problematic Sovereignty: Contested Rules and Political Responsibilities* (New York: Columbia University Press, 2001).

[748] Thorne, "Rule of Law through Imperfect Bodies," 1.

Generally, however, these ideals do not correspond to local realities and preferences. In a number of post-conflict situations, resources are scarce, and the judicial system is in shambles. In other cases, such as in New Zealand and Australia, indigenous communities sometimes mistrust state institutions, and prefer to rely upon their own ancestral practices to carry out justice. There is an undeniably increasing trend towards the promotion of customary mechanisms of justice, along with other hybrid mechanisms, and legal pluralism.[749] Unfortunately, this movement towards the inclusion of local norms and practices in the promotion of justice and the rule of law remains constrained within the legal paradigm afore mentioned.[750] As a result, customary mechanisms of justice are often criticized for not meeting international legal standards, including fair standards, transparency, and equality of all before the law. It is important, however, to be clear on the criteria used to evaluate such things as fair standards, legitimacy and equality before the law, as they may take different shapes in different contexts. Evaluating the legitimacy of judicial mechanisms from a rational-legal perspective or from a 'traditional,' 'local' or indigenous perpective is likely to wield different results. In the case of New Zealand, for instance, Kaumuatuas, as opposed to legally trained lawyers, are perceived as the legitimate source of authority when carrying out justice.

This study argues that failing to engage with these mechanisms and simply disparaging them contributes to the further marginalization of customary law and practices, often pushing them underground, rather than assisting them. It adopts Betts' view, which argues that instead of "reifying notions of legal positivism, there should

[749] Phil Clark, "Hybridity, Holism and 'Traditional' Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda," *George Washington International Law Review* 39 (2007), 765.
[750] David Dyzenhaus,"Transitional Justice," *International Jounal of Constitutional Law* 1 (2003), 165.

be greater awareness of the cultural and historical contingency of the successful application of justice at the local level."[751] This means that transitional justice scholars should capture this opportunity to engage with customary law and practices in an unbiased and indiscriminatory manner, so as to better understand their underlying assumptions. While various customary mechanisms may not embody notions of procedural fairness, transparency (in the rational-legal sense) and other legal and human rights principles, they illustrate how local populations perceive justice. It is important to keep in mind that different legal traditions function in various ways, and that "what may appear as a failing—from the perspective of one tradition—could well be regarded as a virtue from the perspective of another tradition."[752] As argued by Thorne, "there is a case for accepting that the local perception of justice [is] equitable in more ways than just the strictly legal one."[753] It remains for transitional justice scholars to explore.

Transitional justice efforts and scholarship must take into account the specific characteristics and attributes of the traditions and practices of the countries in which judicial reforms are launched. At the most basic level, credibility, in the eyes of the local population, is vital for any institutions and practices, if justice is to be successfully carried out. As noted by Le Sage, any justice system that does not take into account local realities and needs, as well as engage local stakeholders will most

[751] Alexander Betts, "Should Approaches to Post-Conflict Justice and Reconciliation Be Determined Globally, Nationally or Locally?" *The European Journal of Development Research* 17 no. 4 (2005), 750.
[752] Julio Faundez, "Rule of Law or Washington Consensus: The Evolution of the World Bank's Approach to Legal and Judicial Reform," *Warwick School of Law Legal Studies Research Paper* (2009), 5.
[753] Thorne, "Rule of Law through Imperfect Bodies," 3.

likely fail.[754] In many of cases, as in New Zealand, Somalia and elsewhere, customary mechanisms of justice do not function in complete isolation from state structures, but, rather, complement the state's judicial system in the sense that they fill in the void them by it.

Again, it is important to reiterate that respecting and engaging with local norms and customary practices should not serve as an excuse for the violation of some basic rights. Access to, and the right to justice necessitates that the process and its outcome be fair, representative, equitable, and accountable to all, in a sense that make sense to the local population rather than according to some hightened universal standards. For this reason a middle ground must and can be created. For instance, this could be accomplished by marrying "the social accessibility, authority and legitimacy of informal processes with accountability to the community and the state."[755] This can only be achieved with proper consultation with and engagement of community members, rather than the imposition of a state-centered approach.

In order to reach common ground and start a dialogue about how local and customary practices can be both empowered and respectful of the rights all, "unhelpful dichotomies such as 'relativism versus universalism' and 'retribution versus restoration' should be discarded in favour of a more nuanced understanding of the dynamic relationship between the global, national and local."[756] After all, traditions and customary practices are flexible, and always changing, and adapting to circumstances. Dinnen notes that respect for human rights is not alien to a number of

[754] Le Sage, "Stateless Justice in Somalia," 9.
[755] Ibid., 9.
[756] Betts, "Should Approaches to Post-Conflict Justice," 750.

these customary practices, which are rooted in a profound respect for humanity.[757] The altruistic nature of a number of these traditions, coupled with international programs designed to raise awareness, surrounding women's rights for instance, may help accelerate change and respect for some of these norms.[758] Further research on customary mechanisms of justice, and the conceptions of justice they embody is needed before anything else can be achieved. It may just be that deontological approaches to justice and the legalistic understanding of justice adopted by transitional justice scholars is simply imcommensurable to the philosophies of justice embodied in customary mechanisms of justice. Yet, we must understand these practices rather than simply trying to co-opt them. Furthermore, when engaging in research on customary law and customary mechanisms, we must not forget the need to "turn the lens of observation back upon ourselves and to question the certitude of the international legalist worldview."[759] Respectfully engaging and exploring customary law and practices may provide transitional justice scholars with the opportunity to do just that.

[757] Dinnen, "Traditional Justice Systems in the Pacific," 2.
[758] Ibid., 2.
[759] Ariel Meyerstein, "Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality," *Law and Social Inquiry* 32 no. 2 (2007), 501.

CHAPTER SEVEN

METHODOLOGY

When working and conducting research with indigenous communities, it is important to be aware of the potentially harmful and colonizing effect social science research has had, and may still have on these communities.[760] Early explorers and observers of New Zealand put forward distorted images and accounts of Mãori ways and social reality. For instance, the Mãori were described as "savage and barbaric"[761] and a "Neolithic folk."[762] Little was done to engage and understand the Mãori. Mãori society was observed and dissected according to unquestioned epistemological assumptions, and observations and research were "validated by scientific method and colonial affirmation."[763] As a result, it is crucial when researching indigenous knowledge and communities to recognize the potentially colonizing effect of research,[764] which has often been used as an instrument in "defining legitimate knowledge."[765]

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[760] Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999); Tri-Council Policy Statement, "Research Involving Aboriginal Peoples," in *Ethical Conduct for Research Involving Humans: Interagency Secretariat on Research Ethics*, 2005.
[761] Eldon Best, *The Mãori as He Was: A Brief Account of Mãori Life as It Was in Pre European Days* (Wellington: New Zealand Board of Science, 1934), 87.
[762] Best, *The Mãori as he was*, 87
[763] Tuhiwai Smith, *Decolonizing Methodologies*, 170.
[764] Helen Moewaka Barnes, "Kaupapa Mãori: Explaining the Ordinary," *Whariki Research Group* (Auckland: Alcohol & Public Health Research Unit, The University of Auckland, 2006).
[765] Tuhiwai Smith, *Decolonizing Methodologies*, 173.

For this reason, a research methodology that offered "internal validity from the perspective of the community being studied and external validity according to accepted norms of research practices" was adopted.[766] This was important in showing respect for these communities' values, wisdom and knowledge, which often differ from the Western way of knowing and doing things.[767] Indeed, the Mãori, and Aboriginal Peoples elsewhere, have distinctive epistemological foundations that frame the way they see the world and how they relate to it.[768] When thinking about "justice," the questions asked, the solutions sought and the lens used are consequently different.

Kaupapa Mãori, a Mãori methodology committed to the promotion of Mãori knowledge from a Mãori point of view, inspired my approach to this research. *Kaupapa Mãori* is primarily concerned with the transmission and protection of Mãori knowledge and heritage.[769] It asserts the legitimacy and intrinsic value of Mãori epistemology and knowledge.[770] This approach challenges accepted norms and assumptions about knowledge and the way it is constructed. It also seeks the promotion of Mãori knowledge, from a Mãori point of view.[771] *Kaupapa Mãori* influenced this research, in that it shed light on the power dynamics that seep through research, the construction of knowledge, and "the ways in which dominant groups

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[766] Jarem Sawatsky, *The Ethic of Traditional Communities and the spirit of Healing justice* (London: Kingsley, 2009).
[767] Sawatsky, *The Ethic of Traditional Communities,* 75; Government of Canada, "Appendix E: Ethical Guidelines for Research," Royal Commission on Aboriginal Peoples, 1996.
[768] Tuhiwai Smith, *Decolonizing Methodologies*, 187; Tri-Council Policy Statement, "Research Involving Aboriginal Peoples."
[769] Marie Battiste and James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Press, 2000).
[770] Moewaka Barnes, "Kaupapa Mãori," 8.
[771] Russell Bishop, *Collaborative Research Stories: Whakawhanaungatanga* (Palmerston North: Dunmore Press, 1996).

construct concepts of common sense."[772] This research breaks away from this by attempting to contribute to "a body of knowledge that asserts a Māori worldview as legitimate… [and] move toward a greater acceptance of what Māori see as 'successful' and 'robust.'"[773]

This study, therefore, employs an interpretive approach to reveal the multi-faceted dimensions of "justice" rather than one that draws on formal quantitative methods. An interpretive analysis supports the belief that there exist "diverse images of reality that need to be understood inter-subjectively," thereby providing a space for exploring and relaying non-Western ways of knowing.[774] This approach to doing research stems from the belief that interpretation permeates every step, and aspect of research and social life. All human action is context specific and imbued with meaning. As Clifford Geertz put it, "man is an animal suspended in webs of significance he himself has spun."[775] This means that social science and interpretive research is about finding meaning, making sense and providing an intelligible account of these "structures of significance," that make up a culture or beliefs.[776]

The interpretive approach to research aligns closely with *Kaupapa Māori* in its distrust towards any method, approach or theory that claims "a universal and general claim to authoritative knowledge."[777] In other words, it recognizes the plurality of dimensions and interpretations reality may hold without giving precedence to one over another. An interpretive approach values and emphasizes the

[772] Tuhiwai Smith, *Decolonizing Methodologies*, 186.
[773] Moewaka Barnes, "Kaupapa Māori," 8.
[774] Ho-Wong Jeong, *Peace and Conflict Studies: An Introduction*. Ashgate: Aldershot, 2000.
[775] Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 5.
[776] Clifford Geertz, *Thick Description: Toward and Interpretative Theory of Culture* (New York: Basic Books, 1973), 217.
[777] Laurel Richardson, "Postmodern Social Theory: Representational Practices," *Sociological Theory* 9 (1991), 173.

fact that different ontological and epistemological approaches inform and influence the way one comprehends and conceptualizes reality. Different ontological and epistemological positions define the kind of questions that are asked and the kind of research and findings that are ultimately acceptable. Adopting an interpretive lens allowed me to appreciate the necessity for a culturally sensitive approach to doing research in indigenous communities and to understanding and making sense of Mãori conception of justice.[778]

This research used both secondary as well as primary sources. Before, as well as during, and after, fieldwork in New Zealand, research papers, field reports, conference proceedings, and speeches along with various legal documents available in both Canada and New Zealand were collected and analysed. I specifically collected documents, legal briefs and research notes that relayed the existence of Mãori customary practices and their recognition, or the lack thereof, by the New Zealand government. A number of anthropological, historical and linguistic sources were consulted to gain a knowledge of the Mãori culture, the colonial history of New Zealand and to become familiar with the Mãori language.

The Folk Bayesian approach to doing and analyzing research was employed. This allowed me to move "back and forth between theory and data, rather than taking a single pass through the data."[779] In this way, the evidence gathered through ethnographic research helped confirm, test and develop the hypothesis around which this study is anchored. Going back and forth through the findings allowed for the

[778] Tri-Council Policy Statement, "Research Involving Aboriginal Peoples."
[779] Timothy McKeown, "Case Studies and the Statistical Worldview: Review of King, Keohane, and Verba's Designing Social Inquiry: Scientific Inference in Qualitative Research," *International Organization* 53 no. 1 (1999).

refining of the theory and conceptual formulation of an alternative approach to justice.

Three months of ethnographic research were conducted in New Zealand, where I acquired a better knowledge and understanding of events as well as local customs, behaviours and beliefs that inform the communities' thinking about "justice." Conducting ethnographic research was instrumental in acquiring a sense of the strength, credence and layers of the Mãori culture as well as an introduction to its "web of meanings."[780] During my stay in New Zealand, I was affiliated with the University of Auckland, where I had access to the university's library and its extensive collection of sources on New Zealand's colonial history and Mãori cultural practices. Auckland, the largest city in New Zealand, was a convenient place to contact and interview individuals from a variety of backgrounds. I did, nonetheless, travel to the capital, Wellington, where I interviewed a Mãori MP and to Rotorua, which has a large Mãori population. During my stay in Auckland, I joined the Law School's field trip to the University's *Waipapa Marae*.[781] I was invited to visit *whare whakairo*[782] and was introduced to the symbolism of the meetinghouse and its importance in thinking about "justice" and jurisprudence in a way that would accommodate a Mãori worldview. I also attended a week-long conference organized by the New Zealand Mãori Centre of Research Excellence, on the topic of Indigenous Traditional Knowledge, where a number of Mãori academics, activists and community members presented their views and experiences. This gave me access to a

[780] Geertz, *The Interpretation of Cultures*.
[781] A *Marae* is a traditional Mãori meetinghouse. *Waipapa Marae* is the name of the University of Auckland's meetinghouse.
[782] *Whare whakairo* is another word for meetinghouse.

range of opinions and allowed me to hear the views of some prominent Mãori community members who were difficult to reach or refused to be interviewed.

Throughout, I continued to consult secondary sources and obtained a number of unpublished governments briefs and reports from the Ministry of Mãori Development as well as the New Zealand Law Commission, which had investigated a possible accommodation of Mãori practices within the national legal system. I broadened my knowledge of the Mãori culture and history by participating in Mãori cultural practices such as *Powhiri*[783] and by visiting Mãori communities, families, museums and sites of cultural significance to the Mãori.[784] By visiting and staying with Mãori families, I had the opportunity to observe Mãori ways in everyday life. This helped me get a deeper sense and understanding of the Mãori culture and its credence in contemporary New Zealand society. It gave me a unique vantage point from which to experience and witness the things that my Mãori respondents told me during interviews. It also allowed me to further appreciate how Mãori principles influence their thinking about justice. In addition, I read national newspapers daily to get a better awareness of the relationship between the *pakeha*[785] and the Mãori and recorded daily observations and impression through journaling.

Many of the Mãori I approached were often suspicious and initially reluctant to take part in the study. I learnt, during these 12 weeks, that conducting research within indigenous communities required breaking away from the traditionally held observer/subject or researcher/researched approaches to conducting research.

[783] A *Powhiri* is a traditional welcome to the *Marae*, and community.
[784] This allowed me to be familiar with the context, places and items that sometimes came up in my interviews with Mãori cultural leaders, for instance.
[785] *Pakeha* is a term widely used in New Zealand, as well as the literature to refer to 'white people.'

Sawatsky explains that conducting research with indigenous communities requires "developing relationships rather than being a neutral observer."[786] Māori would sometimes say to me a variation of "Your steps on my *whariki*, your respect for my home, open my doors and windows."[787] In a discussion of this proverb, Barnes explains that "information and knowledge cannot be asked for without respecting those who choose to share and without an understanding of the responsibilities and accountabilities of researchers."[788] One of the implications of this for researchers is that gaining access to communities and Māori knowledge is a slow process. It requires gaining trust, showing respect, accountability and giving back to communities by "providing a tool for assisting positive transformation of our [Māori] conditions."[789] I did my best to gain my respondents' trust and respect, and actively shared my own French heritage with them, for instance, by teaching an introductory French class at a local school. I often traveled to Māori homes to meet with respondents and their families. I found that to be the best way to gain access to respondents.

I left Canada intending to rely on a directed snowball sampling method to obtain interviews with Māori, once in New Zealand.[790] I had planned to select an initial sample of respondents based on their knowledge and/or experience of the processes investigated and the Māori culture, in the hope that they would refer me to

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[786] Sawatsky, *The Ethic of Traditional Communities*.
[787] Moewaka Barnes, "Kaupapa Māori," 2. In the original Māori, "*Ko tau hikoi i runga i oku whariki, Ko tau noho i toku whare, E haukina ai toku tatau toku matapihi."*
[788] Moewaka Barnes, "Kaupapa Māori," 2.
[789] Graham Hingangaroa Smith,"Kaupapa Māori Theory: Theorizing Indigenous Transformation of Education & Schooling," a paper presented at the Kaupapa Māori Symposium, Auckland, December 2003; Sawatsky, *The Ethic of Traditional Communities*.
[790] Tansey Oisín, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling," *PS: Political Science and Politics* 40 no. 4 (2007): 1-24.

other potential respondents. I started, for instance, by contacting Māori academics and students at the University of Auckland, as well as Māori governmental officials, who, in turn, suggested or introduced me to other potential respondents whose knowledge and experiences would be relevant to my inquiry. As outlined above, however, obtaining interviews with Māori proved to be more difficult than I had anticipated. Approximately one quarter of the individuals contacted agreed to be interviewed. I also found that simply being referred to respondents was insufficient. It was often necessary for a previous participant to take me to meet another potential respondents. This required participants to take the time, often out of their working hours, to personally introduce and recommend me to potential respondents. The Māori I tried to contact all wanted to know who they would be talking to, and as a result, wanted to meet with me to hear about my research and my own personal background before accepting to take part in my research. And while gaining access to Māori communities and respondents proved to be a slow process, I ended up gathering a wealth of information from a broad cross-section of respondents. I obtained information and opinions that may not have been publicly expressed and entered into contact with less visible, yet equally knowledgeable, individuals. Most importantly, part of the information sought out, such as traditional beliefs and practices, is inscribed within an oral tradition and therefore only accessible as such

The questions asked were purposely open-ended to accommodate a diversity of responses. I wanted to know about my respondents' level of activity within their community, their knowledge of the Māori language and Māori cultural beliefs and practices, as well as their experience and knowledge of customary mechanisms of

justice. In a few cases, participants asked that our conversation not be recorded, or that their identity remain confidential. For this reason, this work only reveals the identity of respondents who agreed to have their identity disclosed. By the end of three months spent in New Zealand, thirty-three open-ended interviews with Mãori individuals had been conducted.

I purposefully chose to interview only Mãori individuals, in accordance with the values of *Kaupapa Mãori*, because I strived to get a glimpse of the Mãori culture and conception of "justice" from a Mãori perspective. All participants expressed great pride in being Mãori. In total, nine participants were under the age of thirty, and four were older than sixty, two of whom were *Kamautuas.*[791] It appeared, however, that individuals below the age of thirty and above the age of sixty often had only basic knowledge of the Mãori language and Mãori culture. Those individuals above the age of sixty were the ones who had been more severely affected by New Zealand's assimilationist policies in place well until the Mãori renaissance in the 1970s. Youth under the age of thirty also showed huge discrepancies in degrees of knowledge of the language and the Mãori culture. As a result, the majority of participants were between the ages of thirty and sixty, and were active in several sectors, including academia, the judiciary, parliament, tourism. Individuals belonging to twenty different *iwi*, with the majority from Nga Puhi, Ngati Porou, Ngati Whatua, Te Arawa and Tuhoe, were interviewed. These *iwis* are located in the Northern and Northeastern region of the North Island. They are all within several hours' driving distance of Auckland, the

[791] Kaumatuas are elders who play a leading role in the organization of community. They usually belong to the oldest generation of the community.

only major urban center in the area, which explains why respondents usually lived and/or worked in Auckland.

CHAPTER EIGHT

MÃORI HISTORY AND CUSTOMARY LAW

Early European explorers of New Zealand ignored the existence of Māori customary law and often viewed the Māori as a violent people.[792] In Captain Cook's words, war was considered to be the Māori's "principal profession."[793] Eldon Best, one of the first European explorers and observers, described the Māori as an "uncultured," "savage," "Neolithic folk," and "barbaric society."[794] His work was reflective of the ethnocentric bias of the work produced by early explorers and anthropologists. The idea that there were no or few social norms and law in indigenous and pre-contact societies was a common and persistent one in European jurisprudence.[795] Quince explains that Europeans brought with them a different system of laws "centered around strongly defined notions of individuality" and visible legal institutions.[796] What they failed to see, and later to recognize, was the existence of a complete system of beliefs and values regulating social interaction. *Tikanga Māori*, or the Māori way of doing things,[797] became marginalized as the state's judicial system

[792] Christina Thompson, "A Dangerous People Whose Only Occupation Is War: Māori and Pakeha in 19th Century New Zealand," *The Journal of Pacific History* 32 no. 1 (1997), 11-112.
[793] Alexander Wyclif Reed, and Alfred Hamish Reed eds., *Captain Cook in New Zealand: Extracts from the Journals of Captain James Cook* (Wellington: Dalton Books, 1969), 252.
[794] Eldon, Best *The Māori as He Was*, 86-89.
[795] Alex Frame and Paul Meredith, "Performance and Māori Customary Legal Process," a paper presented at the Symposium on Concepts and Institutions of Polynesian Customary Law, University of Auckland, October 2004, 4.
[796] Khylee Quince, "Māori Disputes and Their Resolutions," in *Dispute Resolution in New Zealand*, ed. Peter Spiller (Auckland: Oxford University Press, 2007), 13.
[797] Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland,

strengthened its hold and Mãori principles and practices were considered "quaint custom, belittled, or ignored."[798] The tumultuous relationship between the Mãori and European explorers, and *tikanga Mãori*, are explored below.

This chapter is important for two reasons. First, there have been, so far, very few recent and systematic examinations of the Mãori conception of justice and the state of *tikanga Mãori* today. Second, this chapter substantiates, using field research findings, the argument that customary law and practices, and in this case *tikanga Mãori* adopt a view of justice that does not easily fit within the existing deontological-liberal framework.

Mãori History

The Mãori were New Zealand's first settlers. It is estimated that the Mãori arrived in New Zealand, from Polynesia, about 1000 years ago.[799] It was not until 1662 that the first documented European encounter took place, with the arrival of the Dutch navigator Abel Tasman.[800] This was followed by the arrival of French, British and American explorers in the late 17th and early 18th centuries.[801] New Zealand quickly became the centre of a hub of activities surrounding whale trade and hunting.[802] While "early relationships between the Mãori and Europeans were usually of mutual

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interview with author, May 10 2010, Auckland, New Zealand.
[798] Quince, "Mãori Disputes," 15.
[799] Ranginui Walker, *Ka Whawhai Tonu Matou Struggle without End* (New Zealand: Penguin: 2004), 28.
[800] The Encyclopedia of New Zealand, "European Discovery of New Zealand," [website]; http://www.teara.govt.nz/en/european-discovery-of-new-zealand; accessed August 21st 2010.
[801] Ibid.
[802] Geoffrey Rice, *The Oxford History of New Zealand* (Oxford: Oxford University Press, 1993).

convenience and economic benefit,"[803] the ever-increasing arrival of explorers resulted in a number of violent incidents between the Mãori and the traders,[804] which culminated in the Musket War (1820-1835) and the New Zealand Wars (1845-1872).[805]

In 1840, 540 Mãori chiefs and Captain William Hobson, representative of the British Crown at Waitangi, ratified the Treaty of Waitangi, which became the nation's founding document.[806] It constituted an agreement between the British Crown and the Mãori, and established British law in New Zealand, while the Mãori understood the treaty as guaranteeing Mãori authority over their land and culture. Different understandings of the Treaty, however, have long been the subject of debate and continue to affect the politics of today. The treaty, composed only of three articles, was written in both English and Mãori, but resulted in vastly different understandings of what it precisely entailed.[807] What may appear, at first, as a mere question of linguistics has had tremendous implications for the development of the Mãori-*Pakeha* relationship and New Zealand's history.

While early explorers to New Zealand did not recognize the existence of a value-based system of social control, the Treaty of Waitangi did guarantee the protection of Mãori culture and customs.[808] Mãori customary law was also, to a certain extent, tolerated under the Native Exemption Ordinance of 1844, which

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[803] Geoffrey Rice, *The Oxford History of New Zealand*.
[804] Thompson, "A Dangerous People," 111.
[805] Ron Crosby and Michael King, *The Musket Wars a History of Inter-Iwi Conflict 1806-45* (New Zealand: Raupo, 1999).
[806] Waitangi Tribunal *Te Ropu Whakamana I Te Tiriti O Waitangi*, "The Treaty of Waitangi,"[website]; http://www.waitangi-tribunal.govt.nz/treaty/; accessed February 8th 2010.
[807] Linda Archibald, *Decolonization and Healing: Indigenous Experiences in the United States, New Zealand, Australia and Greenland* (Ottawa: Aboriginal Healing Foundation, 2006).
[808] Government of New Zealand, "Treaty of Waitangi."

stipulated that the Crown was not required to intervene in Mãori affairs, and, in crimes committed against Mãori, by Mãori.[809] In an a poor adaptation of the principle of *utu,*[810] and exclusively for cases of crimes committed against *Pakeha,* the Crown allowed any Mãori convicted of theft to pay four times the value of the stolen good in lieu of punishment.[811] The 1852 New Zealand Constitution further specified that Mãori laws and customs were to be preserved so long as these were not "repugnant to the principles of humanity."[812] Latent to all these legislative acts was the belief that "English law and culture were innately superior," and that customary practices were to be subsumed to the dominant culture.[813] As a result, a mixed measure of "denial, suppression, assimilation and co-option put Mãori customs, values and practices under great stress."[814] This was particularly visible through land tenure disputes between the Mãori and the Crown, which incrementally ignored customary land titles in favor of its own statutory claims.

Mãori resistance to the British, in the years following the ratification of the Treaty of Waitangi, gave way to a set of policies designed to eliminate the Mãori identity and unity in the struggle against the colonial powers. For instance, a Native School Act was passed in 1867, under which the government set up state controlled, secular schools in Mãori communities.[815] The Act required that only English be

[809] Government of New Zealand, "*He Hinatore Ki Te Ao*; A Mãori Glimpse at the Mãori World," Ministry of Justice, Wellington, 2001, 16.
[810] *Utu* can be translated as the principle of reciprocity.
[811] Joseph Robert and Tom Bennion, "Mãori Values and Tikanga Consultation under the Rma 1991 and the Local Government Bill: Possible Ways Forward," a paper presented at the Inaugural Mãori Legal Forum Conference, Wellington, 9-10 October 2002, 3.
[812] Government of New Zealand, "He Hinatore Ki Te Ao Mãori," 21.
[813] Ibid., 22.
[814] Ibid., 22.
[815] Archibald, *Decolonization and Healing.*

taught and used in the education of Māori children.[816] Often, corporal punishment was used to enforce such cultural and linguistic surrender.[817] The intensification of the New Zealand Wars forced the closure of these schools in 1865, and gave way to even more aggressive government policies including the New Zealand Settlement Act, which allowed for the confiscation of Māori land by the government, as a form of punishment for rebellion.[818]

Despite years of oppression and policies aiming at cultural assimilation, *tikanga Māori* did not die out. Adherence to this system helped preserve a social system based on mutual expectations and collective responsibility, aimed at avoiding dispute.[819] The strength of *tikanga Māori* comes from the fact that it is not a separate set of laws, but rather a worldview and set of beliefs sustained through "the interaction and arrangement of the people that are to be the subjects of the law."[820] It survived "outside of formalized structures"[821] and in "Māori controlled environments such as *marae* and *hui*, in a significant number of Māori homes," where the state could not meddle.[822] In the words of Quince, New Zealand ended up with a "kind of accidental pluralism," whereby the traditional Māori legal system continued to operate in non-

[816] Archibald, *Decolonization and Healing.*
[817] Walker, *Ka Whawhai Tonu Matou.*
[818] Alexander McKay, "A Compendium of Official Documents Relative to Native Affairs in the South Island," Government of New Zealand, 1872.
[819] Wayne Rumbles, "Seeing Law in Pre-European Society," custom law project draft paper, Hamilton, Waikato University, 3, [paper online]; accessible at http://lianz.waikato.ac.nz/PAPERS/wayne/what%20is%20custrom%20law.pdf
[820] Alex Frame, *Grey and Iwikau: A Journey into Customs* (Wellington: Victoria University Press, 2002), 5.
[821] Juan Tauri and Allison Morris, "Re-Forming Justice: The Potential of Māori Processes," in *Restorative Justice: Critical Issues*, ed. Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmarland (London: The Open University, 2003), 23.
[822] Government of New Zealand, "*He Hinatore Ki Te Ao Māori*," 27; Tauri and Allison, *"Re-forming Justice"* 45.

urban areas, without the knowledge and sanction of the state.[823] Throughout the years, the relationship entertained between Mãori customary law and the New Zealand legal system has remained ambiguous, with the possibility of giving full and formal recognition to *tikanga Mãori* only ever half-heartedly considered.[824]

Dispute and resentment between the Mãori and the increasing number of European settlers continued for many years.[825] Belgrave notes that the ability of Mãori to officially exercise customary law and practices has been "restricted by loss of resources, by lack of recognition by the courts and by Parliament and by persistent and prolonged promotion of individualism and assimilation."[826] With the exodus from rural communities to urban centers in the mid-twentieth century, "the long arm of the colonial legal system began to be comprehensively extended to Mãori."[827] It was not until the 1970s, feeling increasingly economically marginalized, that Mãori started to call for the terms of the Treaty to be honored.[828] The Mãori "renaissance" signaled an era of protests and expression of grievances,[829] which culminated in the creation of the Waitangi Tribunal[830] and Mãori Party.[831]

The Mãori "renaissance" also directly contributed to the revival and legal recognition of Mãori culture and, by the same token, *tikanga Mãori*. This revival of

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[823] Khylee Quince, "Mãori and the Criminal Justice System in New Zealand" in *The New Zealand Criminal Justice System*, ed. John Tolmie and Warren Brookbanks (Auckland: LexisNexis, 2007), 10.
[824] Michael Belgrave, "Mãori Customary Law: From Extenguishment to Enduring Recognition," The New Zealand Law Commission Library, 1996, 12.
[825] Allan Ward, "Historical Claims under the Treaty of Waitangi: Avenue of Reconciliation or Source of New Divisions?" *The Journal of Pacific History* 28 no. 2 (1993): 181-203.
[826] Belgrave, "Mãori Customary Law," 12.
[827] Quince, "Mãori and the Criminal Justice System," 10.
[828] Andrew Sharp, *Justice and the Mãori: The Philosophy and Practice of Mãori Claims in New Zealand since the 1970s* (New Zealand: Oxford University Press, 1997).
[829] Ward, "Historical Claims under the Treaty of Waitangi."
[830] George Barton, "New Zealand's Courts and Tribunals," in Pacific Courts and Legal Systems, ed. Guy Powles and Mere Pulea (Victoria: University of South Pacific, 1988).
[831] Mãori Party, [website]; accessible at http://www.maoriparty.org/; accessed April 8th 2010.

Mãori culture and customs took different forms, and was most visible through the *Kohanga reo* and *Kura Kaupapa* Mãori movements, which promoted Mãori language in schools and institutions. Recognition of Mãori customs *vis-à-vis* land tenure was given more serious acknowledgment through the Mãori Land Court and the Waitangi Tribunal. Both reviewed and redressed land claims, in the name of the Treaty of Waitangi. The 1962 Mãori Community Development Act even established Mãori councils and district committees through which Mãori were given the authority to employ Mãori customary law by ways of by-laws.[832] The most significant recognition of the value of *tikanga* and its principles in terms of justice, was the creation of Family Group Conferencing (FGC) under the Children, Young Persons and Their Families Act 1989, and, to a certain extent, the Sentencing Act 2002.[833]

The purpose of setting up FGCs and the Sentencing Act 2002 was twofold: First, the New Zealand government sought to address the high number of young, usually Mãori, offenders in the legal system and limit recidivism.[834] Secondly, the government saw the restorative conferencing model as a way to reform the existing judicial system into "a modern system of justice, which is culturally appropriate," and thereby incorporate some of the values of New Zealand's indigenous population in the legal system.[835] A report published by the Law Commission of New Zealand stated that, in accordance with the spirit and terms of the Waitangi Treaty, "the law

[832] Tauri and Allison, "Re-forming Justice," 45.
[833] Frederick McElrea, "The New Zealand Model of Family Group Conferencing," *European Journal on Criminal Policy and Research* 6 no. 4 (1998), 528.
[834] Carolyn Henwood, "The Children, Young Persons and Their Families Act 1989 (NZ): A Judicial Perspective in 1997," a paper presented at the Judicial Commission of New South Wales Seminar Series, Sydney, July 1997.
[835] The Youth Court of New Zealand, "Overview of Youth Justice Principles and Processes," [website]; accessible at http://www.justice.govt.nz/courts/youth/about-the-youth-court/overview-of-principles-and-process (accessed June 4th 2010); accessed June 12th 2010.

and legal and political institutions should reflect the values underlying *tikanga*."[836] In many ways, the creation of FGCs and the derived restorative initiatives proved to be "a test case of the ability of the present justice system to adapt to the needs of indigenous peoples."[837]

Today, New Zealand is a bi-cultural nation. It has a diverse, multi-cultural population of 4 million people, 15% of which are Mãori.[838] A number of laws have been passed and institutions set up to acknowledge the Mãori culture and the social and political difficulties encountered by the Mãori population due to the initial colonization and the assimilationist policies of subsequent governments. Yet, despite these measures, the Mãori continue to be over-represented in jails, and often have a lower socioeconomic status and poorer health than the rest of the population.[839] While the Mãori renaissance of the 1970s has been successful in repositioning the legitimacy of Mãori culture and language, it has been far less successful in addressing the social and economic inequalities experienced by Mãori.

Tikanga Mãori

While *tikanga* corresponds to a widely shared set of beliefs as to what is right and wrong, its application or *kawa* may differ from *iwi* to *iwi*.[840] One must abide by the

[836] The New Zealand Law Commission, "Mãori Custom and Values in New Zealand Law," Wellington, 2001, 88. Italics added, [report online]; accessible at http://www.vanuatu.usp.ac.fj/library/Online/USP%20Only/Customary%20Law/Maori.pdf
[837] Tauri and Allison, "Re-forming Justice," 48.
[838] Archibald, *Decolonization and Healing*, 14.
[839] Nicole Coupe, "Mãori Suicide Prevention in New Zealand," *Pacific Health Dialog: Journal of Community Health and Clinical Medecine for the Pacific* 7 no. 1 (2000).
[840] Ibid., 7; Alex Frame, *Grey and Iwikau: A Journey into Customs* (Wellington: Victoria University Press, 2002), 5. Iwi is the largest Mãori community.

kawa or protocol of the *iwi* whose land on which one is standing.[841] The protocol may affect practical aspects of community life,[842] including for instance, when it is proper to call for a *hui*[843] or when and whether women can talk during *hui*.[844] As a result, while the ideals and values that make up *tikanga* are vastly similar from *iwi* to *iwi*, Mead notes that "what we see happening when *tikanga* is put into practice is not necessarily the ideal manifestation of that *tikanga*."[845] This variety in protocols between *iwi*, however, does not preclude the existence of common, fundamental values that underpin *tikanga Mãori*.[846]

When asked, 25 out of the 33 Mãori interviewed agreed that *tikanga* is important in thinking about justice in a Mãori way. I was told that *tikanga* was "absolutely essential in thinking about Mãori justice"[847] or simply that *tikanga* was justice.[848] Judge Durie adds that *tikanga Mãori* can be defined a body of "Mãori principles for determining justice."[849] Not abiding by *tikanga* would have severe consequences in communal life and would result in oneself, and one's community "being hurt."[850]

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[841] Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[842] Joan Metge, "Custom Law Guideline Project: Commentary on Judge Durie's Custom Law," Wellington: The New Zealand Law Commission, 1996.
[843] Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[844] Arena Williams, Auckland youth and law student at the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[845] Hirini Moko Mead, *Tikanga Mãori: Living by Mãori Values* (Wellington: Huia Publishers, 2003), 18. Emphasis added.
[846] The New Zealand Law Commission, "Mãori Custom and Values in New Zealand Law," Wellington, 2001, 4, [report online]; accessible at http://www.vanuatu.usp.ac.fj/library/Online/USP%20Only/Customary%20Law/Maori.pdf
[847] Anonymous member of Auckland's Mãori Regional Tourism Organization, interview with author, May 14 2010, Auckland, New Zealand.
[848] Anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.
[849] Eddie Durie, "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy," *Victoria University of Wellington Law Journal* 24 (1994), 331.
[850] Rãhui Kãtene, member of the New Zealand Parliament and Mãori Party, interview with author,

In fact, *tikanga Mãori* is a normative system that prescribes correct ways of behaving and processes to use for correcting problematic behavior.[851] It can be seen as a set of principles determining right from wrong and prescribing actions on how to deal with it.[852] *Tikanga* also includes "measures to deal firmly with actions causing a serious disequilibrium within the community."[853] Burrows explains that indigenous people around the world have developed various sets of spiritual, economic, political and social principles in order to foster their relationships with one another and the environment. These principles and conventions, he adds, "became the foundation for many complex systems of governance and laws."[854] *Tikanga Mãori* can be seen as a set of principles to determine justice, and is, therefore, generally referred to as Mãori customary law.[855]

Metge explains that the failure of Europeans to recognize the existence of a system of law in the Mãori society was the result of a "defect in the way of observation rather than any actual absence of law."[856] They could not see *tikanga Mãori*, an orally transmitted code of conduct and set of beliefs, because they were looking for written records of law, duties and rights sustained through formal institutions such as courts of law.[857] The system of social control implied in *tikanga* "was interwoven with the deep spiritual and religious underpinnings of Mãori society

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May 31 2010, Wellington, New Zealand.
[851] Mead, *Tikanga Mãori*, 6.
[852] Government of New Zealand, "*He Hinatore Ki Te Ao Mãori*," 10.
[853] The New Zealand Law Commission, "Mãori Custom and Values," 16.
[854] John Burrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 46. Here, this thesis draws attention to the similarities shared by indigenous groups around the world but does not claim their uniformity. It recognizes that various indigenous communities also differ in a number of ways.
[855] Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Mãori Self Determination* (Auckland: Oxford University Press, 1993), 23; Metge, *Custom Law Guideline Project*, 3.
[856] Metge, "Custom Law Guideline Project," 3; Rumbles, "Seeing Law in Pre-European Society."
[857] Rumbles, "Seeing Law in Pre-European Society," 3.

so that the Mãori people did not so much live under the law, as with it."[858] Hibbitts' research on what he calls "performance law" is useful in understanding the difficulty encountered by Western legal observers when studying Mãori society and customary law. Hibbitts writes:

> As a culture that can physically separate contracts, judgments, and statutes from their proponents, we consider law to exist apart from, and indeed above, human individuals. This attitude is perhaps best captured in the aspirational phrase "a government of laws and not of men." In performance cultures, however, laws and men are virtually coincident. Finding the law generally means finding someone who can perform or remember it.[859]

In other words, the law and its practice are inseparable from those who practice it. It does not, and cannot exist separate from everyday life and is not captured in any one institution or document. The Law Reform Commission of Western Australia, for instance, found that Aboriginal customary law could not be dissociated from Aboriginal culture and way of life and governed "all aspects of Aboriginal life, establishing a person's rights and responsibilities to others, as well as to the land and natural resources."[860] In the context of the Mãori, *tikanga* guides interpersonal relationships but cannot be located in one place. Indeed, when it comes to indigenous beliefs and laws, there are no tangible written resources to which we can refer for study, and "there is sharp caution from the people within the communities against the collection and codification" of these beliefs.[861] The strength of these conventions and norms, as well as their survival, is largely due to their fluidity and adaptability.

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[858] Moana Jackson, "The Mãori and the Criminal Justice System a New Perspective: *He Whaipaanga Hou*, Part 2," (Wellington: Department of Justice, 1988), 36.
[859] Bernard Hibbitts, "Coming to Our Senses: Communication and Legal Expression in Performance Cultures," *Emory Law Journal* 41 (1992), 873.
[860] The Law Reform Commission of Western Australia, "Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture," Perth, 2006. 62, [report online]; accessible at http://www.lrc.justice.wa.gov.au/094-FR.html
[861] Burrows, *Recovering Canada*, 15.

Tikanga Mãori "has been receptive to change while maintaining its basic beliefs."[862] As explained earlier, *tikanga Mãori* is a value-based, ancestral set of beliefs that guide everyday action and life in the community. As such, it is extremely flexible and, while relying on ancestral beliefs, always adapts and re-invents itself to suit the circumstances. It is the adherence to principles rather than rules, which allowed *tikanga* to maintain its cultural integrity and survive.[863] In the words of one of my respondents, the values that make up *tikanga* "give us our identity."[864]

In part, what renders *tikanga Mãori* difficult to observe and translate into Western legal thinking is precisely its flexibility and the fact that it is not a "technical, standalone system: rather it is part of culture."[865] In other words, it is a "way of life that makes law a living concept that one comes to know and understand through experience."[866] In this respect, it is strongly reminiscent of Bourdieu's *habitus*, which can be described as a system of cognitive dispositions acquired through social interaction and guiding individual action.[867] The precepts of customary law, and in this case *tikanga*, "have nothing in common with the transcendental rules of a judicial code: everyone is able, not so much to cite and recite them from memory, as to reproduce them (fairly accurately)."[868] *Tikanga Mãori* is an integral part of the culture, way of life and identity of the Mãori.

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[862] Government of New Zealand, "*He Hinatore Ki Te Ao,"* 5.
[863] Metge, *New Growth from Old*, 21.
[864] Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Mãori, Auckland University of Technology (AUT), interview with author, June 30 2010, Auckland, New Zealand.
[865] Frame, *Grey and Iwikau*, 25.
[866] Melton, "Indigenous Justice Systems and Tribal Society," 109.
[867] Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 2009).
[868] Bourdieu, *Outline of a Theory of Practice*, 17.

"The traditional system of *tikanga* for resolving dispute still exists"[869] and is routinely used in some areas of the country. Māori generally prefer to deal with offenses and crimes amongst themselves, without any external state intervention.[870] Only a few decades ago, the police rarely got involved or intervened in Māori communities.[871] Today, while the police are sometimes called, they still do not always come to the help of Māori living in rural communities.[872] As noted by Stafford, "historical legacies of indigenous peoples and police interaction have resulted in… feelings of mutual suspicions held by both parties."[873] Māori often feel disempowered and disadvantaged by the judicial system. They are also often distrustful of the police forces, which they see as "amplifiers of crimes."[874] That is the police is often perceived as being more severe towards the indigenous population than against the white population.[875] Moreover, there exists a shared belief, amongst the Māori, that New Zealand laws and judicial procedures are foreign and imposed legal norms. These imposed *pakeha* laws and mechanisms are considered "part of the mechanism of colonization," that has "shaped and helped create the circumstances which lead to much contemporary Māori offending."[876] And so, as a result of a combination of factors, including the police's attitude towards Māori communities, the remoteness of

[869] Quince, "Māori Disputes," 16. Emphasis added.
[870] Anonymous community member, interview with author, June 13 1010, Rotorua, New Zealand; and Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand.
[871] Anonymous community member, interview with author, June 13 1010, Rotorua, New Zealand.
[872] Lisa Chant, Professor of Māori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[873] Christine Stafford, "Colonialism, Indigenous Peoples and the Criminal Justice Systems of Australia and Canada: Some Comparisons," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen Hazlehurst (Aldershot: Avebury, 1995), 233.
[874] Stafford, "Colonialism, Indigenous Peoples and the Criminal Justice Systems," 233.
[875] Stafford, "Colonialism, Indigenous Peoples and the Criminal Justice Systems," 233.
[876] Moana Jackson, "Justice and Political Power," 253.

some communities, as well as their "know how," non-urban Mãori communities will generally deal with disputes and offenses themselves.[877]

Traditional Mãori dispute resolution "is still happening but it is not entrenched in the New Zealand legal system. It's like a parallel thing that we do not want to say too much about because it is outside of the legal system and could attract the wrong kind of attention."[878] It would be inaccurate, however, to say that all Mãori communities and all crimes are dealt with the traditional ways of *tikanga*. Each *iwi* may deal with crimes differently. The type and severity of offences committed often determine whether Mãori community members choose to use the traditional Mãori ways or resort to police intervention. For the "everyday type of offending, people do not even consider calling the police."[879] Mãori community members often deal with offences, such as theft, youth misbehavior and domestic violence, through the *marae* and *tikanga*.[880] In some cases, sexual offence is also dealt with at the community level, without external judicial or police involvement.[881] Mãori community members,

[877] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand; Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand; anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand; Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand; anonymous member of staff at Auckland University of Technology (AUT), interview with author, June 30 2010, Auckland, New Zealand.

[878] Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand.

[879] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand.

[880] Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand; Arena Williams, Auckland youth and law student at the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; anonymous community member, interview with author, June 13 1010, Rotorua, New Zealand; anonymous member of the UN forum on Indigenous Issues, interview with author, May 16 2010, Auckland, New Zealand; Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand; anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.

[881] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand; anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand; anonymous member of staff at Auckland University of Technology (AUT), interview with author, June

however, do tend to reach toward more formal legal authorities to deal with severe offences including murder, which they do not feel appropriately equipped to deal with.[882] The *kawa* of the community, as well as the number of people involved in a dispute or crime, will also affect the location and the participation of community members in the dispute resolution process.[883] For instance, dispute resolution may take place in the *marae*, when more than one family is involved in the dispute. Holding a *hui* in the *marae* allows all community members to attend. When a crime or dispute is confined to a family, the *hui* may take place in a home, where the process remains more private.

Belgrave explains that "an understanding of the nature of customary law has become a matter of growing urgency," for the Mãori have continued to renew their demands for Mãori sovereignty under the Treaty of Waitangi, to be recognized.[884] Moreover, the rights of indigenous peoples have been recognized under a number of international documents, including the International Covenant on Economic, Social and Political Rights, and more recently the UN Declaration on the Rights of Indigenous Peoples, which, under Article 34 specifies: "indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international

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30 2010, Auckland, New Zealand. According to respondents, dealing with sexual offending through Tikanga is more likely to allow healing for both the victims and the sexual offender. However, if either party prefers, the crime can be brought to the state's judicial attention.

[882] Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.

[883] Haare Williams, Kaumatua and Manukau city councelor, interview with author, June 18 2010, Auckland, New Zealand.

[884] Belgrave, "Mãori Customary Law," 1.

human rights standard."[885] Understanding the principles that underpin indigenous customary law, and in this particular case *tikanga Mãori* is therefore of paramount important.

To understand *tikanga Mãori*, we must approach the body of thought and sets of beliefs and principles that define it.[886] The existing scholarship surrounding the existence of Mãori customary law and the traditional system of *tikanga* for dealing with offences and dispute, however, is sparse. The work of anthropologists, legal philosophers, lawyers and judges, such as Joan Metge, Justice Eddie Durie, Hirini Moko Mead, Khylee Quince and Moana Jackson provide the few discussions of the concepts and values that make up *tikanga*. The following section identifies some of the chore principles of *tikanga Mãori* in order to gain an understanding of the Mãori approach to justice.

Relational Justice

Customary and indigenous law is said to originate in social values "expressed through the teachings and behavior of knowledgeable and respected individuals and elders."[887] The principles and beliefs that underpin *tikanga Mãori* are themselves transmitted from generation to generation through *korero tawhito*, which are a collection of myths and stories that "reflect the philosophies, ideals and norms" of the Mãori world.[888] Central to these Mãori norms and ideals is the primacy of kinship. Relationships are

[885] United Nations, "Declaration on the Rights of Indigenous Peoples,"Article 34
[886] Eddie Durie, "Address to Symposium on Indigenous Knowledge," a paper presented at the Indigenous Knowledge, Rights and Responsibilities Symposium, Wellington, 2006, 2.
[887] Burrows, *Recovering Canada*, 13.
[888] Government of New Zealand, "*He Hinatore Ki Te Ao Mãori*," 9.

of paramount importance to the Mãori.[889] No discussion of the principles that underpin *tikanga Mãori* can bypass the primacy of relationships, which in turn influence and affect the Mãori practice and approach to justice. In fact, *tikanga Mãori* is fundamentally relational, and, just like other indigenous traditions, is centered on the primacy of kinship.[890]

The importance of relationships is visible through a number of principles that Mãori abide by, including *whakapapa* (genealogical connection) and *whanaungatanga* (human connection). Both point to the strength and importance of connections between people and their communities.[891] While *whakapapa* is concerned with the spiritual, *whanaungatanga* deals with present relationships and is not restricted to the genealogical order.[892] In other words, both *whanaungatanga* and *whakapapa* remind each person of the centrality of relationships, both past and present, and his or her responsibility towards these. These values, which resonate in a number of other traditions found throughout the South Pacific, remind individuals of "the importance of group unity and of maintaining relationships."[893] They provide the understanding that all Mãori are related to one another and their environment.[894] As a result, it is in the interest of all to act in ways that strengthen and sustain relationships,

[889] The New Zealand Law Commission, "Mãori Custom and Values," 30.
[890] Patricia Monture Okanee,"Thinking About Aboriginal Justice: Myths and Revolution." In *Continuing Poundmaker's & Riel's Quest*, edited by Richard Gosse, James Youngblood Henderson and Roger Carter, 221-229. Saskatoon: Purich, 1994, 227.
[891] Joe Williams, "The Mãori Land Court: A Separate Legal System?" a paper presented at the Faculty of Law and the New Zealand Centre for Public Law, University of Wellington, July 2001.
[892] Anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.
[893] The New Zealand Law Commission, "Converging Currents: Custom and Human Rights in the Pacific," Wellington, 2006, 51.
[894] Anonymous former offender, interview with author, June 9 2010, Auckland, New Zealand.

whether they be with other human beings or with the natural world.[895] The *whanau*,[896] to Mãori, is "a pivotal social and cultural force," that gives its members a sense of identity and safety.[897] To many, the *whanau* is everything.[898] It is "what we are made of"[899] and "makes us the way we are."[900] To a Mãori "you are nobody unless you belong to a community, to some land and some people."[901] Mãori identity is defined by community membership and the relationships that comprise it.

According to Huffer and So'o, "Pacific values must be seen in the context of a network of social relationships."[902] Indeed, to Mãori and other Pacific Islanders, society is seen as a "collective unit meaning everyone within that unit has the responsibility of working together."[903] As a result, "connections… must be respected and fostered."[904] Mane notes that the creation and maintenance of relationships, for Mãori, "is a matter of considerable significance highlighting the required sense of reciprocity, accountability and mutual respect."[905] This has important consequences on the Mãori practice and approach to justice and requires re-thinking our approach to

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[895] Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand.
[896] The *Whanau* is the family, but in a wider sense than its Western counterpart.
[897] Ministry of Health, "Whaia Te Whanaungatanga: Oranga Whanau the Well-being of Whänau: The Public Health Issues," Wellington, 1998, 1.
[898] Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand; amomymous community member, June 13 1010, Rotorua, New Zealand; anonymous Kaumatua, interview with author, June 13 2010, Rotorua, New Zealand; anonymous community member, interview with author, June 26 2010, Auckland, New Zealand; Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand; anonymous Marae Trustee, interview with author, June 29 2010, Auckland, New Zealand.
[899] Anonymous Kaumatua, interview with author, June 13 2010, Rotorua, New Zealand.
[900] Anonymous community member, interview with author, June 26 2010, Auckland, New Zealand.
[901] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand.
[902] Elise Huffer and Asofou So'o, "Beyond Governance in Samoa: Understanding Samoa Political Thought," *The Contemporary Pacific* 17 (2005): 311.
[903] Government of New Zealand, *He Hinatore Ki Te Ao Mãori*, 128.
[904] John Patterson, *Exploring Mãori Values* (Palmerston: Dunmore Press, 1992), 88.
[905] Jo Mane, "Kaupapa Mãori: A Community Approach," *MAI Review* 3 no. 3 (2009): 1-9.

criminal behavior. Crime is seen no longer as breach of contract and law, but rather as a "breakdown in relationships."[906] It must, therefore, be treated as such.[907] Implicit in the centrality of the *whanau* and relationships to Māori is the sense of collective social responsibility.[908] In turn, this sense of interconnectedness and collective responsibility, begets active involvement and participation of all community members for the well-being of the collective.[909]

Interconnectedness and Collective Responsibility

The Māori approach to justice is built around "fundamental values such as collectivism and interconnectedness."[910] Māori "collective identity lends itself to collective responsibility."[911] This has important consequences for justice and how it is viewed and carried out in Māori communities. Relationships being the most valued element of Māori social life and worldview, they are the focus of justice.[912] Justice

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[906] Jonathan Burnside and Nicola Baker, *Relational Justice: Repairing the Breach* (Winchester: Waterside, 2004), 24.
[907] Michael Schuler, "What Is Relational Justice" in *Relational Justice: Repairing the Breach*, ed. Johnathan Burnside and Nicola Baker (Winchester: Waterside, 2004), 24.
[908] The New Zealand Law Commission, "Māori Custom and Values," 32; anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.
[909] This research focuses on the philosophy of justice embodied in customary mechanisms of justice, and highlights important tenets of some of these approaches which are used to demonstrate the inability of the existing approaches to justice used by transitional justice scholars. At no time does this thesis contend that these tenets are uniquely 'indigenous,' nor does it categorically reject the fact that any 'Western' community may share some of these principles. Rather, it focuses its criticism on the transitional justice scholarship and the framework it relies on to account for customary mechanisms of justice and philosophies, and which, this research argues, do not accommodate these principles. For an interesting discussion of non-indigenous, 'Western' communities adopting some of these principles, read Jarem Sawatsky, *The Ethic of Traditional Communities and the spirit of Healing justice* (London: Kingsley, 2009), 70.
[910] Joseph Robert, "Māori Customary Laws and Institutions," Te Matahauariki Institute at the University of Waikato, 1999, 3, [paper online]; accessible at lianz.waikato.ac.nz/PAPERS/Rob/Custom%20Law.pdf
[911] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand.
[912] Mead, *Tikanga Māori,* 28.

becomes a way to nurture and sustain relationships. This is strongly reminiscent of Ross' "relational lens" discussed concerning *Ubuntu* and Aboriginal *healing Justice*. This emphasis on relationships, interdependence and collective responsibility encourages us to think of wrongdoing as a "relational event."[913] A crime becomes the symptom of "disharmonies within the offender's relational life."[914] It is therefore the relational life of the offender that must explored and restored.

Accordingly, one of the first steps in dealing with offences, for Mãori, is to uncover the relational ties, each of the parties to the dispute, sustains with other community members.[915] Many indigenous traditions, such as those of the Navajo, view a person who harms another as a person who "has no relatives."[916] Accordingly, justice is very much about reinstating these relationships. It is concerned with "retaining, teaching and maintaining relationships."[917] Only once the relationships between the parties to the dispute have been explored, can discussions about why a dispute took place and how it can be solved, begin.[918] Exposing the relational ties between the *whanau*, the offender and the victim lifts the veil of anonymity and contributes to accountability. "You know your victims and they know you. That puts more of an onus on you for your actions."[919] By the same token, highlighting the connections and kinship between all community members serves to demonstrate how

[913] Ross, *Exploring Criminal Justice,* 8.
[914] Ross, *Exploring Criminal Justice,* 8.
[915] Jackson, "The Mãori and the Criminal Justice System," 34.
[916] Sawatsky, *The Ethic of Traditional Communities*, 69.
[917] Monture Okanee, "Thinking About Aboriginal Justice," 227.
[918] Anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.
[919] Anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.

the wrong and the pain caused "reverberates through the individual and the community."[920]

This, in turn, directly influences how justice is carried out, and who is involved in the process. "Offenders and victims must be seen in the context of extended family."[921] After a crime or dispute, people come together, whether in the *marae* or in a home, depending on the severity of the crime, to discuss what has been done and what needs to be done. According to the Mãori way, "it is all about the collective, rather than the individual."[922] Individuals and their communities share a co-dependent and almost symbiotic relationship. This means that when a crime takes place, everyone in the community is affected to some degree, because the harmony of the community is threatened.[923] The focus of the process of justice is more than just the offender and the individual wronged. Both are "inextricably linked to family, clan and culture,"[924] thereby giving a kind of derivative responsibility to the individuals' *whanau* and the wider community. Traditionally, the system of *tikanga* simply attributed "responsibility for wrongdoing on the family of the offender."[925] Because Mãori society is largely based on collective responsibility, if an individual member is wronged or hurt, the entire *whanau* is equally liable to redress the harm caused.[926]

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[920] Drummond, *Incorporating the Familiar,* 107.
[921] Anonymous probations officer, interview with author, June 28 2010, Auckland, New Zealand.
[922] Anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand.
[923] James Guest, "Aboriginal Legal Theory and Restorative Justice," Native Law Centre of Canada, 4 no. 3, 1999, 2, [article online]; accessible at http://www.usask.ca/nativelaw/publications/jah/1999/Ab_Legal_Theory_Pt2.pdf
[924] Penal Reform International, "Access to Justice," 23.
[925] Jackson, "The Mãori and the Criminal Justice System," 43.
[926] Government of New Zealand, "He Hinatore Ki Te Ao Mãori," 40.

"When you hurt one member, you hurt the rest of the *whanau*."[927] Each member of a community will "either feel some sense of having being wronged or some sense of responsibility for the wrong."[928] It is, therefore, in the interest of all to contribute to the process of justice.[929]

This sense of collective responsibility "does not resonate quite so strongly in non-Māori communities."[930] It requires providing support to those who have been wronged as well as to those who have wronged.[931] One is never alone in the Māori world, and that means everyone has to look after one another to sustain the community.[932] This principle of collective responsibility also influences everyday life in contemporary New Zealand. "As children, we grow to learn the importance of the community and involvement and responsibility."[933] A significant number of my respondents appeared to be socially aware and responsible, in that many actively contributed, and in some ways, supported community life.[934] Some individuals

[927] Anonymous Kaumatua, interview with author, June 13 1010, Rotorua, New Zealand. Emphasis added.
[928] Penal Reform International, "Access to Justice," 22.
[929] Anonymous member of the UN forum on Indigenous Issues, 18th May 2010, Auckland, New Zealand; Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Māori, Auckland University of Technology (AUT), interview with author, June 30 2010, Auckland, New Zealand.
[930] Lisa Chant, Professor of Māori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[931] Marilyn Brewin, Research Programming Leader, The National Institute of Research Excellence for Māori Development and Advancement, interview with author, June 4 2010, Auckland, New Zealand.
[932] Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand.
[933] Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Māori, Auckland University of Technology (AUT), interview with author, June 30 2010, Auckland, New Zealand.
[934] For instance, Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; Lisa Chant, Professor of Māori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; Arena Williams, Auckland youth and law student at the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.

admitted to having taken into their homes and raised another family's child,[935] periodically chairing or attending marae meetings,[936] or working on the construction of a marae for their *iwi*.[937] A schoolteacher explained "these are our kids. They're not that family's or that family's; they're all our kids. And all, whoever they are, belong to our whanau and we have a social responsibility as a community to help them."[938]

This sense of collective identity and responsibility urges community members to take part in communal matters and decision-making. As a result, the participation by and consultation of community members becomes a central element in doing justice within Mãori communities, and according to *tikanga*. This stems from the "very real sense that a conflict belongs to the community itself,"[939] and constitutes a violation of the community's interwoven relationships and harmony.[940]

Community Participation and Engagement

Mãori processes to carry out justice are not a "formal court sitting that a lawyer would recognize."[941] When a *hui* is organized, it is open to all who wish to contribute.[942]

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[935] Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.
[936] Anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand; Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, May 10 2010, Auckland, New Zealand.
[937] Anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand; anonymous Marae Trustee, interview with author, June 29 2010, Auckland, New Zealand.
[938] Anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand.
[939] John Holleman, "An Anthropological Approach to Bantu Law: With Special Reference Toshona Law," *Rhodes-Livingstone Journal* 10 (1949): 53.
[940] Schuler, "What Is Relational Justice," 24.
[941] Rãhui Kãtene, member of the New Zealand Parliament and Mãori Party, interview with author, May 31 2010, Wellington, New Zealand.
[942] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand; Arena Williams, Auckland youth and law student at the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; Kim-sara Hohaia, Auckland youth and Resource

"Whoever may feel that they have an interest" is included.[943] There is no audience, *per se,* since everyone is encouraged to participate and share their views.[944] Hearings usually take place in the *marae,* because it is inclusive of all and represents a neutral "place to reconcile difference."[945] During a *hui*, community members talk through things in an attempt explain what happened, why it happened, and to solve the issues at hand.[946] Customary mechanisms of justice use a "talking-out process among relatives (by blood and clan)" to reach a practical solution to the problem.[947] Justice is the result of "what the society…considers to be fair and just."[948] Both parties to the dispute must be present to exchange their views and opinions.[949] Their participation and the expression of their interests are central to a process that relies on voluntariness.[950]

The active participation and contribution of community members to the process is an inherent element of a worldview based on the centrality of relationships.

Management student, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.

[943] Anonymous member of the UN forum on Indigenous Issues, interview with author May 18 2010, Auckland, New Zealand.

[944] Drummond, *Incorporating the Familiar,* 108.

[945] Haare Williams, Kaumatua and Manukau city councelor, interview with author, June 18 2010, Auckland, New Zealand.

[946] Rãhui Kãtene, member of the New Zealand Parliament and Mãori Party, interview with author, May 31 2010, Wellington, New Zealand; anonymous Kaumatua, interview with author, June 13 1010, Rotorua, New Zealand; Robert, "Mãori Customary Laws and Institutions," 3-4.

[947] James Zion, "Punishment Versus Healing: How Does Traditional Indian Law Work?" in *Justice as Healing: Indigenous Ways*, ed. Amanda McCaslin. (Minnesota: Living Justice Press, 2005), 70.

[948] Ulrike Wanitzek, "Legally Unrepresented Women Petitioners in the Lower Courts of Tanzania," *Journal of Legal Pluralism* 30 (1990), 258.

[949] Anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand; Haare Williams, Kaumatua and Manukau city councelor, interview with author, June 18 2010, Auckland, New Zealand; Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand; Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; anonymous executive member of Nga Tauira Mãori Auckland Mãori Student Association, May 12 2010, Auckland, New Zealand; Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.

[950] Robert, "Mãori Customary Laws and Institutions," 5.

"Justice has to be done with the families."[951] The inclusion of community members in the process, however, also serves to reinforce the community's values, and "generates a more compelling sense of justice."[952] Holding offenders verbally accountable for their wrongdoing is "essential to expressing remorse to the victims," and facilitate the communication of suffering, and possibly apologies.[953] By participating, the community shows its commitment to social stability and harmony. It emphasizes the "solidarity of the collective" towards upholding communal well-being and empowers community members to make decisions.[954] Justice, then, becomes a "communal asset" to be safeguarded by all.[955] On top of regenerating communal values of respect and care, the presence of community members in the process contributes to what Braithwaite calls "reintegrative shaming."[956] The purpose of reintegrative shaming is not to exclude, but, rather, to reintroduce offenders within a supportive network of relationships, and discourage further misbehaving.[957] Shaming helps produce compliance with the values upheld by the community and limits potential deviance.[958]

The process engendered by *tikanga*, a form of relational justice, creates a venue where "offenders, the victims and their support system get to see how the crime has affected each of them."[959] Offenders get to experience justice, as it is not handed

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[951] Anonymous community member, interview with author, June 13 1010, Rotorua, New Zealand.
[952] Drummond, *Incorporating the Familiar,* 108.
[953] Melton, "Indigenous Justice Systems and Tribal Society," 115.
[954] Kayleen Hazlehurst, *Popular Justice and Community Regeneration: Pathways of Indigenous Reform* (London: Praeger, 1995), xxii.
[955] Nin Thomas, "Māori Justice: the Marae as a Forum for Justice" in *Justice as Healing: Indigenous Ways*, ed. Amanda McCaslin (Minnesota: Living Justice Press, 2005), 135.
[956] John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press, 1989), 84-104.
[957] Ibid.
[958] Elmar Weitekamp, "The History of Restorative Justice," in *A Restorative Justice Reader*, ed. Gerry Johnstone (Devon: Willan Publishing, 2003), 111.
[959] Anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.

down to them, but requires their participation, their commitment and agreement. Participation is also entirely voluntary.[960] The strength of relational justice lies in the fact that community participation lends authority to the process and the decision reached.[961] In horizontal and acephalous societies, communities tend to take a very active role in the process.[962] "Consensus development for the resolution of disputes or grievances between or within communities" is an important element of these processes.[963] And because all are held accountable by their *whanau*, which engages in the process, parties to the dispute "have to own up to the decision and carry out what has been decided collectively."[964]

Moreover, relational justice is about showing *aroha*, support and care to both offenders and victims, regardless of their actions.[965] Indeed, the "methods of justice reflect the virtues of justice: respect, love, engaging family and community, land, elders and the Creator."[966] These values "bind the individual to the group and the group to supporting the individual."[967] The exploration of the crime, truth-telling, and confrontation between offenders and victims can be emotionally trying, but also contributes to the acknowledgment of their experiences.[968] The support and presence of the community also serves to alleviate the pain and contributes to the collective

[960] Penal Reform International, "Access to Justice," 16.
[961] Rumbles, "Seeing Law in Pre-European Society," 14.
[962] Guest, "Aboriginal Legal Theory," 338.
[963] The New Zealand Law Commission, "Converging Currents," 54.
[964] Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Māori, Auckland University of Technology (AUT), interview with author, June 30 2010, Auckland, New Zealand; Arena Williams, Auckland youth and law student at the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand; anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand.
[965] Māori word meaning love and care.
[966] Jarem Sawatsky, *The Ethic of Traditional Communities*, 70.
[967] Zion, "Punishment Versus Healing," 70.
[968] Borer, *Telling the Truths,* 23.

healing.[969] The sense of interconnectedness and collective responsibility discussed previously requires all to engage in the restoration and rehabilitation of those affecting by injustice.

Well-being and Rehabilitation

To Mãori, justice is a way of life, not simply a response to crime. It is *houhou rongo*, literally sewing the seeds for peace.[970] Justice is "a conversation around living."[971] It is an "everyday thing, so you don't have a special courtroom, special lawyers or special language."[972] The way justice is carried out, as a public space for all to participate, very much reflects that. In fact, it is argued that justice in indigenous communities is "inseparable from issues of social well-being."[973] The occurrence of a crime causes a serious imbalance in the community and reflects the community's failure to set favorable living conditions for all. Implicit in the sense of collective responsibility that underpins relational justice is the belief that all community members are responsible for sustaining community wellbeing. Justice, therefore, serves as a means of maintaining or redressing that harmony and balance within the community.[974]

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[969] Patricia Lundy and McGovern Mark, "Community Based Approaches to Post-Confict Truth Telling: Strength and Limitations," *Shared Space: research journal on peace, conflict and community relations in Northern Ireland* 1 (2005), 42.
[970] Haare Williams, Kaumatua and Manukau city councelor, interview with author, June 18 2010, Auckland, New Zealand.
[971] Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[972] Anonymous former lawyer and law professor, interview with professor, May 20 2010, Auckland, New Zealand.
[973] Hazlehurst, *Popular Justice*, xii.
[974] Thomas, "Mãori Justice," 135.

The Mãori approach to justice is essentially holistic and oriented towards the maintenance of mutually supportive relationships.[975] It is based on the belief that justice is about healing the person who has wronged, the person who has been wronged and the entire network of relationships affected by the harm caused. As such, it seeks to deal with harm in its entirety, while recognizing the centrality of emotions.[976] The emphasis on healing is the "necessary manifestation of a [indigenous] world-view."[977] Zion notes that indigenous justice "attempts to reach into the mind."[978] Justice cannot succeed and heal without dealing with the person in his entirety.[979] Justice is about healing the spiritual, emotional, physical or mental imbalance in the person, and goes beyond the legal sphere. It allows one to "fix one's spirit."[980] This means that justice is not simply about redressing a wrong and restoring a balance, but it is also about healing those involved.[981] It can only be successfully achieved if it restores the "spiritual, emotional and physical balance within the social, environmental, and cosmic sphere."[982]

Relational justice requires working "collectively in a manner to help rebuild the person that has done wrong. It is a daily process of doing things together, and surrounding that person with normality, to show them caring and *aroha*."[983] In turn,

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[975] Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand; anonymous schoolteacher, interview with author, May 17 2010, Otara, New Zealand.
[976] Sawatsky, *The Ethic of Traditional Communities*, 69.
[977] Ross, "Exploring Criminal Justice," 13.
[978] Zion, "Punishment Versus Healing," 69.
[979] Gloria Lee, "Defining Traditional Healing," in *Justice as Healing: Indigenous Ways*, ed. Amanda McCaslin (Minnesota: Living Justice Press, 2005), 68.
[980] Anonymous probations officer, interview with author, June 28 2010, Auckland, New Zealand.
[981] Rãhui Kãtene, member of the New Zealand Parliament and Mãori Party, interview with author, May 31 2010, Wellington, New Zealand.
[982] Benton, "*Te Pu Wananga*," 6.
[983] Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand.

healing those directly affected by wrongdoing contributes to the well-being of the entire community.[984] Healing the harm provides the opportunity to "transform suffering and root causes of harm… to cultivate conditions of respectful living within the interrelated aspects of the self, other, communities, social structures, environment and spirit."[985] Viewing justice through a Mãori lens leads us to focus on relationships as the source of restoration and rehabilitation for individuals affected by a dispute or crime. Mãori justice is not about retribution, but about restoration and rehabilitation.[986] This "derives from long held indigenous customs in which kin…seek to meet the need if all involved in a harm situation."[987]

At a *hui,* "the basic question asked is what happened and how can we fix it?"[988] The discussion engaged at a *hui* help to identify the reasons that led a community member to wrong another member,[989] provides a space for exploring and "understanding what made offenders do what they did, who they are, where they come from."[990] Justice, therefore, is sought when the community tries "to restore that balance within them and between the individuals involved in what happened."[991] This is done in accordance with the principle of *utu,* which emphasizes reciprocity and the

[984] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand; Benton, "*Te Pu Wananga*," 8.
[985] Sawatsky, *The Ethic of Traditional Communities*, 39.
[986] John Pratt, *Punishment in a Perfect Society. The New Zealand Penal System 1840 - 1939* (Wellington: Victoria University Press, 1992), 35.
[987] Sullivan and Tifft, *Handbook of Restorative Justice*, 1.
[988] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand.
[989] Anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand.
[990] Moana Papa, South Auckland community member, interview with author, June 28 2010, Auckland, New Zealand.
[991] Anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand.

maintenance of harmonious relationships between members of society.[992] Whatever harm has been caused by an item being stolen or damaged, for instance, must be returned or repaired.[993] The kind of reparations must fit the circumstances and needs of all parties, keeping in mind the collective concern for harmony and balance.[994]

Because all community members are considered integral and essential parts of a collective, "it is not as simple as just removing [offenders.]"[995] The emphasis remains on restorative penalties, such as community service.[996] This approach is based on the understanding that removing someone from the community, such as sending him through the penitentiary system, does not mend relationships or contribute to healing the harm. It is, on the contrary, more likely to cause further suffering and victimization for all involved.[997] Removing someone from the community would also signal a break in communal relationships and result in additional imbalance. It would absolve the Mãori notion of collective responsibility, which bestows responsibility on all community members, for the wrong committed by one.

The Mãori approach to justice is clearly embedded within a kinship-based tradition that highly values principles of collective responsibility, social harmony and well-being. Dyhrberg argues that "central to Mãoridom is the right and the

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[992] Government of New Zealand, "*He Hinatore Ki Te Ao*," 7; anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.
[993] Anonymous executive member of Nga Tauira Mãori Auckland Mãori Student Association, interview with author, May 12 2010, Auckland, New Zealand; Anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand; anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand.
[994] Government of New Zealand, "*He Hinatore Ki Te Ao*," 67; and Robert, "Mãori Customary Laws and Institutions," 4.
[995] Agnes Naera, Programme Director Equity, Kaiwhakahaere Kaupapa Mãori, Auckland University of Technology (AUT), interview with author, June 30 2010, Auckland, New Zealand.
[996] Penal Reform International, "Access to Justice," 22.
[997] Anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.

responsibility of a community to care for its own, and to seek… solutions to its social problem."[998] Over the years, Mãori have remained critical of New Zealand's formal legal apparatus, which many viewed as a "system imposed upon them by an aggressive colonizer,"[999] and which incessantly worked against indigenous communities and their rights.[1000] The existing legal system never fully empowered Mãori communities to take care of their own, according to their own traditions and beliefs.[1001] Despite the increasing number of Mãori going through the criminal justice system, New Zealand's formal legal system continued to uphold Western judicial values and to adjust to the needs of the *Pakeha* society.[1002] Upon mounting criticism from Mãori communities that the existing legal system "was wholly foreign to its traditional values and destructive of the kinship networks essential to Mãori society," Family Group Conferencing was set up.[1003] The FGC model put in place by the New Zealand government is often said to epitomize the restorative justice approach.[1004] It is also frequently presented as a Mãori process.[1005] Judge McElrea goes as far as to

[998] Marie Dyhrberg, "Mãori Based Justice: An Alternative Dispute Resolution in the Criminal Justice System," a paper presented at the The Fifth International Criminal Law Congress, Sydney, 25-30th September 1994, 6.
[999] Jane Kesley, "Legal Imperialism and the Colonization of Aotearoa," in *Tauiwi: Racism and Ethnicity in New Zealand*, ed. Paul Spoonley, Cluny MacPherson, Davis Pearson and Charles Sedwick (Wellington: Dunmore, 1984), 21.
[1000] Larissa Behrendt, *Aboriginal Dispute Resolution* (Mayborough: The Federation Press, 1995), 71.
[1001] Consedine, *Restorative Justice*, 81.
[1002] Moana Jackson,"The Mãori and the Criminal Justice System a New Perspective: *He Whaipaanga Hou,* Part 2," Wellington: Department of Justice, 1988, 262.
[1003] Erik Luna,"Reason and Emotion in Restorative Justice," a paper presented at the New Zealand Institute for Dispute Resolution, Victoria University of Wellington Faculty of Law, July 2000.
[1004] Maxwell, Gabrielle and Allison Morris, "Youth Justice in New Zealand: Restorative Justice in Practice?" *Journal of Social Issues* 62 no. 2 (2006), 239.
[1005] Anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand.

claim that the restorative model employed by FGCs is the "direct descendant of the *whanau* conference long employed by Mãori people."[1006]

In fact, part of the debate surrounding restorative practices and traditions concerns the "claims that restorative justice draws on traditional processes for resolving disputes among indigenous peoples."[1007] Daly has coined this the "myth of origin," according to which restorative justice "uses indigenous justice practices and was the dominant form of pre-modern justice."[1008] Restorative justice practices and indigenous approaches to justice are often seen as one and the same. As mentioned earlier, a common assumption, in the case of the New Zealand restorative conferencing model, is that the practice is rooted in Mãori culture.[1009] This belief is particularly striking in that it reveals a lack of understanding of the cultural, social and spiritual principles that underpin Mãori society and its approach to justice. Hakiaha expresses concerns at the New Zealand government's use of Mãori principles, which may result, in his view, in "the dilution, bastardization and disenfranchisement of these revered and sacred principles."[1010] This amalgamation of restorative justice practices and indigenous approaches illustrates the worrisome

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[1006] Frederick McElrea, "Justice in the Community: The New Zealand Experience," in *Relational Justice: Repairing the Breach*, ed. John Burnside and Nicola Baker (Winchester: Waterside, 2004), 98. Emphasis added.
[1007] Chris Cunneen, "Reviving Restorative Justice Traditions?" University of New South Wales Faculty of Law Research Series, paper 15, 2008, 1, [research paper online]; accessible at http://law.bepress.com/cgi/viewcontent.cgi?article=1090&context=unswwps&sei-redir=1#search=%22Cunneen%2C%20Chris.%20Reviving%20Restorative%20Justice%20Traditions%3F"%20University%22
[1008] Kathleen Daly, "Restorative Justice: The Real Story," in *Restorative Justice: Critical Issues*, ed. Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmarland (London: Sage Publication, 2003), 195.
[1009] Jim Consedine, *Restorative Justice.*
[1010] Matt Hakiaha, "What Is the State's Role in Indigenous Justice Process," in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barbara Towes (Devon: Willan Publication, 2004), 358.

propensity to romanticize and homogenize indigenous philosophies and practices.[1011] The ongoing attempt to include and represent Māori values in the legal system, according to Jackson, only serves to "capture, redefine and use Māori concepts to freeze Māori cultural and political expression within parameters acceptable to the state."[1012] The tendency to equate the FGC restorative model with the Māori approach to justice, in his view, is simply part of the continuing history of colonization and co-option of Māoridom.[1013]

[1011] See for instance, Maureen Cain, "Orientalism, Occidentalism and the Sociology of Crime," *British Journal of Criminology* 40 (2000): 239-60.
[1012] Jackson, "Justice and Political Power, 254.
[1013] Ibid., 254. For examples of this tendency, see Consedine, *Restorative Justice;* McElrea, "Justice in the Community." Both are vocal proponents of the FGC model in New Zealand, in part on the basis of its connection to Māori cultural values.

CHAPTER NINE

RESTORATIVE JUSTICE AND *TIKANGA*: A COMPARISON

As the restorative justice model continues to attract attention as a potentially healthier alternative to the criminal court system, concerns have been raised regarding the extent to which restorative mechanisms can accurately represent indigenous practices and philosophies of justice.[1014] Often, the restorative approach to justice is said to have its roots in customary practices, such as healing circles used by American and Canadian Aboriginal communities.[1015] Yet, as mentioned above, a number of indigenous scholars and Mãori communities have expressed concern regarding this tendency to equate, in this particular case, *tikanga*, with the restorative justice philosophy and the family group conferencing model launched by the government. This chapter examines this issue by carrying out a comparison between New Zealand's FGCs and the practice of *tikanga*, as restorative justice mechanisms. It is argued that even though both mechanisms appear to adopt similar approaches to doing justice, for instance, by putting emphasis on active participation of victims, offenders and the community, their underlying values differ significantly.

[1014] Kathleen Daly, "Racializing Restorative Justice: Lessons from Indigenous Justice Practices," a paper presented at the Second Restorative Justice Conference, San Antonio, Texas, 2009, 1.
[1015] Carrie Menkel-Meadow, "Restorative Justice: What Is It and Does It Work?" *Annual Review of Law and Social Sciences* 3 (2007), 167.

Principles of Restorative Justice Practices

There are a variety of understandings regarding what restorative justice practices entail. They are usually described as being "more humane, participatory, inclusive, need-meeting and effective response to state-defined crime."[1016] Marshall depicts restorative justice as a "process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence."[1017] The UN also recently adopted its own, and rather all-encompassing, definition of restorative practices as "any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."[1018]

Restorative justice is often presented as a social movement,[1019] and an alternative to the adversarial approach of the court system, which "prefers inclusive, collaborative processes and consensual outcome."[1020] While restorative principles are said to have roots in indigenous cultures and non-state societies, the scope of restorative justice has expanded considerably to include a number alternative dispute resolution processes.[1021] Roche argues that restorative justice has become a "unifying banner sweeping up a number of informal traditions of justice and capturing the

[1016] Dennis Sullivan and Larry Tifft, *Handbook of Restorative Justice: A Global Perspective* (London: Routledge, 2006), 17.
[1017] Tony Marshall, "Criminal Mediation in Great Britain," *European Journal on Criminal Policy and Research* 4 no. 4 (1996), 37.
[1018] United Nations Office on Drugs and Crime, "Handbook on Restorative Justice Programmes," New York, 2006, 7
[1019] John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," *Crime and Justice: A Review of Research* 25 no. 1 (1999).
[1020] Howard Zehr, *The Little Book of Restorative Justice* (Pennsylvania: Good Books, 2002), 26.
[1021] Elmar Weitekamp, "The History of Restorative Justice," in *A Restorative Justice Reader*, ed. Gerry Johnstone (Devon: Willan Publishing, 2003), 111.

imagination of many of those interested in reforming the criminal justice system."[1022] In fact, the rather broad definition adopted by the UN, in its Handbook of Restorative Justice Programmes, reflects this tendency to subsume a wide range of judicial practices under the restorative justice category. This has resulted in a lack of consensus regarding the nature of restorative justice, and the processes that are said to embody restorative values. This may be due to the fact that, as Zehr warns, restorative justice is "a compass, not a map,"[1023] and is used freely to designate a number of less-retributive practices put in place in parallel to traditional court systems.

Building on the existing literature and the discussion of the restorative justice approach presented above, this chapter lists four elements generally associated with restorative *practices*, namely (a) active participation and engagement, (b) community involvement and ownership, (c) informality and flexibility and (d) restoration. These are recurrently identified as elements that feature through restorative mechanisms, such as the family group conferencing model in New Zealand. This chapter will then look at how these four elements feature in FGCs, and how the nature and implementation of these elements substantively differ in the Mãori tradition. Doing so will help highlight some of the similarities and differences that underlie both the FGC and the Mãori approach to justice.

[1022] Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2004), 7.
[1023] Howard Zehr, *The Little Book of Restorative Justice* (Pennsylvania: Good Books, 2002), 10.

Active Participation and Engagement

Restorative processes encourage the attendance and participation of both parties to the dispute.[1024] These processes are supposed to provide a space where victims and their offender(s) can discuss a crime and explore how it has affected each of them.[1025] It gives victims and offenders an opportunity to participate in and interact with the process, in a respectful and less antagonistic manner. This, in turn, is more conducive to the expression of grievance and to reconciling both parties. Most importantly, restorative justice is concerned with identifying the harms and needs of those affected by a crime, as well as dealing with the obligations that stem from redressing it.[1026] Victims and offenders are empowered by a process that is less alienating and that gives them a voice and a choice in what they expect from justice.[1027] The restorative process often encourages a face-to-face encounter between the parties to the crime, in an attempt to encourage truth-telling and foster acknowledgement and reconciliation.[1028] Restorative justice practices also "rely in large part upon voluntary cooperation" between victims and offenders.[1029] The non-coercive aspect of restorative processes is an important contributing factor in facilitating

[1024] Daniel Van Ness and Karen Strong, *Restoring Justice* (Cincinnati: Anderson Publishing, 1997).
[1025] Dean Peachey, "Victim/Offender Mediation: The Kitchener Experiment," in *Mediation in Criminal Justice*, ed. Martin Wright and Burt Galaway (London: Sage, 1988), 98.
[1026] Zehr, *The Little Book*, 22-23.
[1027] Susan Sharpe, "How Large Should the Restorative Justice Tent Be?" in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barbara Towes (Devon: Willan publisher, 2004), 26.
[1028] Jennifer Llewellyn and Robert Howse, "Restorative Justice--A conceptual Framework," a paper prepared for the Law Commission of Canada (1999), 59, [paper online]; accessible at http://dalspace.library.dal.ca/bitstream/handle/10222/10287/Howse_Llewellyn%20Research%20Restorative%20Justice%20Framework%20EN.pdf?sequence=1
[1029] Marshall, "Criminal Mediation in Great Britiain," 8.

acknowledgment, and in encouraging offenders to take responsibility for their actions.[1030]

Community Involvement and Ownership

The participation of the community in the process is also central to the effectiveness and uniqueness of restorative justice. Restorative justice processes give any crime a "social context," and stresses viewing the incident as an issue to be fixed collectively.[1031] The presence and support thereby provided by the community is supposed to render the process less stigmatizing for all affected by it.[1032] Restorative justice practices are described as being generally "community driven and controlled,"[1033] implying that the community ought to have ownership in the process. The community, for instance, ought to actively participate in the decision-making process with regards to the measures to be taken for redress and restoration. Indeed, the restorative approach to justice recognizes the "role of the community as a prime site of preventing and responding to crime and social disorder."[1034] The participation of the community renders the process more powerful and effective, in that it signals the community's commitment to justice and contributes to the shaming process, which is itself inherent to restorative practices.[1035] Frank also notes that survivors'

[1030] United Nations Office on Drugs and Crime, "Handbook on Restorative Justice Programmes," 8.
[1031] Tony Marshall, *Restorative Justice: An Overview* (London: Research Development and Statistic Directorate, 1999), 5.
[1032] Van Ness and Strong, *Restoring Justice*.
[1033] Angela Cameron, *Restorative Justice: A Literature Review* (Vancouver: The British Columbia Institute Against Family Violence, 2005), 7, [report online]; accessible at http://synthesis.womenshealthdata.ca/uploads/topic200_0.pdf. Accessed August 23rd 2009.
[1034] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, 8.
[1035] John Braithwaite, "Restorative justice: Assessing Optimistic and Pessimistic Accounts," *Crime and Justice* 25 no. 1 (1999): 1-97.

narratives shared with the community are critical because "it does not simply affect those who receive it; testimony implicates others in what they witness."[1036] The community is caught in the dispute and thereby forced to take action.[1037] In this respect, restorative processes engage the community in "the rehabilitation of offenders and victims."[1038]

Informality and Flexibility

Restorative processes are often described as being more flexible than existing retributive mechanisms that are entrenched in states' legal apparatus.[1039] This flexibility and relative informality, compared to the court system, allows these practices to respond to the needs of the victims and accommodate their personal experiences. Braithwaite explains that restorative processes are to address "whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime."[1040] The United Nations considers the restorative process more suitable to deal with a variety of offences, precisely because of the flexibility of the process.[1041] The process can be re-organized in a manner which suits both the type of offences and the needs of the victims in dealing with harm. In a way, this enables the

[1036] Arthur Frank, *The Wounded Storyteller: Body Illness and Ethics* (Chicago: University of Chicago, 1995), 143.
[1037] Judith Herman, *Trauma and Recovery* (New York: Basic Book, 1997), 7.
[1038] Marshall, "Restorative Justice: An Overview," 6.
[1039] Ibid., 5.
[1040] John Braithwaite, *Restorative Justice and Responsive Regulations* (New York: Oxford University Press, 2002), 11.
[1041] United Nations Office on Drugs and Crime, "Handbook on Restorative Justice Programmes," 8.

exploration of events that may not be directly relevant to the crime investigated, but related to its underlying causes.[1042]

Restorative processes must also remain flexible enough to deal with a variety of cases and circumstances. Sexual offences and theft are substantively different, and will, therefore, require different responses and means to deal with the psychological and emotional impact on the victims. Johnstone explains that the type of restitution offered by the offender will be chosen "not by professional sentencers, but by the victims and offenders" in a way that will suit them both.[1043] The flexibility of restorative practices is, as a result, more likely to allow for an outcome that will satisfy and correspond to the needs of all those affected.

Restoration

One of the central tenets of restorative justice is the rehabilitation and restoration of those primarily affected by harm, and those close to them. It requires facing the legal, emotional and physical impact a crime has had on those party to it. The flexible nature of the process previously identified is a useful asset in the restorative process, as it allows the process to be adjusted to the needs of the participants. Indeed, restorative practices provide room for participants to devise ways of addressing harm in a manner that they understand and prefer. The attendance of victims and offenders, as well as community members, also factors in the restorative process. Indeed, the

[1042] Ibid., 7.
[1043] Gerry Johnstone, "How and in What Terms Should Restorative Justice Be Conceived" in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barbara Towes (Devon: Willan publication, 2004), 6.

sharing of experiences directly contributes to restoring dignity to the victims.[1044] The dialogue-engaged offenders, victims and their community is said to have a therapeutic impact on all.[1045] Marshall notes that this is most visible for offenders who have to "face up to the reality of what they have done."[1046] At the same time, acknowledging the experiences of the wrongdoers is a "crucial step towards their taking responsibility and being accountable for their actions."[1047] They can also actively take part in the restoration of victims and their own rehabilitation, to a certain extent, through reparation and restitution. The nature of the reparation is determined through a consensual process between the parties, thereby empowering them all.[1048] The restorative process strengthens and heals communities by restoring a sense of safety and respect, as well as by rehabilitating both victims and offenders.[1049] Howse and Llewellyn add that addressing and preventing the alienation of offenders upon their return to communities, is an important aspect of restorative justice, that differentiates it from other mechanisms.[1050]

Active participation and engagement, community involvement and ownership, informality, flexibility of processes and restoration are, therefore, generally considered attributes of restorative justice practices. Together, they form the restorative justice umbrella, under which Family Group Conferencing and *tikanga* are often placed. Daly warns against putting "different types of innovative justice practices under one umbrella," and stresses the need to pay attention to the significant

[1044] Charles Villa-Vicencio and Fanie Du Toit, *Truth and Reconciliation in South Africa: 10 Years On* (South Africa: Claremont, 2007), 6.
[1045] Marshall, "Restorative Justice: An Overview," 11.
[1046] Ibid., 11.
[1047] Llewellyn and Howse, "Restorative Justice," 51.
[1048] Johnstone, "How and in what terms should restorative justice be conceived," 6.
[1049] Zehr, *The Little Book*.
[1050] Llewellyn and Howse, "Restorative Justice," 52.

differences that underlies all these so-called restorative mechanisms.[1051] The next section examines how these four restorative elements feature through the family conferencing model set up by the New Zealand government, before carrying out a similar examination of *tikanga* in a subsequent section. Doing so will help emphasize and highlight how each of these four attributes of restorative practices are interpreted and implemented differently in theory and practice, and according to cultural sensibilities.

Restorative Justice in New Zealand

The New Zealand criminal system, as an adversarial legal system, is antithetical to the values embodied in *tikanga Mãori* and its practice.[1052] Yet a number of efforts have been made to introduce and reflect some of the values of *tikanga* under the cover of restorative justice. Family Group Conferences represent an important attempt of the New Zealand government to breakaway from its traditionally adversarial and individualistic approach to justice, specifically when dealing with young offenders between the ages of 14 and 17.[1053] The FGC was also the first restorative program set up and entrenched in the criminal justice system of New Zealand, under the Children, Young Persons and Their Families Act 1989.

A Family Group Conference is a meeting convened by the Youth Court, where the young offender and his immediate family, the victims and his representative as

[1051] Daly, "Racializing Restorative Justice," 4.
[1052] Marie Dyhrberg, "Mãori Based Justice: An Alternative Dispute Resolution in the Criminal Justice System," a paper presented at the The Fifth International Criminal Law Congress, Sydney, 25-30th September 1994, 2.
[1053] Frederick McElrea, "Justice in the Community: The New Zealand Experience," in *Relational Justice: Repairing the Breach*, ed. John Burnside and Nicola Baker (Winchester: Waterside, 2004), 94.

well as a police officer, social worker or other state mediator, meet. During the hearing, the young offender is first expected to admit the offence committed. Only then, can the meeting proceed to a discussion about the reasons for offending, its impact and solutions to be agreed to by all parties.[1054] The Family Group Conferencing Model is considered the "lynch pin, and the jewel in the Crown of Youth Justice in New Zealand.[1055]

One of the main criticisms of FGCs was that, in spite of the government's efforts, these processes failed to include Māori practices and principles in conferencing.[1056] Moana Jackson criticized existing attempts at introducing Māori values in the judicial system for simply "continuing the historical trend whereby whatever form Māori justice practices take is co-opted by the state."[1057] While the government of New Zealand boasted about how FGCs could "better cope with cultural diversity,"[1058] it did little to actually include *tikanga* in their practice. FGC hearings, for instance, were most commonly held in government offices,[1059] and did not incorporate many elements of the traditional Māori legal system, including the presence and leadership of Māori elders. The schism between FGCs and the practice of *tikanga* will become evident in this chapter's examination of both mechanisms.

[1054] Allison Morris and Gabrielle Maxwell, "Restorative Justice in New Zealand: Family Group Conferences as a Case Study," *Western Criminology Review* 1 no. 1 (1998).
[1055] Andrew Becroft, "Restorative Justice in the Youth Court," a paper presented at the 9th International Conference on Alternative Dispute Resolution, Wellington, 19 September 2007.
[1056] Juan Tauri and Allison Morris, "Re-Forming Justice: The Potential of Māori Processes," in *Restorative Justice: Critical Issues*, ed. Eugene McLaughlin, Ross Fergusson, Gordon Hughes and Louise Westmarland (London: The Open University, 2003).
[1057] Moana Jackson, "Cultural Justice: A Colonial Contradiction or a Rangatiratanga Reality?" in *Rethinking Criminal Justice*, ed. Frederick McElrea (Auckland: Auckland Legal Research Foundation, 1995), 34.
[1058] The Youth Court of New Zealand, "Family Group Conference," [website]; accessible at http://www.justice.govt.nz/courts/youth/about-the-youth-court/family-group-conference; accessed May 12th 2010.
[1059] Morris and Maxwell, "Restorative Justice in New Zealand."

Since the creation of FGCs, and in an effort to enhance and further develop the conferencing restorative model, the government has launched a number of other initiatives, sometimes on an *ad hoc* basis.[1060] These initiatives include several pilot projects, such as the New Zealand Court Referred Restorative Justice Pilot, which specifically targeted adult offenders.[1061] More recently, some youth court hearings and FGCs were moved to *maraes* under the Rangatahi Courts Initiative. The first one of its kind was set up in Gisborne in 2008.[1062] As of August 2010, only 6 Rangatahi courts had been set up across the country.[1063] Essentially, Rangitahi are a form of *tikanga* infused FGCs. A judge, familiar with the principles of *tikanga*, and local *marae* elders chair the hearing. The process is similar to that of FGCs, but takes place on the *marae* and follows the protocol of *tikanga Māori.*[1064] This means that participants may start the meeting with a *karakia*[1065] and recite their *whakapapa*.[1066] This initiative was launched to "better link Māori young offenders with their culture and the local Māori community,"[1067] and to further integrate Māori values into the

[1060] Government of New Zealand, "Restorative Justice in New Zealand: Best Practices," Ministry of Justice, Wellington, 2004, 8, [report online]; accessible at http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice

[1061] Sue Triggs, *The New Zealand Court Referred Restorative Justice Pilot: Evaluation 2005* (Wellington: Evaluation Crime and Justice Research Centre of Victoria University, 2009).

[1062] "Marae-Based Youth Court," *Youth Transition Newsletter*, 14 March 2009.

[1063] The Youth Court of New Zealand, "Te Kooti Rangitahi Ki Orakei, the Pacifika Youth Court, and Te Kooti Rangitahi Ki Owae: Three Inspiring Community Initiatives Opened the Same Week," *Court in the Act*, July 2010. As of May 2011, there has been no new Rangitahi courts set up.

[1064] New Zealand Police, "Punishment Should Fit the Offender as Well as the Crime," [website]; accessible at https://admin.police.govt.nz/blog/2010/03/10/punishment-should-fit-offender-well-crime/22589; accessed August 3rd 2010. This is a message written by New Zealand's Police Commissioner, Howard Broad, after his attendance at a Marae-based Youth Court.

[1065] A *karakia* is a Māori prayer

[1066] Matt Hakiaha, "Resolving Conflict from a Māori Perspective," in *Restorative Justice: Contemporary Themes and Practice*, ed. Jim Consedine and Helen Bowen (Christchurch: Plougshare, 1999), 94.

[1067] Tangata Whenua-Māori News and Indigenous Views, "Rangitahi Courts Initiative," 24th August 2010, [website]; accessible at http://news.tangatawhenua.com/archives/6844; accessed August 28th 2010.

conferencing model.[1068] Indeed, a common assumption amongst Māori is that one of the reasons for the high rate of young Māori offending is their disconnect from their own communities and culture.[1069] It appeared, therefore, logical that reconnecting the youth with their heritage when carrying out justice, would contribute to reducing their chances of re-offending.

FGCs, representing the New Zealand government's first statutory attempt to become more culturally sensitive and include Māori values in the legal system through restorative practices, are of critical importance to this study.[1070] They are also the template used by the government to develop restorative programs and initiatives. Other pilot projects, such the Rangitahi Courts initiative, heavily borrow from the FGC model, and are often too recent to be examined in much depth. Most importantly, FGCs having been in operation nationally since 1989, have been subject of much scrutiny, and "judgments can be made about its [FGC model] ability to deliver what it promised in its early years."[1071] For this reason, the FGC model is considered a benchmark of the restorative justice approach espoused by the New Zealand government, which is used, here, to compare to *tikanga*.

[1068] New Zealand Parliament, "Youth Court-Manurewa Marae," Questions for Oral Answer at The House of Representatives, 24th September 2009, [website]; accessible at http://www.parliament.nz/en-NZ/PB/Business/QOA/4/d/e/49HansQ_20090924_00000010-10-Youth-Court-Manurewa-Marae.htm; accessed September 3rd 2010.
[1069] Katherine Jones, Professor in Management, Auckland University of Technology, interview with author, July 1 2010, Auckland, New Zealand; Lisa Chant, Professor of Māori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[1070] The Youth Court of New Zealand, "Family Group Conference."
[1071] Gabrielle Maxwell, "Achieving Effective Outcomes in Youth Justice: Implications of New Research for Principles, Policy and Practice," in *New Directions in Restorative Justice: Issues Practice and Evaluation*, ed. Elizabeth Elliott and Robert Gordon (USA: Willan Publishing, 2005), 70.

Active Participation and Engagement

FGCs encourage the attendance of the victim and the offender along with the immediate family members of both.[1072] The participation of both parties is central to the process, and is what differentiates it from mainstream criminal procedure. Their participation contributes to the "inclusive, informal, and dialogic nature of the FGCs."[1073] It is expected that by listening to each other's points of view and experiences and collaborating throughout the conferencing process, the offender may feel "genuine remorse" and make amends.[1074] The victims, in turn, have their experiences acknowledged and validated, which contributes to the healing process. The Ministry of Justice maintains that FGCs "can be an effective way of holding young people accountable for their actions."[1075] The onus throughout the process is on the individuals who are parties to the dispute and who must take responsibility. The role of immediate family members is limited to that of emotional support.

Judge McElrea claims that FGCs are most likely to produce "responsible reconciliation," whereby both sides to the dispute collaborate and share responsibility for the crime.[1076] However, this emphasis on individual responsibility "cuts against any conception that an individual is accountable to… and works in relation to social groups," as in the case of the Mãori.[1077] Furthermore, it is important to note that, in

[1072] McElrea, "Justice in the Community," 94.
[1073] Becroft, "Restorative Justice in the Youth Court."
[1074] Erik Luna, "Reason and Emotion in Restorative Justice," a paper presented at the New Zealand Institute for Dispute Resolution, Victoria University of Wellington Faculty of Law, July 2000.
[1075] Government of New Zealand, "Youth Offending Strategy." Ministry of Justice, April 2002, [website]; accessible at http://www.justice.govt.nz/policy/crime-prevention/youth-justice/youth-offending-strategy; accessed June 12th 2010.
[1076] McElrea, "Justice in the Community," 96.
[1077] Linda Tuhiwai Smith, "The Native and Neoliberal Down Under: Neoliberalism and Endangered Authenticities," in *Indigenous Experience Today*, ed. Marisol De la Cardena and Orin Starn (New York: Berg Publisher, 2007), 243-244.

accordance with the principle of voluntariness, victims may choose not to attend family group conferencing and send a representative in their stead.[1078] A youth advocate may also be present to advocate on behalf of the young offender.[1079] In such cases, the nature of the process is altered, since the strength of restorative justice processes comes from the physical presence, and direct and active engagement of the parties to the dispute and their families.[1080]

The fact that the entire process, and its organization, including the participation of the parties to the dispute, is entirely directed and orchestrated by a youth coordinator is however, problematic.[1081] A study conducted by Morris and Maxwell demonstrated that almost half of the participants did not feel actively involved in the process, and felt that "decisions had been made about them, not with them."[1082] A follow-up study questioned the degree to which FGCs empowered their participants. Indeed, findings showed "evidence that… professionals dominated decision-making."[1083] Often, the engagement and participation of offenders was virtually limited to the initial admission of guilt and exploration of crime-related facts, but went no further. As a result, it could be argued that the participation and engagement of the parties to the dispute in FGCs are, at best, superficial.

[1078] The Youth Court of New Zealand, "Family Group Conference."
[1079] Becroft, "Restorative Justice in the Youth Court."
[1080] Jim Consedine and Helen Bowen, *Restorative Justice: Contemporary Themes and Practice* (Christchurch: Plougshare, 1999), 20-21.
[1081] Becroft, "Restorative Justice in the Youth Court."
[1082] Morris and Maxwell, "Restorative Justice in New Zealand."
[1083] Maxwell, "Achieving Effective Outcomes in Youth Justice," 59.

Community Involvement and Ownership

The presence of family members, in accordance with restorative justice principles, serves in part to re-introduce the element of shame to the existing "antiseptic model of justice."[1084] A police officer, social worker, and a youth justice coordinator, who chairs the meeting, are also present.[1085] The role of any state professionals involved is supposed to remain low key. They are to contribute to the discussion, when needed, to make sure that all issues are explored, and that the final decision respects the wills of all those involved, as well as the law.[1086] According to McElrea, a staunch supporter of the Family Group Conferencing model in New Zealand, FGCs represent "another way to do justice, one which can promote the acceptance of responsibility and by a consensual process seek to heal the wounds caused by crime."[1087]

While there is no explicit limit on the number of persons who can attend,[1088] FGCs generally do not include more than 12 individuals and are closed to the public, thereby restricting the participation of the rest of the wider community.[1089] Immediate family members are allowed to share their opinions only privately during the family caucus, during which the offender and the victim develop separate proposals to bring back to the meeting.[1090] Haines warns against a "victim-offender axis" of participation, without the proper involvement of the community, which in his view

[1084] McElrea, "Justice in the Community," 97.
[1085] Ibid., 94.
[1086] Morris and Maxwell, "*Restorative Justice in New Zealand*."
[1087] McElrea, "Justice in the Community," 94.
[1088] Ibid., 95.
[1089] Ibid., 95; The Youth Court of New Zealand, "Family Group Conference."
[1090] Zehr, *The Little Book*, 49.

results in nothing more than a traditional legal process disguising as restorative justice.[1091]

In this respect, the extent to which community members are involved in FGCs is questionable. Community attendance is limited to close family members, who have little say and no decision-making power. The community has no ownership of the process. FGCs are still very much entrenched in the existing judicial system. The Youth Court must endorse every decision agreed upon at FGCs.[1092] The Youth Court also has the power to demand that an FGC be reconvened if the court does not deem the final decision appropriate or to be in accordance with the law.[1093] This reliance on the state apparatus and authority is problematic for Mãori, who see the seeds of change in the legal system in the "restoration of authority to the community and a transfer of the focus from the individual to the group."[1094]

Informality and Flexibility

FGCs are meant to be more flexible than traditional courts of law.[1095] Such flexibility is needed so that conferencing may accommodate the needs of the participants, and

[1091] Kevin Haines, "Some Principles Objection to Restorative Justice Approach to Working with Juvenile Offenders," in *Restorative Justice for Juveniles: Potentialities, Risks and Problems*, ed. Lode Walgrave (Leuven: Leuven University Press, 1998), 94; Morris and Maxwell, "Restorative Justice in New Zealand."
[1092] Becroft, "Restorative Justice in the Youth Court."
[1093] Becroft, "Restorative Justice in the Youth Court."
[1094] Donna Durie Hall, "Restorative Justice: A Mãori Perspective," in *Restorative Justice. Contemporary Themes and Practice*, ed. Helen Bowen and Jim Consedine (Littleton: Ploughshares, 1999), 25-26.
[1095] Government of New Zealand. "Restorative Justice in New Zealand: Best Practices." Ministry of Justice, Wellington, 2004, 6, [report online]; accessible at http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice

the types of offenses dealt with.[1096] It is evident, for example, when victims chose not to face their offender, if they do not feel comfortable.[1097] The relative flexibility of the process also allows participants to share their experiences and views with reasonable freedom in comparison to the court system. They are expected to engage in a discussion on how best to redress the crime, and reach consensus on the penalty.[1098] In an effort to remain culturally sensitive, FGCs may be also convened on a *marae*.[1099]

Despite their relative flexibility, FGCs usually do follow certain required steps. The young offender, for instance, is required to admit to the offence, if conferencing is to continue.[1100] Conferencing also must be convened within a statutory timeframe.[1101] At the beginning of each conferencing, a youth justice coordinator is expected to explain the procedure and requirements of conferencing to both parties. Then follows an exploration of the crime committed, the reason behind the crime, and its effect on the victim.[1102] Meetings last between one and two hours at the most,[1103] which does not allow for an in-depth exploration of the crime and its impact on the community. The principal objective of FGCs is to formulate, in accordance with the law, and the need of the victim, "a plan about how best to deal with the offending,"

[1096] Erik Luna, "Reason and Emotion in Restorative Justice," a paper presented at the New Zealand Institute for Dispute Resolution, Victoria University of Wellington Faculty of Law, July 2000.
[1097] The Youth Court of New Zealand, "Family Group Conference."
[1098] McElrea, "Justice in the Community," 95.
[1099] Maxwell and Morris, "Youth Justice in New Zealand," 242.
[1100] Morris and Maxwell, "Restorative Justice in New Zealand," 2.
[1101] Maxwell and Morris, "Youth Justice in New Zealand," 247.
[1102] Larry Siegel and Brandon Welsh, *Juvenile Deliquency: Theory, Practice and Law* (Belmont: Wadsworth, 2008), 173.
[1103] Morris and Maxwell, "Restorative Justice in New Zealand," 2.

keeping the ideal of restoration in mind.[1104] The final decision must reflect the agreement between the young person and the state's representatives.[1105]

It appears the state ownership of FGCs affects the flexibility of the process and the extent to which it can accommodate Māori expectation of a community-based justice. The presence of state representatives and the state's continued control of the process fail "to enable outcomes to be reached which were in accord with Māori philosophies and values."[1106] Indeed, the conferencing model that exists, despite its collaborative nature, continues to function within a formal hierarchical structure with the state and its representatives clearly managing the system.[1107] The degree of flexibility of FGCs is significantly restricted by their embededness "within the formal justice apparatus."[1108]

Restoration

One of the stated objectives of FGCs, beyond reducing the rate of re-offending,[1109] is to "promote the healing of the victim and the reintegration of the offender."[1110] The healing process is supposed to be facilitated by the potentially inclusive and collaborative nature of FGCs. The contextual exploration of facts surrounding the crimes gives both parties the opportunity to understand the causes for offending and

[1104] Ibid., 2.
[1105] McElrea, "Justice in the Community," 95.
[1106] Tauri and Morris, "Re-forming Justice," 49.
[1107] Ibid., 48.
[1108] Evelyn Zellerer and Chris Cunneen, "Restorative Justice, Indigenous Justice and Human Rights," in *Restorative Community Justice: Repairing Harm and Transforming Communities*, ed. Gordon Bazemore and Mara Schiff (Cincinnati: Anderson Press, 2001), 246-247.
[1109] Government of New Zealand, "Youth Offending Strategy."
[1110] Government of New Zealand, "Restorative Justice in New Zealand: Best Practices," 27.

the harm it caused.[1111] Research shows that victims' sense of justice was usually higher for those who attended FGCs than courts.[1112] FGCs' approach to the idea of restoration favors the implementation of diversionary programs where young offenders do not have to be charged and prosecuted.[1113] More often than not, FGCs put forth a plan of action, agreed upon by both parties and state representatives, which specifies the penalty incurred by the offender and the reparation to be provided to the victim. The agreement usually includes some form of apologies, financial payment or community work.[1114] In serious cases, however, imprisonment and other court-imposed sanctions can be chosen.[1115]

A number of concerns have been raised regarding the degree and nature of restoration offered by FGCs. Haines explains that, from a young person's point of view, the conferencing model can be no different from courtroom proceedings since both involve facing "a room full of adults."[1116] Often, the participation, empowerment and the resulting rehabilitation of the young persons will depend on the professionals involved, their knowledge of FGCs, and their ability to encourage participation.[1117] Research also found that often "promised outcomes have not been delivered."[1118]

While FGCs appear to effectively encourage young people to take responsibility for their acts, and diverting them from the traditional court system, they are far less

[1111] Government of New Zealand, "Youth Offending Strategy."
[1112] Kathleen Daly and Hennessey Hayes, "Restorative Justice and Conferencing in Australia," in *Trends and Issues in Crime and Criminal Justice* (Canberra: Australian Institute of Criminology, 2001), 5.
[1113] Frederick McElrea, "The New Zealand Model of Family Group Conferencing," *European Journal on Criminal Policy and Research* 6 no. 4 (1998): 529.
[1114] Ibid., 529.
[1115] Ibid., 529.
[1116] Haines, "Some Principles Objection to Restorative Justice," 99.
[1117] Morris and Maxwell, "Restorative Justice in New Zealand."
[1118] Ibid.

successful in following up and facilitating the rehabilitation of young persons involved. Indeed, the kind of restoration offered to participants is often a legal one, which simply seeks to divert young offenders away from the penitentiary system. The psychological, emotional and social dimensions of young offenders' rehabilitation are generally left unaddressed.[1119] When provisions are made concerning the educational or social rehabilitation of young offenders, they are, too often, not implemented.[1120]

Tikanga and Restorative Justice

The Family Group Conferencing model set up by the New Zealand government does share some similarities with Māori processes, notably its focus on restoration and consensus.[1121] It is important to note, however, that the principles that make up *tikanga* "hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble."[1122] Rudin explains that even though restorative justice practices and various indigenous traditions share commonalities, there are also "substantive differences that are not always as readily recognized."[1123] This section explores how the four restorative justice elements identified earlier feature in *tikanga*. This will help bring to light the substantively different understandings of the nature and role of the community that underpin the Māori approach.

[1119] Ibid., 255.
[1120] Maxwell, "Achieving Effective Outcomes in Youth Justice," 58.
[1121] Tauri and Morris, "Re-Forming Justice," 48.
[1122] Joan Metge, "Custom Law Guideline Project: Commentary on Judge Durie's Custom Law," Wellington: The New Zealand Law Commission, 1996, 2.
[1123] Jonathan Rudin, "Aboriginal Justice and Restorative Justice," in *New Directions in Restorative Justice: Issues Practice and Evaluation*, ed. Elizabeth Elliott and Robert Gordon (Devon: Willan Publisher, 2006), 89.

Active Participation and Engagement

The principles of inclusiveness and active participation are central to the Mãori approach and expectation of justice.[1124] In the aftermath of a dispute, all parties, including their support systems, are expected to take part in a *hui* to discuss the harm caused to the community and its members. Throughout the process, each side gets to express its pain, grief and resentment. The offender explains the reason for his action and gets to see the suffering it has caused on the victim, and the community. Likewise, the victim gets the opportunity to face the offender and to gain an understanding of the reasons behind the crime. Throughout the process, everyone (victim, offender and community) is engaged in a respectful discussion around living together, and redressing the imbalance caused by the dispute.[1125] An amiable outcome, agreed to by *all* parties, is sought.[1126] The purpose of this exercise is to uncover the roots and contextualize the causes of harm, so as to better heal it.[1127] It also serves to remind both parties, of the humanity of the other, and of their "connectedness as relatives" and members of the same community.[1128] By putting emphasis on the connectedness between offenders and victims as community members, *tikanga* emphasizes the collective dimension and impact of the crime. It also gives credence to the decision and penalty agreed to by all.

[1124] Khylee Quince, "Mãori Disputes and Their Resolutions," in *Dispute Resolution in New Zealand*, ed. Peter Spiller (Auckland: Oxford University Press, 2007), 27.
[1125] Wayne Rumbles, "Seeing Law in Pre-European Society," custom law project draft paper, Hamilton, Waikato University, 14-15, [paper online]; accessible at http://lianz.waikato.ac.nz/PAPERS/wayne/what%20is%20custrom%20law.pdf
[1126] Matt Hakiaha, "Resolving Conflict from a Mãori Perspective," in *Restorative Justice: Contemporary Themes and Practice*, ed. Jim Consedine and Helen Bowen (Christchurch: Plougshare, 1999), 90.
[1127] Sawatsky, *The Ethic of Traditional Communities*, 225.
[1128] Drummond, *Incorporating the Familiar,* 107; Sullivan and Tifft, *Handbook of Restorative Justice*, 4.

This emphasis on interrelatedness introduces a significantly different dimension to the victim-offender axis. While FGCs focus on the victims and offenders as distinct and unrelated individuals, the Mãori approach tends to view them as members of a wider network of relationships. Individuals and their well-being are inseparable from their *whanau*.[1129] The idea of victimhood does not only apply to the specific individual who has been directly violated, but rather to the individual and his whole support system.[1130] Likewise, the offender and his support system are to shoulder the responsibility and redress for the harm caused.[1131]

So while the New Zealand conferencing model emphasizes individual responsibility,[1132] the Mãori approach sees individuals in the context of relationships, and, therefore, seeks to address a crime and its impact on relationships, accordingly. Victims and offenders are not seen in isolation of each other but with reference to the network of relationships to which they both belong. As a result, the degree and nature of engagement and participation of victims, offenders and their support system, in FGCs and *tikanga*, differ significantly.

Community Involvement and Ownership

The community, as an extension of the self, plays a central role in "doing" justice. When a crime occurs, it is the *mana*[1133] and status of the individual and his

[1129] Moana Jackson, "Justice and Political Power: Re-Asserting Mãori Legal Processes," in *Legal Pluralism and the Colonial Legacy*, ed. Kayleen Hazlehurst (Avebury: Aldershot, 1995), 248.
[1130] Quince, "Mãori and the Criminal Justice System," 8.
[1131] Rumbles, "Seeing Law in Pre-European Society," 16.
[1132] Mary Clark, *In Search of Human Nature* (London: Routledge, 2002), 6.
[1133] Loosely translates as 'prestige.'

community that is affected.[1134] The entire social harmony is disturbed. The community, therefore, becomes equally victimized by the crime. Central to the Mãori society is the notion of collective responsibility.[1135] As such, the community's interest, needs and point of view also need to be considered. The emphasis of the Mãori approach to dispute resolution is "on reaching consensus and involving the whole community."[1136] Its participation cannot and ought not to be limited. All those who feel have a stake in the dispute are welcome to attend. Attendance and participation is not limited to immediate relatives, as is the case in FGCs. The Mãori legal tradition is also based on notions of equity and equality.[1137] As such, it values contributions from all community members. *Hui* are conducted in a non-hierarchical manner,[1138] where the community itself acts as the witness, "prosecutor and sentencing court."[1139] The process and its outcome must reflect and accommodate the wills of all, for the good of the community.[1140] By the same token, the authority and legitimacy of both is strengthened in the eyes of the participants.

Underpinning this approach to justice and the role of the community is a fundamentally different understanding of 'who' the community is. To Mãori, the community is not a place, nor is it defined by blood. Rather, the community is one of care. It refers to a sense of kinship, belonging and connectedness that is difficult to

[1134] Robert, "Mãori Customary Laws and Institutions."
[1135] Dyhrberg, "Mãori Based Justice," 6; Matiu Dixon, "Crime and Justice," in *State of the Mãori Nation: Twenty-First Century Issues in Aotearoa*, ed. Malcolm Mulholland (Auckland: Reed, 2006).
[1136] Teresa Olsen, Gabrielle Maxwell, and Allison Morris, "Mãori and Youth Justice in New Zealand," in *Popular Justice and Community Regeneration: Pathways of Indigenous Reform*, ed. Kayleen Hazlehurst (London: Praeger, 1995), 45.
[1137] Matt Hakiaha, "What Is the State's Role in Indigenous Justice Process," in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barbara Towes (Devon: Willan Publication, 2004), 359.
[1138] Anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.
[1139] Jim Consedine, "The Mãori Restorative Tradition," in *Restorative Justice Reader: Texts, Sources, Context*, ed. Gerry Johnstone (London: Willan, 2003), 154.
[1140] Larissa Behrendt, *Aboriginal Dispute Resolution* (Mayborough: The Federation Press, 1995), 17.

find in contemporary urban societies.[1141] The Mãori restorative tradition is based on certain meso-social structures, where individuals share thick social ties.[1142] It is what gives the process strength and meaning. As a result, social pressure and shaming is more effective and likely these kinds of close-knit communities.[1143]

Informality and Flexibility

The relative informality and flexibility of the traditional Mãori process significantly affects how justice is carried out and its impact on the community. *Tikanga* seeks to deal with a crime holistically, which means that the process seeks to address the needs that arise from the harm caused. Understanding why an offense took place matters to the Mãori. It also requires time. A *hui* may take days to complete, during which all members are invited to participate in the hope of finding consensus.[1144] The process engaged by *tikanga* is also entirely more informal that any other form of state-sponsored program. Participation is not restricted to any topic or timeframe. All are welcome to attend and decisions are reached collectively and by consensus. There is no police or criminal record that will haunt the offender to rest of his life,[1145] no "state machinery…no courts, no formal burdens of proof."[1146]

[1141] Anthony Bottoms, "Some Sociological Reflections on Restorative Justice," in *Restorative Justice and Criminal Justice*, ed. Andrew Van Hirsh, Julian Roberts and Anthony Bottoms (Oregon: Hart Publishing, 2003), 110.
[1142] Idid., 109.
[1143] Behrendt, *Aboriginal Dispute Resolution,* 21.
[1144] Anonymous probations officer, interview with author, June 28 2010, Auckland, New Zealand; anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand; Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[1145] Consedine, "The Mãori Restorative Justice Tradition," 154.
[1146] Quince, "Mãori and the Criminal Justice System," 8.

There is also great flexibility in the type of penalty that is handed out. The nature of the restitution can be either material, symbolic, or both, and the penalty must fit the circumstances of the crime and the needs that arise from it.[1147] The parties to the dispute must agree on the nature of the restitution and repair, in accordance with their needs, rather than chose from a list of options provided by the state, and in accordance with the law. The validity of the outcome of Tikanga comes, in part, from the fact that it is agreed upon by all and reflects the needs of participants. As a result, and if needed for the well-being of the community, severe punishment, such as ostracisation, is not unheard of.[1148]

To the Mãori, justice is a discussion about living together rather than "a formal let's sit around in a circle and sort stuff out"[1149] In this respect, it fundamentally differs from FGCs, which tend to "fragment, compartmentalize and limit" the process of decision-making.[1150] Rudin argues that the tendency to standardize and compartmentalize restorative justice mechanisms "frustrates the will of the aboriginal community and gets in the way of the community's ability to deal with the real justice issues that confront it."[1151] While FGCs and other restorative initiatives launched by the New Zealand government are truly more flexible than the traditional processes engaged in the state's courts of law, they remain anchored within a Western legal

[1147] Anonymous probations officer, interview with author, June 28 2010, Auckland, New Zealand.
[1148] Quince, "Mãori and the Criminal Justice System," 8. While this is true in theory, none of my respondents reported any case of ostracization in their experience of Tikanga. It is rarely enforced as it is seen as making little contribution to the rehabilitaion of the community and all those affected by the crime.
[1149] Lisa Chant, Professor of Mãori Studies, the University of Auckland, interview with author, May 10 2010, Auckland, New Zealand.
[1150] Sawatsky, *The Ethic of Traditional Communities*, 69.
[1151] Rudin, "Aboriginal Justice," 108.

framework, which is at odds with the informal nature and aspiration of the Mãori approach.

Restoration

The rehabilitation of offenders, victims and those affected by the crime is central to *tikanga*. Justice is primarily about social well-being, which can only achieved by ensuring the happiness of all individual community members.[1152] As a flexible and holistic approach to justice, *tikanga* seeks to deal with the impact of the crime in its entirety. The minds, bodies and souls of those affected must be healed.[1153] Each dimension is addressed as part of justice. From this perceptive, the response to the needs of the community and its members "do not come neatly packaged in boxes with labels like 'justice,' 'health,' and 'social services.'"[1154] They are all dealt with as part of the same process, rather than compartmentalized. The emotional and physical impacts of a crime, for instance, are brought to the forefront of the process when offenders and victims get to share their experiences and express their grievances.

Community members themselves, rather than state agencies, including social services, ensure the emotional and physical rehabilitation of victims and offenders.[1155] The Mãori approach to justice assumes an active community, ready and willing to make room for former offenders, by providing them with opportunities and support. While this is easily foreseeable in societies that espouse principles of collective

[1152] Kayleen Hazlehurst, *Popular Justice and Community Regeneration: Pathways of Indigenous Reform* (London: Praeger, 1995), 156.
[1153] Jackson, "The Mãori and the Criminal Justice System," 58.
[1154] Rudin, "Aboriginal Justice," 103.
[1155] Tuhiwai Smith, "The Native and Neoliberal Down Under," 343.

responsibility, kinship and interconnectedness, it is more problematic in liberal and capitalistic societies where the process of social fragmentation and individualization has weakened social ties.[1156]

Sanctions and punishment, agreed upon by consensus, also draw strongly upon ancestral and spiritual values and beliefs, without which the process would lose significance.[1157] More often than not, amends, apologies and restitution are offered. Restitution and apologies offered by offenders directly contribute to the mending of relationships.[1158] They also help in the emotional journeys of victims. At the same time, offenders can take responsibility for their actions, and thereby regain a sense of their own *mana*.[1159] The emphasis of sanctions, rather than being on individual rights and desert, is on spiritual and emotional rehabilitation.[1160] The idea of sanctions and repair are rooted in Mãori principles of reciprocity and harmony.[1161] Hakiaha explains that while FGCs open the door for the expression of Mãori spirituality and approach to justice, they still do not "allow full scope for Mãori cultural expression and needs."[1162]

The following table illustrates the differences outlined in the previous examination of FGCs and *tikanga* as restorative justice mechanisms. All four elements commonly associated with restorative practices, namely (a) active participation and engagement, (b) community involvement and ownership, (c)

[1156] Charlotte Williams, *The Too-Hard Basket: Mãori and Criminal Justice since 1980* (Wellington: Institute of Policy of Victoria University, 2001), 147.
[1157] John Patterson, *Exploring Mãori Values* (Palmerston: Dunmore Press, 1992), 66.
[1158] Quince, "Mãori and the Criminal Justice System," 6.
[1159] Charles Royal, Director of The National Institute of Research Excellence for Mãori Development and Advancement, interview with author, May 11 2010, Auckland, New Zealand.
[1160] Weitekamp, "The History of Restorative Justice," 113.
[1161] Metge, "Custom Law," 11; Quince, "Mãori Disputes," 22.
[1162] Hakiaha, "What Is the State's Role," 361.

informality and flexibility and (d) restoration, are clearly present. Yet, as this table demonstrates, the manner and degree to which they are implemented in both practices differ substantively.

Restorative Justice	Family Group Conferencing	Tikanga Maori
- Active Participation and Engagement	- Engagement limited to Victim-Offender Axis - Emphasis on individual responsibility	- Engagement of victims, offender and the wider community - Emphasis on relationships and collective responsibility
- Community Involvement and Ownership	- Closed meeting with immediate family -Process directed and chaired by state representative -Outcome must satisfy victims, offenders and the state	- Open gathering where all community members are welcome - Process chaired by community members - Consensus-based
- Informal and Flexible	- Room for accommodation of offenders and victims - Time and legal	- Adaptable to circumstances and needs - Lengthy process

	constraints - Embedded within hierarchical state structure	
- Restoration	- Amends, apologies and repair. -Reduce re-offending -Alternative to imprisonment	- Holistic approach (mind, body and soul) - Well-being (communal and individual) - Reciprocity and Spirituality

Justice: Different Ways of Knowing

It is undeniable that FGCs and *tikanga* share some of the same characteristics. Both value respectful and collaborative encounters between offenders and victims and their support systems. Both also prefer consensual outcomes, favoring the restoration of both parties to a dispute, rather than marginalization. Yet, the previous examination of restorative principles applied through FGCs and *tikanga* revealed some practical and qualitative differences. And while it appears, at first sight, that both practices adopt a similar approach to dealing with crime, the underlying values in each process are markedly different.[1163]

One of the most significant differences between the Western, legally entrenched approach to restorative practices, and *tikanga*, is the value and meaning attached to the community. The term has various meanings across, as well as within,

[1163] Metge, *"Custom Law,"* 11.

cultures. Often, it is used to designate a group restricted by geographical boundaries, or a group sharing similar beliefs, history and traditions.[1164] To Mãori, as well as to a number of non-Western traditions, the community corresponds to "a perception of connectedness… to other individual human beings and to a group."[1165] This sense of community and relatedness is inseparable from the practice of justice, as a means of maintaining relationships. Individuals are never seen in isolation of fellow community members.

This approach to the community and its role in providing justice is rooted in a distinctive view of the self and its relationship to the other. As discussed earlier, the Mãori and a number of other indigenous communities adopt a relational understanding of the self. The strength of Mãori communities and approach to justice comes from a deep-seated sense of collective identity, which informs every aspect of living and knowing.[1166] Such an understanding fundamentally differs from that of a society, which views the self as a fully independent and autonomous entity.[1167] Clark explains that the Western legal tradition is anchored in an "understanding of events as interactions between independent objects."[1168] This is apparent in the New Zealand government's approach to FGCs. With deep roots in individualism, the Western, Eurocentric approach to justice is unable to detach itself from the idea of justice

[1164] Morris Jenkins, "How Do Culture, Class and Gender Affect the Practice of Restorative Justice?" in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barbara Towes (Devon: Willan publisher, 2004), 321.
[1165] Paul McCold and Benjamin Watchel, "Community Is Not a Place: A New Look at Community Justice Initiatives," in *Restorative Justice Reader: Ideas, Values, Debates*, ed. Gerry Johnstone (London: Willan, 2003), 294.
[1166] Tuhiwai Smith, "The Native and Neoliberal Down Under," 343.
[1167] Val Napoleon, "By Whom and by What Processes Is Restorative Justice Defined and What Bias Might This Introduce?" in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barbara Towes (New York: Criminal Justice Press, 2004), 40. See also Michael Asch, "Indigenous Self-Determiniarton and Applied Anthropology in Canada: Finding a Place to Stand," *Anthropoligical* XLIII no. 2 (2001): 204-205.
[1168] Mary Clark, *In Search of Human Nature* (London: Routledge, 2002), 6.

carried out, in part, through the punishment of individuals who violate the rule of law. It also generally "assumes that the voice of the community is the same as the voice and values of the state."[1169] It is therefore important to not underestimate these two different conceptions of the self and the community, which, in turn, establish "both how we work with the other and the solutions we imagine."[1170]

Failing to look at communities from an indigenous perspective and to incorporate this dimension into any attempt to introduce Māori values into the judicial system is likely to produce an *ersatz* of community-justice, which will quickly evolve into "little more than correctional alternatives."[1171] This is, to an extent, demonstrated through FGCs, which continue to function within a relatively formal, legalistic and individualistic framework. The strength of indigenous community-based mechanisms of justice cannot easily be reproduced in societies where individuality and autonomy are celebrated. Bottom suggests that restorative justice initiatives that do not recognize and capitalize on the value of community in indigenous worldviews result in a "blanket delivery of restorative justice."[1172] Second, and most importantly, is the risk of misrepresenting and re-appropriating customary mechanisms to fit the Western individualistic brief. The Māori conception and processes of justice are "based on a different cultural orientation than the Western model."[1173] Part of the difficulty lies in the fact that the underlying philosophy of Māori practices and approach to justice are not well understood.[1174] While it is argued that any modern "Māori system of dispute

[1169] Jenkins, "How Do Culture, Class and Gender Affect the Practice of Restorative Justice," 322.
[1170] Napoleon, "By Whom and by What Processes," 40.
[1171] Sullivan and Tifft, *Handbook of Restorative Justice*, 3.
[1172] Bottoms, "Some Sociological Reflections," 110.
[1173] Dyhrberg, "Māori Based Justice," 7.
[1174] Jackson, "The Māori and the Criminal Justice System," 38; anonymous Kaumatua, interview with author, June 13 2010, Rotorua, New Zealand.

resolution must incorporate fundamental aspects of *tikanga*," such as *whakapapa, utu* and the centrality of community,[1175] these principles are often simply "diluted to fit the system."[1176] Little is done to alter the existing judicial framework to truly accommodate Māori cultural sensibilities.[1177]

Another difficulty can be found in the active role taken by the state in designing, implementing and managing restorative programs in New Zealand. The problem partly lies in the fact that, as mentioned earlier, state ownership and control over FGCs denies the primacy of communities in providing justice.[1178] Māori communities tend to view state led and controlled initiatives, such as FGCs, with suspicion.[1179] A Māori member of parliament explicitly expressed concern *vis-à-vis* the role of state agencies in shaping policies designed for the Māori.[1180] Such concern was echoed by a number of respondents who expressed distrust in the government's attempt to include Māori values in the judicial.[1181] Jackson contends that a number of

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[1175] Quince, "Māori and the Criminal Justice System," 22.
[1176] Anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand.
[1177] Anonymous schoolteacher and head of Māori department, interview with author, May 17 2010, Otara, New Zealand.
[1178] See for instance, Hakiaha, "What Is the State's Role." Also see Gerald Taiaiake Alfred, "Colonialism and State Dependency," *Journal of Aboriginal Health* November 2009, [online journal]; accessible at http://www.naho.ca/jah/english/jah05_02/V5_I2_Colonialism_02.pdf. In this article, Alfred denounces the state of dependency created by policies of the Canadian state and which are inscribed within an ongoing process of colonization. For an overview of the role of the state and its policies in shaping the 'aboriginal reality,' see Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand*, Vancouver: UBC Press, 1995. The issue of the state having control over the development and administration of 'traditional' initiatives is all the more problematic when taking in consideration the fact many communities see these initiatives as a way to reassert their indegeneity and identity. Moreover, and as discussed in earlier parts of this thesis, part of the reason for reinvigorating customary practices is based on the perception that customary mechanisms of justice are legitimate processes that empower communities and gives them ownership of the outcome of justice.
[1179] Zellerer and Cunneen, "Restorative Justice, Indigenous Justice and Human Rights," 246-247.
[1180] Rāhui Kātene, member of the New Zealand Parliament and Māori Party, interview with author, May 31 2010, Wellington, New Zealand.
[1181] Anonymous former offender, interview with author, June 9 2010, Auckland, New Zealand, Kim-sara Hohaia, Auckland youth and Resource Management student, the University of Auckland,

the so-called Mãori restorative aspects of FGCs are, in fact, a poor adaptation and cooption of these principles. He adds that the so-called inclusion of Mãori principles is "part of the colonising ethic," of the New Zealand government.[1182] This concern is echoed by Tauri, who claims that the adoption of these alleged Mãori principles only serves to further deny Mãori autonomy and practices rather than empowering Mãori communities to take care of their own.[1183] Essentially, breaking this distrust of the state and its effort to incorporate *tikanga* into its policies requires empowering Mãori communities to design, inform and implement these programs.[1184] Most importantly, it also requires recognizing the harmful impact colonization has had, and continues to have, on Mãori, their culture and identity.[1185]

Potential Implications for the Field of Transitional Justice

The New Zealand government's inability to truly engage with the Mãori approach to doing justice, this study argues, is illustrative of the general tendency in the transitional justice scholarship, to try to fit customary approaches and conceptions of

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interview with author, May 10 2010, Auckland, New Zealand; anonymous schoolteacher and head of Mãori department, interview with author, May 17 2010, Otara, New Zealand; anonymous member of the UN forum on Indigenous Issues, interview with author, May 18 2010, Auckland, New Zealand; anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland, New Zealand; anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand; anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.

[1182] Jackson, "Cultural Justice," 33.

[1183] Juan Tauri, "Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand," in *Justice as Healing: Indigenous Ways*, ed. Amanda McCaslin (Minnesota: Living Justice Press, 2005), 317; anonymous representative from the Ngati Whatua Trust, interview with author, June 27 2010, Auckland, New Zealand.

[1184] Rãhui Kãtene, member of the New Zealand Parliament and Mãori Party, interview with author, May 31 2010, Wellington, New Zealand; anonymous social worker, interview with author, July 22 2010, Auckland, New Zealand.

[1185] Anonymous Kaumatua, interview with author, June 13 1010, Rotorua, New Zealand; anonymous former lawyer and law professor, interview with author, May 20 2010, Auckland; New Zealand.

justice within a legal and individualistic framework. Transitional justice is, in fact, a field highly defined by legal norms.[1186] It is an active promoter of judicalization and, as a result, it is a prime site for this universalizing tendency. Scholars of the field of transitional justice appear to remain unaware of the fact that the approaches to justice, and institutions the literature endorses in transitional societies are "held together by common concepts, practical aims, and distinctive claims for legitimacy," embedded in a specific intellectual tradition.[1187] As explained above, the scholarship is driven by given norms and assumptions about the nature of justice, which is contrary to a number of indigenous traditions that see law and justice as a lived experience, always reflecting the needs and preferences of those involved, as opposed to a rigid body of rules disconnected from local realities. Moreover, as it has been argued above, the scholarship is unable to thinking about doing justice, whether retributive, reparative or restorative, outside of legal and individualistic confines it sets.

This research contends that the Western intellectual and legal tradition, rooted in an inherently universalizing discourse of enlightenment rationalism, threatens different ways of knowing, and doing justice. As argued by Bryan, "the rule of law's guarantee of ensuring justice and justice for all collapses in on itself when the fact of its universality is exactly what ensures that all people are not treating equally."[1188] By claiming the universality of our conceptual knowledge, transitional justice scholars risk generating inaccurate accounts of the problems encountered in transitional

[1186] Peer Zumbansen, "Transitional Justice in a Transnational World: The Ambiguous Role of Law," *CLPE Law Research Paper Series*: Oosgode Hall Law School, 2008, 8-9; Christine Bell, "Transitional Justice, Interdisciplinarity and the state of the field of non-field," *The International Journal of International Justice* 3 no. 1 (2009), 1.
[1187] Arthur, "How 'Transitions' Reshaped Human Rights," 324.
[1188] Bryan, "Property as Ontology," 30.

societies, and much worse, design solutions with little applicability. The irony, of course, is that, unconsciously, the rhetoric surrounding conceptions and mechanisms of justice, as illustrated by the transitional justice scholarship, "performs the same function of the imperialism it nominally scorns, relegating the non-European other to a less advanced stage of development."[1189] Other ways of knowing are simply relegated to second place or absorbed within the existing corpus of knowledge and conceptual framework. This is clearly visible in the transitional justice scholarships' inability to think about justice beyond a deontological-liberal framework, as well as in the scholarship's reticence towards mechanisms and conceptions of justice that do not espouse Western values and legal standards. It is important, therefore, for transitional justice scholars, to acknowledge the universalizing undercurrent of the legalist paradigm that underlies the transitional justice literature. Indeed, this undercurrent has both practical and ethical impact on the research that is undertaken in the field of transitional justice, thereby influencing the types of mechanism promoted, and the kinds of approaches to justice that are validated.

[1189] Nick Mansfield, *Subjectivity: Theories of the Self from Freud to Haraway* (New York: New York University Press, 2000), 127. This thesis does not put all liberal thinkers into the same basket. It is important to note that there is a diversity of approaches within the liberal school of thought, some of which are more or less aware or critical of this universalizing tendency. For an interesting discussion on the subject, refer to Sankar Muthu, *Enlightment against Empire* (Princeton: Princeton University Press, 2003).

CHAPTER TEN

CONCLUSION

This research was born out of a personal interest in customary mechanisms of justice. It became clear when surveying the transitional justice literature for research relating to these mechanisms, that the existing scholarship was lacking, and its approach to customary mechanisms of justice problematic, for two reasons. First, most of the research relating to customary mechanisms of justice failed to engage with the local traditions, culture, and reality that surrounded these mechanisms. More often than not, customary mechanisms of justice were described using our own conceptual tools, without any critical evaluation of the implications this had for the quality and relevance of the transitional justice research. Indeed, customary mechanisms of justice were generally described as embodying a mix of restorative and retributive values.[1190] Seldom were they ever considered and examined outside of the existing conceptual framework used to think about justice mechanisms in transitional justice. Second, the transitional justice literature's interest towards customary mechanisms of justice was limited to post-conflict situations. The paucity of research on customary mechanisms of justice and the philosophy of justice they embody was all the more salient in cases where there had been no open conflict or regime transition. While

[1190] Joanna R. Quinn, "The thing behind the thing: The role and influence of religious leaders in the use of traditional practices of justice in Uganda," a paper presented at the Canadian Political Science Association, Ottawa, May 2009, 8.

transitional justice scholars started to pay attention to customary mechanisms of justice in post-conflict situations, such as in Rwanda and Uganda, other customary justice mechanisms, in settler societies for instance were largely ignored.

This research, therefore, makes an important contribution to the field of transitional justice by examining the philosophy of justice embodied in customary mechanisms of justice, and by *tikanga Mãori*, a customary practice and philosophy of justice, using as a case study from a settler society. More specifically, this research argues that the existing framework used by transitional justice scholars is ill suited to account for customary mechanisms of justice. The argument put forth in this study was substantiated by an examination of the Mãori tradition and justice practices. This conclusion draws out the main themes of this research and the implications my findings have for the transitional justice scholarship. It starts by unpacking the argument according to which the framework used by transitional justice scholars to examine justice mechanisms is flawed. It explains how the scholarship's approach to doing justice is fundamentally deontologically rooted. It then, discusses customary mechanisms of justice, and most importantly, the type of justice they embody. The conclusion also touches upon the implications these research findings have for the field of transitional justice, and seeks to push the boundaries of the transitional justice literature further by speaking to the need to revise the common understanding of what constitutes a transitional society. Finally, it identifies venues for potential further research that builds on the present argument and research findings.

"Justice" in Transitional Justice

This research argued that, traditionally, the transitional justice literature has been dominated by a legal, and individualistic approach to doing justice. It appears that a large number of mechanisms used since the Second World War have primarily sought to carry out through retribution and punishment via the use of tribunals and courts, including, for instance, the ICC. Furthermore, transitional justice scholars generally resort to the use of three conceptions of justice to explain, and categorize transitional justice efforts. These three approaches to justice, namely the retributive, reparative and restorative approaches, each focus on different aspects of the crime and prioritize different elements. In a nutshell, the retributive approach emphasizes punishment for the crime committed. Reparative justice focuses on reparation and restitution for the harm caused, while the restorative approach emphasizes healing for all involved.

Yet, regardless of whether justice is to be categorized as retributive, reparative or restorative, each approach sees the individual as the primary source of concern, and justifies the need for justice either in the restoration, reparation, or retribution for individuals, whose rights have been infringed upon. Each of these approaches is rooted in a deontological-liberal view of justice, which gives precedence to the idea of a rational self, and conceives of the individual as a holder of rights, regardless of any other factor. These three approaches to justice, this research argued, are fundamentally grounded in a Western, liberal, and overly individualistic framework, which is often antithetical to the conception of "justice" embodied in customary or customary mechanisms of justice. By and large, transitional justice scholars have been unable or unwilling to engage with customary mechanisms of justice and the

conception of justice they embody, beyond the existing framework. This research argued that this poor conceptual imagination seriously affects the relevance and quality of transitional justice research.

Customary mechanisms of justice and the "relational" lens

Customary mechanisms of justice have long been overlooked and under-researched in the transitional justice literature. Mostly out of pragmatism, and in response to their growing use in post-conflict societies, transitional justice scholars have started to pay more attention to traditional justice practices and customary law. There is now a better understanding of why these mechanisms matter and what they look like.[1191] Yet, there is still very little knowledge about what they can and cannot achieve. The lack of conceptual imagination of transitional justice scholars has also limited their approach to these mechanisms and their ability to engage with the beliefs and conception of justice they generally embody. This study explored how indigenous traditions often adopt a community-centered view of justice that cannot fit within the existing deontological-liberal framework. Using evidence gathered through three months of ethnographic research in New Zealand, during which 33 Māori community members were interviewed, this study contends that the Māori approach to justice,

[1191] See for instance, William Zartman, *Traditional Cures for Modern Conflicts* (London: Lynne Rienner, 2000); Sverker Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda* (Durham: Duke University Press, 2008); Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability after War* (Cambridge: Polity, 2007)*;* Joanna R. Quinn, "The Role of Informal Mechanisms in Transitional Justice," a paper presented at the Canadian Political Science Association, London, Ontario, 2005; James Crawford, *The Proof of Aboriginal Customary Law* (Sydney: Australian Law Reform Commission, 1983); Penal Reform International, ″Access to justice in Sub-Saharan Africa: the role of traditional and informal justice systems," 2001, [report online]; accessible at http://www.gsdrc.org/docs/open/SSAJ4.pdf

like many other indigenous approaches, adopts a relational lens. A relational lens requires that justice be seen in the context of relationships, and crimes dealt with in terms of the relationships they have affected.[1192] Adopting a relational lens allows us to appreciate the primacy of the relationships that make up the community. As a result, justice must be carried out within the community, and the process owned by community members. To that, this research adds that the type of "justice" embodied in customary mechanisms has often been taken out of context, and rendered universal and ahistorical through its representation in restorative justice mechanisms. Indeed, more often than not, restorative justice is said to have its roots in indigenous practices.[1193] Chapter Nine illustrated this point by demonstrating how, in New Zealand, the government easily equates tikanga Mãori with FGCs, which it claims embodies Mãori values and preferences. It has shown how inaccurate this claim is, by carrying out a comparison between both practices. This tendency to equate restorative justice with indigenous approaches to law and justice is harmful and dangerous, for it risks rendering the transitional justice scholarship homogenizing and universalizing, to the detriment of local preferences and practices.

Implications for the field and transitional societies

Throughout its development, the transitional justice scholarship has favored the use, and implementation of, specific judicial institutions, including courts and tribunals, to carry out justice and hold individuals accountable in the aftermath of mass violations

[1192] Rupert Ross, "Exploring Criminal Justice and the Aboriginal Paradigm," discussion paper, 2010, [paper online]; accessible at http://www.lsuc.on.ca/media/third_colloquium_rupert_ross.pdf.
[1193] Carrie Menkel-Meadow, "Restorative Justice: What Is It and Does It Work?" *Annual Review of Law and Social Sciences* 3 (2007), 167.

of human rights. These institutions are rooted in a neo-liberal framework that sanctions a certain understanding the nature of law and justice. In fact, it appears that the transitional justice literature is informed by certain assumptions about the "goodness" and "neutrality" of its approach to justice.[1194] The propensity of transitional justice scholars to view "justice" as an unbiased and impartial instrument is highly problematic, for it fails to recognize the cultural contingency of legal practices and understandings. The universalizing tendency of the legalist paradigm that underlies the transitional justice scholarship dictates the kinds of activities that are undertaken in transitional societies. Customary practices often end up being tolerated only to the extent that they can imitate and adopt tenets of the legalist tradition.

Furthermore, this project underlined the propensity of the transitional justice literature to focus its attention on post-conflict societies and countries transitioning out of unrest toward democratic rule. It is argued that a number of settler societies actively engaged in a process of national reconciliation, face some similar challenges as post-conflict societies seeking to come to terms with a difficult past. While circumstances and the magnitude of human rights violations differ in post-conflict and settler societies, governments in both cases are seeking to re-establish, or consolidate their moral authority and legitimacy. As discussed in Chapter Nine, in Canada, just as in New Zealand, governments are actively seeking to acknowledge and repair historical wrongs committed against their indigenous populations. This

[1194] See Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 43 no. 7 (2007); Chanda Sriram, "Transitional Justice and the Liberal Peace," in *New Perspectives on Liberal Peacemaking*, ed. Edward Newman, Roland Paris and Oliver Richmond (New York: UN University Press, 2009); Rosemary Nagy, "Transitional Justice as Global Project: critical reflections," *Third World Quarterly* 29 no. 2, (2008).

research contends that the boundaries of transitional justice must be pushed so as to include a wider array of cases and transitions. The transitional justice scholarship would strongly benefit from broadening its inquiry to include democratic countries dealing with legacies of past violations of human rights and the necessities of historical redress.

Further Research

This doctoral research opens up the way for further research in the field of transitional justice. While the examination of tikanga Mãori, conducted as part of this doctoral research, directly contributes to filling the existing gap in the literature, it only partially does so. Further systematic study of other customary mechanisms of justice, and the philosophy of justice they embody, would significantly deepen our knowledge and understanding of these mechanisms. A similar study could be carried out in Canada, for instance. Inuit communities living in the northern part of the country appear to display strong adherence to, and preference for, their local judicial customs.[1195] And so, an investigation of their legal tradition may help confirm the argument made throughout this research, namely that customary approaches to justice are fundamentally relational, and that we need to adopt of a communitarian lens to view this approach to justice. An in depth study of other customary mechanisms and philosophies of justice would also possibly lead to further theorizing of what these mechanisms, in different regions of the world, have in common, and how they differ.

[1195] Susan Drummond, *Incorporating the Unifamiliar: An Investigation into Legal Sensibilities of Nunavik* (Kingston: Queens University Press, 1997).

Furthermore, and as mentioned earlier, little is known about the effectiveness of customary mechanisms of justice in promoting justice, and accountability. These processes are often the first, and sometimes only, mechanisms to which villagers, living in poor and remote areas, have access.[1196] As this study has shown in New Zealand, people sometimes prefer to resort to their own traditional ways to carry out justice. Often, people trust and understand these kinds of practices, more than they do Western imposed judicial systems.[1197] Yet, until recently, such practices as well as their impact on societies, have been largely overlooked. An empirical investigation of these mechanisms, and the conditions under which they are more likely to succeed, would provide much needed insight into possible ways to enhance present transitional justice efforts. Indeed, research could investigate the conditions and circumstances in which these mechanisms are more successful.

It would also be well worth looking into how attempts to reform and incorporate customary mechanisms of justice into national legal framework affect people's participation in, and experience of, these processes. This research discussed how in Rwanda and Burundi, for instance, state laws have formalized a number of elements and functions of *Gacaca* and *Bashingantahe* courts.[1198] In Uganda, the use of the country's customary mechanisms of justice is even encouraged in the Agreement on Accountability and Reconciliation between the Ugandan government and the Lord's Resistance Army.[1199] This movement towards the recognition and

[1196] Penal Reform International, "Access to Justice."
[1197] Quinn, "The Thing Behind the Thing."
[1198] Stephen Brown, "The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda," a paper presented at the Annual Convention of the International Studies Association, New York, 2009; United Nations Development Program, "Access to Justice," Practice Note (9/3/2004), 2004, 2, [practice note online]; accessible at http://www.undp.org/governance/docs/Justice_PN_English.pdf
[1199] Government of Uganda, "Constitution," 1995.

validation of customary mechanisms of justice, across the African continent, coincides with what Tiemessen notes to be a shift towards "localization," as a more legitimate and effective means to engender justice by including local constituencies and traditions.[1200] Yet, attempts to incorporate customary mechanisms into national legal framework have triggered substantial debate over the changing nature and authenticity of such mechanisms and the relationship they entertain with state laws.[1201] An investigation of the impact of this wave of legalization on customary mechanism is well overdue and would also be needed.

[1200] Alana Tiemessen, "Transitional Justice for East Timor: Expectations and Implications of Localization," a paper presented at the International Studies Association, New York, 2009.
[1201] Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," World Bank, 2005, [report online]; accessible at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf

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INTERVIEWS

Brewin, Marilyn, Research Programming Leader, The National Institute of Research Excellence for Mãori Development and Advancement, interview with author, 04th June 2010, Auckland.
Chant, Lisa, Professor of Mãori Studies, the University of Auckland, interview with author, 10th May 2010, Auckland.
Hohaia, Kim-sara, Auckland youth and Resource Management student, the University of Auckland, interview with author, 10th May 2010, Auckland.
Interview by author with community member, 13th June 1010, Rotorua.
Interview by author with community member, 28th June 2010, Auckland.
Interview by author with court worker, 28th May 2010, Auckland.
Interview by author with a Kaumatua, 13th June 2010, Rotorua.
Interview by author with a Marae Trustee, 29th June 2010.
Interview by author with a probations officer, 28th June 2010, Auckland.
Interview by author with a representative from the Ngati Whatua Trust, 27th June 2010, Auckland.
Interview by author with Executive Member of Nga Tauira Mãori Auckland Mãori Student Association, 12th May 2010, Auckland.
Interview by author with former lawyer and law Professor, 20th May 2010, Auckland.
Interview by author with former offender, 09th June 2010, Auckland.
Interview by author with member of Auckland Mãori Regional Tourism Organization, 14th May 2010, Auckland.

Interview by author with a member from the Māori Student Association, the University of Auckland, 13th May 2010, Auckland.
Interview by author with member of staff at Auckland University of Technology (AUT), 30th June 2010, Auckland.
Interview by author with member of the UN Forum on Indigenous Issues, 18th May 2010, Auckland.
Interview by author with Professor of Māori Studies, the University of Auckland, 14th May 2010, Auckland.
Interview by author with schoolteacher, 17th May 2010, Otara.
Interview by author with schoolteacher and head of Māori department, 17th May 2010, Otara.
Interview by author with social worker, 22nd July 2010, Auckland.
Interview by author with student, the University of Auckland, 7th May 2010, Auckland.
Interview by author with student, the University of Auckland, 13th May 2010, Auckland.
Interview by author with student, the University of Auckland, 26th May 2010, Auckland.
Interview by author with student, the University of Auckland, 28th June 2010, Auckland.
Interview by author with student and member of the Māori Student Association, the University of Auckland, 13th May 2010, Auckland.
Jones, Katherine, Professor in Management, Auckland University of Technology, interview with author, 1st July 2010, Auckland.
Kātene, Rāhui, Member of the New Zealand Parliament and Māori Party, interview with author, 31st May 2010, Wellington.
Naera, Agnes, Programme Director Equity, Kaiwhakahaere Kaupapa Māori, Auckland University of Technology (AUT), interview with author, 30th June 2010, Auckland.
Papa, Moana, South Auckland community member, 28th June 2010, interview with author, Auckland.
Royal, Charles, Director of The National Institute of Research Excellence for Māori Development and Advancement, interview with author, 11th May 2010, Auckland.
Williams, Arena, Auckland youth and law student at the University of Auckland, interview with author, 10th May 2010, Auckland.
Williams, Haare, Kaumatua and Manukau City Councelor, interview with author, 18th June 2010, Auckland.

STEPHANIE, ANNE-GAELLE VIEILLE

EDUCATION

Doctor of Philosophy Degree, Political Science
The University of Western Ontario, Ontario begun 2007

Master of Arts Degree, Political Science
Simon Fraser University, British Columbia June 2007

Honours Bachelor of Arts Degree, Politics and International Relations
University of Kent at Canterbury, UK May 2004

AWARDS

The University of Western Ontario, PhD program (2007-2011)
Western Graduate Research Scholarship, The University of Western Ontario 2010-2011, *$8000*
Nominated for Graduate Student Teaching Award, The University of Western Ontario 2009-2010
Western Graduate Thesis Research Award, The University of Western Ontario 2010, *$750*
SSHRC, CGS Michael Smith Foreign Study Supplement 2010, *$6000*
Western Graduate Research Scholarship, The University of Western Ontario 2009-2010, *$8000*
Western Graduate Research Scholarship, The University of Western Ontario 2008-2009, *$8000*
SSHRC, J. Armand Bombardier CGS Doctoral Scholarship 2008-2011, *$105,000*
Dean's Graduate Scholarship in Migration and Ethnic Relations, The University of Western Ontario 2007, *$2000*
Western Graduate Research Scholarship, The University of Western Ontario 2007-2008, *$8000*

Simon Fraser University, M.A. program (2005-2007)
CIDA-CFHSS Graduate Student Award 2007, *$3000*
Best M.A. Essay Award, British Columbia Political Association, 2007
Graduate Student Open Scholarship, Simon Fraser University 2007, *$1300*

The University of Kent at Canterbury, B.A. Honours program (2001-2004)
Bourse de l'Education Nationale, Ministere de l'Education, France 2002-2003, *€1500*
DFES, Government of Great-Britain 2002-2003, *£1000*
Bourse de l'Education Nationale, Ministere de l'Education, France 2001-2002, *€1500*

DFES, Government of Great-Britain 2001-2002, *£1000*
Bourse de l'Education Nationale, Ministere de l'Education, France 2000-2001, *€1500*
DFES, Government of Great-Britain 2000-2001, *£1000*

PUBLICATIONS

Articles, peer reviewed:

D. Hoogenboom and S. Vieille, "Rebuilding Social Fabric in Failed States: Examining Transitional Justice in Bosnia," *Human Rights Review*, 11.2 (June 2010): 183-198.

"Nationalism on the Island: The Legitimacy of the Corsican Nationalist Movement in Question," *Journal of Federal Governance*, 6 (2007): 1-22.

Reviews:

"*The Cost of Justice*, ed. B. Grodsky" *Journal for Peace and Justice Studies* Forthcoming.

"*Bosnian Women Reclaiming Peace*, ed. S .Hunt" *Millennium Journal of International Affairs* 35.2 (2007).

"*Contact zones: Aboriginal and Settlers Women in Canada's Colonial Past*, ed. K. Pickles and M. Rutherdale" *Canadian Ethnic Studies* 38.2 (2006).

"*Unsettled Pasts: Reconceiving the West through Women's History*, ed. S. Carter and L. Erickson" *Canadian Ethnic Studies* 38.1 (2006).

Unpublished Theses:

"Building Bridges through Reconciliation: A glimpse at Gacaca in Rwanda and Mato Oput in Uganda," M.A. diss., Simon Fraser University, 2007.

Presentations:

"Thinking About Justice through a Māori Lens," **Panel—Transitional Justice 2: From the Ground Up: Cases of Transitional Justice in Action, Canadian Political Science Association,** Waterloo, ON: May 16-18, 2011.

"What of Tikanga Māori: Looking at Justice through a Relational Lens," (Invited presenter) **Speaker Series**, **Centre for Transitional Justice and Post-Conflict Reconstruction**, The University of Western Ontario, November 2010.

"Re-thinking Justice in Transitional Justice," **Panel - Reconciliation, International Peace Research Association Biennial Conference**, Sydney, Australia: July 2010.

"Foucault and bio-power," **Panel - The Failures of Archaeology and the Invention of Genealogy: Sexuality and Bio-Power, Critical Politics Research Group**, The University of Western Ontario, November 2009.

"Tikanga Mãori and Justice," **Transitional Justice Research Colloquium**, **Centre for Transitional Justice and Post-Conflict Reconstruction**, The University of Western Ontario, November 2009.

"Questioning Transitional Justice," **Graduate Research Colloquium**, Department of Political Science, The University of Western Ontario, October 2009.

"Transitional Justice and the Neoliberal Discourse," with D. Hoogenboom **Panel - The Complexities of Transitional Justice, Canadian Political Science Association,** Ottawa, ON: May 29, 2009.

"Re-building Social Fabric in Failed States: Examining Transitional Justice in Bosnia," with D. Hoogenboom **Panel - Transitional Justice II: Local Mechanisms and Initiatives, Canadian Political Science Association**, Vancouver, BC: June 2008.

"Building Bridges through Reconciliation," (Invited presenter), **Congress of the Canadian Federation of Humanities and Social Science**, Saskatoon, SK: June, 2007.

"Terra Incognita: Questions on Accountability, Right to Know and Local Governing in British Columbia," with D. Gavan and P. Smith **British Columbia Political Science Association**, Vancouver, BC: April, 2007.

"Re-building local capacity in the aftermath of intra-state wars," **British Columbia Political Science Association**, Vancouver, BC: April, 2007.

"Traditional Healing Processes in Northern Uganda: Reconciliation and peace building after mass violations of human rights," **UBC Annual Interdisciplinary Graduate Conference on Conflict**, Vancouver, BC: April, 2006.

"Recovering Peace in Rwanda," (Invited presenter) **Symposium on Africa in the 21st Century,** Vancouver, BC: October 2005.

WORK IN PROGRESS

"The semantics of restorative justice and gender" with Prof. Shirley Julich (The University of Auckland, NZ)

"*Cases in transition: towards a broadening of transitional justice"*

"Transitional Justice: A Colonizing Field?" under consideration by *The Journal of Law and Society*

"Unveiling Morocco's Troubled Past: An investigation of the Instance Equité et Réconciliation" under consideration by *Peace, Conflict and Development: An Interdisciplinary Journal*

RESEARCH EXPERIENCE

Principal Investigator, "Investigating Mãori justice," Funded by SHHRC- CGS Michael Smith Foreign Study Supplement, Affiliated with Dept. of Political Science, **The University of Auckland**, **New Zealand** (May-July 2010).

Co-investigator, "Justice and culture," with Caroline Bennett Abu-Ayyash, Department of Psychology, **The University of Western Ontario** (2009-2011).

Graduate Research Fellow, **Centre for Transitional Justice and Post-Conflict Reconstruction,** London, ON (2009-2011).

Field Research Assistant, "Considering Traditional Forms of Acknowledgment in Uganda: VII," Dr. Joanna Quinn, **Uganda, East Africa** (June-July 2009).

Field Research Assistant, "Considering Traditional Forms of Acknowledgment in Uganda: V," Dr. Joanna Quinn, **Uganda, East Africa** (June-July 2008).

Research Assistant, "Donor Democratization and Governance Policies in Africa," Dr. Alison Ayers, **Simon Fraser University** (Winter 2007).

Co-investigator, "An investigation of BC's Municipal Campaign Finance," with Denisa Gavan and Patrick Smith, **Institute of Governance, Simon Fraser University** (2006-2007).

Research Assistant, "African Diaspora and Migration," Dr. Sandra Maclean, **Simon Fraser University** (Winter 2006).

Research featured in the news:

"Municipal politicians deserve more scrutiny," **The Vancouver Sun** (31st March 2008).

"Whose cash backs your local politicians," **The Tyee** (2nd November 2007).

"PoliSci grad addresses international congress," **SFU News** (14th June 2007).

"Justice: Restorative mediation helps find peace," **Langley Advance** (7th June 2007).

"Thesis on justice draws world praise," **Langley Advance** (5th June 2007).

PROFESSIONAL EXPERIENCE

Grant Writer, The Faculty of Law, **The University of Western Ontario** (Summer 2011)

Policy Intern, Direction des Listes Electorales, Claire Thoannes, **La Ville de Marseille** (September 2000).

TEACHING EXPERIENCE

Courses Designed and Taught:

Le Projet Europeen: Comprendre l'Union Europeene
Simon Fraser University (BC), Bureau des Affaires Francophones and Francophiles (2007)

Teaching Assistantships:

The University of Western Ontario, Department of Political Science
International Human Rights POL 3388 (2010-2011) Instructor: David Hoogenboom
International Human Rights POL 3388 (2009-2010) Instructor: Dr. Joanna Quinn
Introduction to Political Theory POL 2237 (2008-2009) Instructor: Dr. Doug Long
Environmental Politics in a Global Age POL 3341 (2007-2008) Instructor: Dr. Radislav Dimitrov

Simon Fraser University, Department of Political Science
- The Administration of Justice POL 151 (Winter 2007) Instructor: Dr. Patrick Smith
- Introduction to International Politics POL 241 (2005-2006) Instructor: Dr. Alexander Moens

Simon Fraser University, Bureau des Affaires Francophones et Francophiles
- French language tutor for students enrolled in the BA in Public Administration taught in French.

On-Line Teaching:

Monitor/Facilitator,
Introduction to International Politics POL 2260 (Fall 2007) Simon Fraser University

Guest Lectures:

"Torture," International Human Rights (POL 3388e), The University of Western Ontario, March 2011.
"Intervention(s): The disposition of land and culture," Indigenous Peoples and Development (POL 2203), Huron College, October 2010.
"Genocide," International Human Rights (POL 3388e), The University of Western Ontario, April 2010.
"Environmental Challenges Today," Environmental Politics in a Global Age (POL 3341), The University of Western Ontario, October 2007.
"Terrorism and Human Rights," The Administration of Justice (POL 151), Simon Fraser University, February 2007.

Professional (Teaching) Development Seminars and Certificates:

Getting Feedback on Your Teaching (The University of Western Ontario, Fall 2010).
Facilitating Active Learning (The University of Western Ontario, Fall 2010).
Advanced Teaching Program Certificate (The University of Western Ontario, Winter 2010).
New Problem Sets to Enhance Learning and Motivation (The University of Western Ontario, Fall 2009).
Developing a Course Outline (The University of Western Ontario, Fall 2009).
Diplome D'Enseignement du Francais – DAEFFLE (Alliance Française, 2007).
Certificate in University Teaching (Simon Fraser University, 2007).

PROFESSIONAL SERVICE

Senior Editor, *UWO Journal of Legal Studies* (June 2011- Present).

Internal Graduate Program Reviewer, The School of Graduate and Postdoctoral Study, The University of Western Ontario (Spring-Summer 2011).

Scholarship Expert Consultant, The School of Graduate and Postdoctoral Study, The University of Western Ontario (Fall 2010).

Member, Critical Theory and Practice Research Group (2009-2011).

Academic Team Leader, ASB-Student Career Centre, The University of Western Ontario (2009 2010).

Member, TA Needs and Bursary Committee, Graduate Teaching Assistant Union (Fall 2009).

Invited Chair, Multipaper Panel: Normes Esthétiques, La Norme et ses Infractions en Literature et Linguistique London ON (May 2009).

Dept. Representative, Society of Graduate Students, The University of Western Ontario (Summer 2009).

Fundraising and Grants Officer, Canadian Sudanese Volunteers for Development, London ON (2008-2009).

Member, Executive Committee Collaborative Programs in Migrations and Ethnic Studies (2007-2008).

Communications Executive, Teaching Support Staff Union, Simon Fraser University (2007).

Manuscript Referee. *Journal of Federal Governance* (2006-2007), *Canadian Journal of Ethnic Studies* (2006-2007).

Member, Graduate Issues Committee, Simon Fraser University (2006-2007).

Graduate Student Representative, Hiring Committee, Dept. Political Science, Simon Fraser University (2006-2007).

External Liaison Officer, Current Affairs Student Society, The University of Kent at Canterbury (2003-2004).

PROFESSIONAL AFFILIATIONS

Canadian Political Science Association (CPSA)
Canadian Association of Studies in International Development (CASID)
African Transitional Justice Network
Centre for Transitional Justice and Post-Conflict Reconstruction