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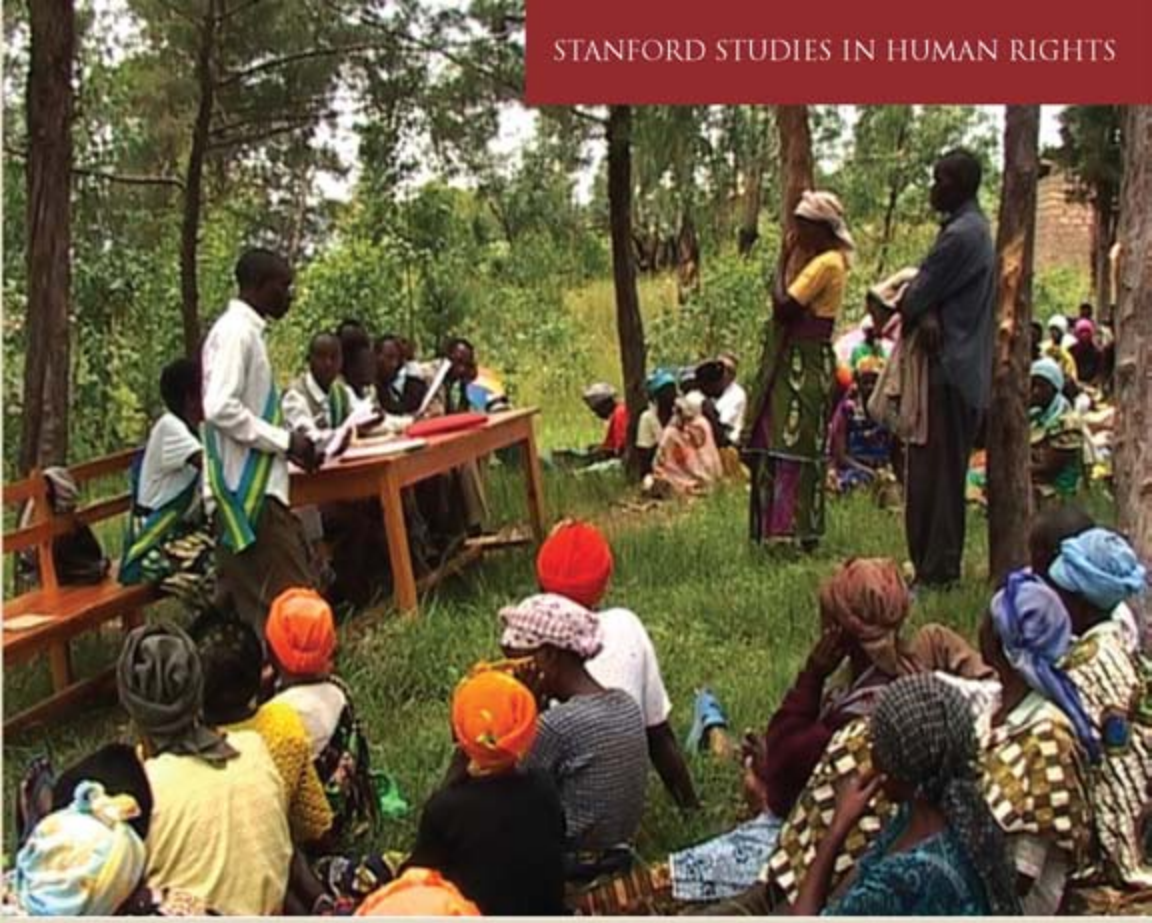

LOCALIZING TRANSITIONAL JUSTICE

INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE

Edited by

ROSALIND SHAW *and* **LARS WALDORF,**

with **Pierre Hazan**

Stanford Studies in Human Rights

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Preface

Ruti G. Teitel

WE ARE WITNESSING what I have elsewhere identified as a "global" and "normalized" phase of transitional justice, a proliferation of accountability mechanisms and processes at and across different levels—international, regional, domestic, and local (Teitel 2008). Yet it is often unclear what these developments actually mean, either theoretically or operationally, at the intersection of the international and the local. This challenge goes to the heart of this book. By focusing on issues of locality, this work puts in question prevailing assumptions and illuminates current controversies in the field through comparative and interdisciplinary research covering a wide ground.

This searching book sets out to get beyond generalizations about the global moment, to take a hard, close look at local realities and impacts on the ground, and to interrogate the state of current responses to conflict and repression. The contributors challenge the teleological assumptions of transitional justice, examining the concrete ways in which its mechanisms intersect with survivors' practices, standpoints, and priorities in specific places and times. They thereby refashion conventional understandings of "the local," "justice," and "transitions."

The range and depth of experience here are impressive. The various contributions probe across regions in far-ranging inquiries spanning Central and South America, Eastern Europe, the Middle East, Africa, and Southeast Asia, exploring complex forms of accountability. Through careful work on the ground, the contributors show persuasively that transitional justice developments have not moved along a linear and progressive trajectory but are instead reshaped through a diverse array of forums and interests, as well as through clashes among multiple rule-of-law values. In so doing, the contributions unsettle as

they challenge the notion of so-called best practices of transitional justice that can be exported throughout.

A recurring theme throughout this scholarly inquiry is how to learn from local standpoints. If a global approach means we are somehow beyond the state and its democratization project, the place-based approach advocated by this book's editors returns us to survivors' experiences of the state and of the global processes that affect them—experiences that may generate other aims and priorities. Choosing between the local and the international has been said to involve the values of objectivity and fairness of a neutral judiciary as opposed to those of local discretion and accountability. But framing the dilemma this way can obscure the often profound disjuncture between survivors' priorities and the interests of international specialists. Moreover, who gets to decide?

As this book tacks between the ideals of transitional justice and the realities on the ground, it opens up an important evaluative space—one that is always guided by the central place of the victims of these mass crimes. Given the pervasive sense of threat and the ever-greater toll borne by civilians in contemporary conflict, this ought to be the guiding principle today. What is the impact of transitional justice measures on survivors? How can their well-being be reconciled with state building? By posing these fundamental questions, which are as much moral as legal and political, this book sheds light far beyond transitions.

RGT
New York City
May 2009

Acknowledgments

THIS BOOK HAS ITS origins in the discussions of six visiting fellows at Harvard University during the spring of 2005. At that time Pierre Hazan, Jamie O'Connell, and Habib Rahiab in Harvard Law School's Human Rights Program formed a transitional justice working group with Tiawan Gongloe, Fabienne Hara, and Rosalind Shaw at the Carr Center for Human Rights Policy. Zinaida Miller, then a JD student at Harvard Law School, also contributed to our exchanges of ideas. We are most grateful to Michael Ignatieff and Pierre Allan for their support of our endeavor, and to Jamie O'Connell as co-writer of funding applications. The following year, we brought additional scholars and practitioners together at the Rockefeller Foundation's Study and Conference Center in Bellagio, Italy. We wish to express our gratitude to the Rockefeller Foundation for providing such a supportive and beautiful environment in which to discuss some of the ideas presented here. We also wish to thank Tufts University's Jonathan M. Tisch College of Citizenship and Public Service for funding some of the participants' travel and accommodations as part of Rosalind Shaw's Tisch College Faculty Fellowship. This volume builds upon these two sets of discussions. We are especially grateful to Kate Wahl of Stanford University Press and Mark Goodale as series editor of Stanford Studies in Human Rights, both for their sustained interest in this project and for their expert guidance. We also express particular appreciation to the two anonymous reviewers for the Press, who gave us extraordinarily helpful feedback on an earlier version of the manuscript. Finally, we are indebted to all our contributors and to the original members of the transitional justice working group at Harvard. Although the only members of the working group represented in this volume are Pierre Hazan and Rosalind Shaw, all of you made its conception and development an inspiring experience.

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PART I

Frames

Chapter 1

Introduction

Localizing Transitional Justice

Rosalind Shaw and Lars Waldorf

Rethinking the Paradigm of Transitional Justice

Since the turn of the millennium, the field of transitional justice has been increasingly challenged by the very people it is designed to serve: survivors of mass violence. Transitional justice has grown over the past twenty years into a normalized and globalized form of intervention following civil war and political repression (Teitel 2003). It embodies a liberal vision of history as progress (Hazan, this volume), a redemptive model in which the harms of the past may be repaired in order to produce a future characterized by the nonrecurrence of violence, the rule of law, and a culture of human rights. This vision is put into practice through a set of legal mechanisms and commemorative projects—war crimes prosecutions, truth commissions, purges of perpetrators, reparations, memorials—that is often conceived as a "toolkit" for use all over the world. But as the heated public controversy over the International Criminal Court's involvement in Uganda indicates, the current phase of transitional justice is frequently marked by disconnections between international legal norms and local priorities and practices. When national and international accountability mechanisms are engaged in specific places and times, they are often evaded, critiqued, reshaped, and driven in unexpected directions.

In this volume, we wish to problematize the local engagement of justice interventions and, in so doing, to rethink the orthodox transitional justice paradigm and the analyses, policies, and practices that it engenders. The contributors to this book promote this rethinking process by interrogating the teleological assumptions of transitional justice and by examining the concrete ways in which its mechanisms actually work.

The paradigm of transitional justice, we argue, is increasingly destabilized by its local applications. Because this is especially apparent when we focus on specific places and times, the contributors to this volume examine how transitional justice actually functions in those places and times and attend to local experience, priorities, and practices. If attention to locality shows us how foundational assumptions and practices of transitional justice break down, it can also show us new sets of possibilities. Too often, an engagement with "realities on the ground" signifies a focus on practical outcomes alone ("lessons learned," "best practices"), while the intellectual and normative frame of transitional justice floats above these in the realm of the transcendent. Here, though, we wish to disturb the dichotomy between the concrete and the conceptual, arguing that the very nature of transitional justice—its underlying teleology of evolution and progress, its dualistic moral vision, its dominant models of memory, speech, and personhood, and its privileging of criminal justice and civil/political rights over other forms—is exposed, challenged, disassembled, and reconfigured precisely in its local engagements (see Tsing 2004).

Recently, transitional justice has itself undergone a shift toward the local. Customary law and other forms of local justice currently receive unprecedented attention as complements to tribunals and truth commissions. And increasingly, transitional justice policymakers conduct surveys to consult people in areas of conflict and post-conflict about their priorities for transitional justice. But closer examination reveals a paradox. This latest phase of transitional justice is marked not only by a fascination with locality, but also by a return to Nuremberg's international norms against impunity and a UN prohibition against granting amnesties for war crimes. Although policymakers and scholars now routinely recognize the importance of adapting mechanisms of transitional justice to local circumstances, such adaptation tends to be conceptualized in ways that do not modify the foundational assumptions of transitional justice. Often, for example, local human rights NGOs are assumed to represent "the local voice," while interactions with ordinary civilians tend to be limited to top-down "outreach" or "sensitization" processes such as workshops and information sessions. And while survivors of violence are increasingly surveyed about their priorities for justice, there is not always agreement as to how surveys should be conducted, interpreted, and translated into practice. Survivors are in any case unlikely to get what they ask for if it contradicts international legal norms.

Kofi Annan's influential report to the United Nations Security Council on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" provides a prominent instance of this paradox. Annan affirms that

> Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations. (2004a:1)

Thus while Annan argues that models of transitional justice can and should be adapted to a specific context, these models must at the same time reflect transcendent values that cannot be modified. He also identifies "the context" in question as that of the nation-state. Here, then, is the conundrum. Increasingly, visible signs of "the local" are incorporated into transitional justice by adapting customary law processes and by involving local NGOs and local elites. Yet local experiences, needs, and priorities often remain subsumed within international legal norms and national political agendas.

In transitional justice discourse, the challenges of localization are sometimes cast in terms of a "clash" between "local (and implicitly 'traditional') culture" and "universal" justice norms. But just as anthropologists studying human rights have changed the terms of the intractable debate between cultural relativism and human rights by recasting ideas of "culture" and examining human rights practice and discourse in particular contexts (e.g., Cowan, Dembour, and Wilson 2001; Goodale 2006b; Merry 2006; Wilson 1997), we use a place-based approach to move us from the model of collision to one of engagement (albeit a frictional engagement: see Shaw 2007). Thus in this volume the contributors explore the complex, unpredictable, and unequal encounter among international norms, national agendas, and local practices and priorities through the operations of transitional justice in particular locations. This is far from being a purely academic exercise. By taking a deeper, more critical look at these operations in specific places and times; by examining the hierarchies, power relations, and heterogeneous interests that frame them; and by tracing how people respond to and sometimes transform them, we wish to lay a foundation for postviolence processes based on more responsive forms of place-based engagement and broader understandings of justice.

Reframing "the Local"

Yet what is "the local"? This is not merely an abstract question, since concepts of locality have direct consequences for the ways in which organizations, policymakers, and practitioners approach concrete locations. Recently, Mark Goodale (2006a) has challenged the conceptualization of "the local" in human rights discourse and most of the social sciences, criticizing the prevalent notion of a nested set of "levels" descending from the global to the regional, from the regional to the national, and from the national to the local. This language of "levels" obscures the fact that no location in the world exists in detachment from national and global processes. It would be hard to find places that, however remote from metropolitan centers, are not pervaded by circulations of ideas and images from human rights to hip-hop.

When we conceptualize "the local" as a level, we place it in a different frame and set it up to carry meanings of remoteness, marginality, and circumscribed contours (see Gupta and Ferguson 1997a:43). To borrow Appadurai's language, we render it as a form of spatial incarceration (1988:37). Through a levels-based definition, we depoliticize locality, constructing it as a residual category characterized both by separation (from "the national," "the international," and "the global") and by absence (of modernity). In place of these absences, we make "culture"—often presumed to be "naturally the property of a spatially localized people" (Gupta and Ferguson 1997b:3)—the most salient feature of "the local." The implications for transitional justice and human rights practice are significant. When we construct "the local" as a level, this predisposes us to marginalize the experiences, understandings, and priorities of people within this residual space. And since, according to this conceptualization, locality can provide no basis for knowledge beyond that of "culture" or "tradition," "local knowledge" becomes conflated with "tradition," while knowledge beyond "tradition" must come from outside.

Rather than approaching "the local" as a level, what if we view it as a standpoint based in a particular locality but not bounded by it? "The local" now becomes the shifted center from which the rest of the world is viewed. The reality with which we have to begin—and without which transitional justice cannot be legitimate or effective—is that of a nuanced understanding of what justice, redress, and social reconstruction look like from place-based standpoints.

As a first step, we need to ask how people affected by armed conflict and political repression experience the mechanisms designed to address their

needs. Over the past ten years or so, scholars and practitioners have begun to explore this question through close methodological engagement in specific sites (e.g., Cobban 2007; Fletcher and Weinstein 2004; Kelsall 2005, 2006; Laplante and Theidon 2007; Ross 2003a; Shaw 2007; Stover 2005; Stover and Weinstein 2004; Wilson 2001). As the chapters in Part Two of this volume explore, the "counterviews" gained from local experiences of justice mechanisms often present a startling contrast to the formal goals of these mechanisms and, in many cases, force a reexamination of some fundamental premises of transitional justice.

As a second step, we need to place particular emphasis on survivors' priorities for postviolence reconstruction. This forms the focus of Weinstein, Fletcher, Vinck, and Pham's chapter in this volume. Asking "Whose priorities take priority?" they draw attention to the gap between the idealized goals and assumptions of transitional justice and the realities of life on the ground. They locate this gap in historical context, reviewing the discrepancies that have emerged at different genealogical phases of transitional justice and addressing the challenges these discrepancies pose—among which the authors give precedence to "our ability to question assumptions and to hear what the beneficiaries of justice believe to be important." This, in turn, prompts them to explore the methodological challenge of how to listen to local priorities, to which we turn later. From their comparison between the priorities of international justice and those of people affected by violence, Weinstein et al. conclude that "[m]any involved with international justice have lost sight of its goals in favor of developing and maintaining an international system of criminal law over and above what might be the needs and desires of the victims of abuse."

These struggles over justice and reconstruction now unfold on a terrain configured by the U.S.-led war on terror. Since September 11, 2001, this "war" has transformed international norms, reconfigured the power of states, intersected in paradoxical ways with transitional justice, and created new frictions with local priorities for dealing with the aftermath of violence. Pierre Hazan's contribution to this volume provides a crucial analytical frame by exploring the ways in which the war on terror is eroding the redemptive paradigm of transitional justice. The events of September 11 created a geostrategic rupture in which, he argues, the dominant discourse of global security is displacing the optimistic model of political evolution through transitional justice. These events also ushered in a new realpolitik: "in this neo-conservative vision,"

observes Hazan, "the alliance with repressive regimes is from now on interpreted as a strategic necessity in the name of the global war for the 'defense of freedom.'" If the paradigm of transitional justice has been destabilized from below, it is now, in key areas, crumbling from above. In places that are not considered particularly relevant to the war on terror—several of which are examined in the current volume—the international community still regards transitional justice as offering a useful toolkit for responding to specific instances of violence. But even here, argues Hazan, transitional justice is becoming decoupled from the encompassing vision of moral and political progress that prevailed "between the fall of the Berlin Wall and the fall of the twin towers in New York."

"Victims" and "Perpetrators": Rethinking Justice

Where this moral vision still obtain its most basic assumption is perhaps that of victims' rights to justice. This premise underlies a recurring feature that structures much transitional justice discourse and practice: the dichotomy between "victims" and "perpetrators." While this dichotomy characterizes many legal approaches, the postauthoritarian context in which transitional justice developed, with its legacy of large power imbalances between citizens as victims and repressive state agents as abductors, torturers, and murderers, may have reinforced it. But in intrastate conflicts originating in part from *structural* violence, this dichotomy tends to be less clear. Not only are such conflicts typically moral gray zones with blurred boundaries between "victims" and "perpetrators," but this Manichean division also has major—although unintended—consequences for people placed in either category.

One of these is a profound depoliticization: neither "victims" nor "perpetrators" are political actors. Writing about the International Criminal Court and its intervention in Uganda, Kamari Clarke (2007) views the ICC's universalizing jurisdictional claims over "victims" through the lens of Agamben's (1998) concept of "bare life." Such claims reduce people to mere existence "marked by a condition of pre-political absolute victimhood" that "exists in tension with the attempts to produce political beings found in the struggles of individuals from postcolonial African regions to implement their own forms of justice" (2007:137). In order to relocate people as political agents within international justice, she concludes, we need to "rethink the conditions within which we envisage justice in the first place" (2007:158).

Finnström, in this volume, examines how justice mechanisms have similarly depoliticized the other half of this binary: the perpetrators. In northern Uganda, the Lord's Resistance Army's (LRA) violence has been so horrendous that the ICC fails to confront the complex politics and history of the conflict in northern Uganda, including systemic abuses by the Ugandan state, and reduces the conflict to the evil or insane actions of LRA perpetrators. At the same time, however, Uganda's 1999 Amnesty Law and related initiatives of forgiveness by local leaders may also be viewed as mechanisms that depoliticize. Each, Finnström argues, is premised on a hierarchical relationship in which the rebels are reduced from political subjects to children or criminals. This is not to deny or diminish the abuses committed by the LRA, but to relocate these crimes—along with those of the government and army—in a political space. By excluding the rebels from the political realm, neither the "retributive" ICC nor the "restorative" amnesty will enable an understanding of the range of political, social, and economic injustice in northern Uganda that brought about and sustains this conflict. Instead, Finnström suggests, "both restorative and retributive justice, even amnesty laws, can become weapons of war rather than tools of peacemaking."

These depoliticizing representations, moreover, circumscribe the workings of justice mechanisms. Kimberly Theidon, in this volume, examines how Peru's Truth and Reconciliation Commission (TRC) produced a category of "innocent victims" that intersected in insidious ways with the Peruvian government's war against terrorism, with problematic consequences for human rights and national reconciliation today. Although the TRC's mandate was to explore the truth concerning Peru's civil war, the state's war on terrorism constrained the truth that could be told. Specifically, the main rebel group—the Sendero Luminoso (SL)—remained so demonized that those who had been part of it were denied the opportunity to testify before the Commission. Because of this exclusion, there was no opportunity to explore why so many people (mostly poor and nonwhite) had supported the SL, and to thereby address the structural causes of the violence. And because the image of the "terrorist" in the Peruvian state came to be layered upon the same conceptual space occupied by "the primitive," the stakes were especially high for those in Andean communities.

This stigmatization shaped the kinds of testimonies that the TRC received in rural areas, as Theidon shows. Building on the TRC's binary categories of

"victims" and "perpetrators," communities developed their own standardized narratives of innocent victimhood. By repressing alternative histories, the discourse of "innocent victims" silenced an important source of the broader truth the TRC was investigating. And by creating "resentful silences," it also disabled another part of the TRC's mandate: national reconciliation. The TRC has not, as a result, been effective in mitigating the polarization and division that the state's war on terrorism created. Currently, legitimate claims for social justice and rights are dismissed as a "rekindling of the ashes of terrorism," while those accused of belonging to or sympathizing with the SL are denied rights altogether.

Finally, as scholars and policymakers seek to integrate transitional justice goals with programs of disarmament, demobilization, and reintegration (DDR) after armed conflicts, they also integrate the sharp moral dualism of these goals. In her chapter, Rosalind Shaw critiques approaches that divide survivors of armed conflict into "victims" entitled to reparations and "perpetrators" subject to accountability mechanisms that, it is assumed, will facilitate reintegration. This latter assumption draws apparent support from the international consensus that Sierra Leone's "experiment" with two concurrent transitional justice mechanisms—the TRC and the Special Court for Sierra Leone—was "successful." Shaw examines the politics of knowledge through which the alleged success of the Sierra Leone experiment became an accepted "fact," and traces the TRC and Special Court's local articulations both with Sierra Leone's DDR program and with informal reintegration practices. This transitional justice experiment intensified processes of exclusion produced by DDR—especially for young, lower-ranking ex-combatants whose marginalization had contributed to Sierra Leone's conflict in the first place. This intensified exclusion, Shaw argues, does not derive from an inherent incommensurability between transitional justice and DDR. Rather, it is rooted in narrow definitions of justice shaped by the "victim–perpetrator" dichotomy that do not adequately address forms of preconflict injustice. If understandings of "justice" were repoliticized and rehistoricized, she suggests, it would entirely transform what it means to link justice with reintegration.

Recasting Silences

If the above studies prompt a reevaluation of our definition of justice, those to which we now turn direct us to reconsider our assumptions concerning truth and memory. In the field of transitional justice, these are premised upon fur-

ther assumptions about the proper work of speech and remembering, models of personhood, and understandings of damage, social repair, and redress. Such ideas are differently constituted through diverse histories and asymmetries of power and critically shape the local engagement of transitional justice. Ideas concerning the empowering, redemptive, and apotropaic powers of speaking and remembering, for example, were forged over the *longue durée* of western religious and psychological thought (Shaw 2007) and entered the transitional justice paradigm during the postauthoritarian period at the end of the Cold War, when truth telling and public remembering became critical weapons against the repressive violence of strong states (Neier 1999). But subsequently, during its current globalized phase (Teitel 2003), transitional justice is more usually applied after (and, increasingly, during) low-intensity intrastate conflicts in weak or collapsed states characterized by violence "among neighbors" (Theidon 2004). Those who have to live with their neighbors in contexts of chronic insecurity do not necessarily share the priorities, memory projects, and speech practices of transitional justice mechanisms that developed to address the aftermath of political repression in other places.

In many areas with a long history of successive layers of violence—slave trades, colonial rule, political subordination, state failure—people have often developed ideas and practices that foster some measure of protection. In Burundi, Rwanda, and Sierra Leone, for example, complex practices of secrecy, concealment, silence, ambiguity, dissimulation, and indirection have developed as strategies for living with the threat of death (e.g., Ferme 2001; Lame 2005; Shaw 2000, 2007).

Such protective mechanisms acquire particular salience in a repressive state. In this volume, Waldorf examines how cultural practices of secrecy that developed as defensive strategies for living under unpredictable rulers during Rwanda's past remain relevant to Rwanda's post-genocide politics. Whereas truth telling originated as a human-rights tool *against* state repression, truth telling in the modern *gacaca* courts under the current regime has become a coercive tool of the state. Since gacaca courts do not hear cases of war crimes committed by the current government, since participation is compulsory, and since those who testify are threatened and occasionally killed by those they accuse, the truth-seeking practices of gacaca form a site of particular fear, danger, and mistrust.

One's own community may also engender profound contradictions. In Fiona Ross's chapter we have a compelling analysis of silence as a protective

mechanism for South African women. For those in charge of South Africa's TRC, women's silences about rape formed an obstacle to the Commission's goal of breaking the silence surrounding acts of violence under apartheid. Rather than speaking out about their own experiences—which, the TRC claimed, would help heal their wounds—women testified about the consequences of violence for their families and communities. Women thereby resisted the category of "rape victim" through which the TRC often sought to define them, seeking instead to rectify the broader social relationships and networks in which they lived. We have to look at these silences, Ross argues, in terms of how the violence of apartheid was folded into the structural violence of kinship relations. She views women's silences before the TRC through the lens of the recent rape trial of Jacob Zuma, the current president of South Africa, in order to examine the social costs and physical risks for women who talk about rape. Because in many cases of sexual violence the perpetrators come from the family or community (as in the Zuma trial), women who directly verbalize acts of rape violate the ideology both of the family and of the liberation struggle itself, thereby placing themselves in the role of betrayer—and in danger of social death and further physical abuse. Given these gendered risks of speaking, Ross concludes, those involved in transitional justice should reexamine the assumption that women in general and rape survivors in particular bear a special responsibility to talk about rape.

Ross's and Waldorf's chapters raise critical questions. What happens when repressive states enact transitional justice as victor's justice? How does transitional justice connect to established forms of structural violence, social asymmetries of power, the "gray zone" where perpetrators may also be victims, and processes of social reconstruction? If those involved in transitional justice respect protective silences, does this reinforce broader silences around violence? Paul van Zyl observed that silence may open the door for zealots and authoritarians to stir up resentments at a politically opportune moment, whereas the process of working with the past often narrows the capacity to use the past for repressive purposes. While he agreed that we need to be attentive to the desire for silence, and should not impose on people to "break the silence," he emphasized the need to find strategies to enable people to engage with the past—such as creating spaces that help people feel safe to speak (pers. comm., November 2, 2006).

Laura Arriaza and Naomi Roht-Arriaza's chapter in this volume attests to the importance of such safe spaces. They describe local initiatives in Guate-

mala called "houses of memory" that extend the documentary and commemorative work of truth commissions through oral history projects. Because these projects are built upon community participation, and because those who record testimonies are trusted, they have been able to document more in their respective localities than Guatemala's two national truth commissions. But safe spaces are not easy to create where the community is itself a site of potential or actual violence—especially given that attempts to protect witnesses in transitional justice mechanisms are notoriously underfunded.

Several of this volume's contributors, moreover, felt that, important as they are, safe space strategies still place emphasis on "getting victims to talk" (e.g., Ross, in this volume; Theidon 2007a). Since we cannot assume that breaking silence is always in the best interests of those who have been abused, and given the enormous insecurity in which survivors of violence often live, what are the ethics of inciting people to talk about things that we cannot repair? If, on the other hand, we respect their silences, is inaction the only alternative? Theidon (2007a) argues that the bulk of the responsibility to speak should be transferred from those whom speech most endangers to others such as perpetrators and bystanders. At a fundamental level, such silences highlight the need to address the structural features that make people vulnerable. And this, in turn, means looking beyond a single short-term "transition" and investing in the long term.

Silences deserve our attention for another reason: their diversity (see Ross, this volume). In the post-conflict situations that now form the most usual contexts for transitional justice, silence is not necessarily the product of the repressive political silencing with which it came to be associated in the post–Cold War phase of transitional justice (and still is in many strong states). For people in face-to-face relationships in conditions of unending insecurity, it may be truth telling that subverts the process of living together, while in some contexts survivors may shape silence into a modality of reintegration.

Thus Nee and Uvin (in this volume) found very little support in the Burundian communities in their study for either prosecutions or a truth commission. Many of their informants feared that a post-conflict justice or truth-telling mechanism could endanger the political transition that has at last brought the country some measure of peace and stability. Instead, their informants spontaneously expressed the wish for dialogue, and sometimes went on to describe the local, face-to-face mechanisms they desired, and that they hoped would foster interpersonal coexistence. These imagined processes, although

based on dialogue, would bring their own silences: they were neither truth telling nor justice mechanisms as the latter are normally understood. But they drew upon a strong normative value of compromise and social repair that derives, Nee and Uvin argue, not from trust in others but from its absence. In this weak state, in a context of past and present vulnerability, life depends on the capacity to maintain and repair relationships.

The same is true of another weak state—Sierra Leone. In this volume, Shaw describes how, after a long history of violence in this region, people selectively integrated those ex-combatants who demonstrated through their enactment of key social values (humility, sobriety, work, and reciprocity)—but not through extensive truth telling about the past—that they could be members of a moral community in the present. When Sierra Leone's TRC was established, and when district hearings were held, participants sought to use these for their own purposes. During the closing reconciliation ceremonies, many ex-combatants made "apologies" that—while full of silences about specific acts of violence—nevertheless enacted moral norms critical to local processes of reintegration. Thus ex-combatants and the audience reconfigured what was intended to be a ritual of verbal accountability into a ritual of social morality that drew upon local techniques of selective reintegration. They thereby retooled it "from below" into an alternate mechanism that would facilitate coexistence.

This is not, however, to idealize either this redirected TRC ritual or the local practices on which it drew: both reconstituted the subordination of youth to senior elite men. But if we want to understand how transitional justice mechanisms are locally engaged, we have to acknowledge the risks of both silence *and* testimony in chronically insecure conditions. What is at stake when we ask people to talk? In contexts in which nobody can rely on the police or army (and certainly not the international community) to protect them from future violence, the maintenance of relationships—including those that are unequal and exploitative—through selective forms of speech and silence may provide the only form of security (however contradictory) to which people have access.

Customary Law and Local Justice Initiatives

To create a locally effective transitional justice, one obvious strategy is to employ local practices and institutions. How have such efforts fared so far? Since customary law is typically defined as a "local tradition," and since it also takes the familiar form of courts and prosecutions, it is often taken to be emblematic

of "the local" and has become the focus of several efforts to incorporate it into post-conflict justice initiatives. Most post-conflict states of the global South have dualist legal systems: formal state law and informal customary law. Often incorrectly viewed as "indigenous" and static, customary law is not, in fact, a stable body of fixed rules, but rather a set of changing practices (Moore 1986:38–39 and 318–19; Rose 2002:191). Many people romanticize customary law as "indigenous," "harmonious," and "restorative" despite the efforts of anthropologists to reveal its colonial remodeling, imported influences, social control, elite manipulation, retributive dimensions, and "harmony ideology" (Chanock 1985; Moore 1986; Nader 1990; Rose 1992).

Customary law has proved highly flexible and adaptive, developing under missionary Christianity, the colonial state, postindependence nationalism, rural socialism, state failure, and war. For example, Menkhaus (2000) examined how "traditional conflict management" played an important role amidst armed conflict in northern Somalia in the early 1990s. Today, customary law flourishes in post-conflict rural Sierra Leone (Maru 2006:431). And South African chiefs continue to adjudicate customary law with the blessing of the 1994 constitution—even though traditional leaders and customary law had been widely discredited by grand apartheid's Bantustans (Kessel and Oomen 1997:574–75).

What accounts for this resilience? Customary law remains far more accessible (and sometimes more legitimate) for the rural poor than formal state law. Furthermore, customary law deals with issues of great concern to them: land and family. As Moore observed of Chagga law in northern Tanzania: "'customary law' remained a critical element in the lives of rural people on the mountain because it determined access to land, and because it framed the structure of family and lineage on which the whole system of social support depended" (1986:317).

Recently, there has been a surge of enthusiasm for adding customary law to the transitional justice "toolkit" (Brooks 2003; Cobban 2007; Huyse and Salter 2008; Zartman 2000). This is partly a reaction to the length and expense of internationalized criminal trials but is also inspired by a newfound pragmatism and a concern with local ownership. All of these impulses are evident in the UN Secretary General's 2004 report on transitional justice. There, Annan stated that "due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards

and local tradition" (UN 2004a:18). Once again, though, he elided the tensions among international norms, national politics, and local needs, and conflated locality with "tradition."

After conflict, customary law offers several possible advantages. First, it has greater capacity (and sometimes greater legitimacy) than devastated or discredited formal justice systems. Second, it may be more responsive to local needs than either state or international justice mechanisms. Third, it can provide some limited accountability for the lower-level perpetrators and bystanders whose numbers challenge resource-strapped courts and truth commissions. Finally, it can provide some limited restitution for a wide range of victims—something that is rarely forthcoming from post-conflict states.

While customary law may be accessible, however, it may also help to reconstitute pre-conflict structures of exploitation. In Sierra Leone, for instance, chiefs have long been notorious for imposing arbitrary and excessive fines on young men. Not only do senior men in general and chiefs in particular monopolize land and wives, but because of the chiefs' control of customary law, young men also fear losing the product of their labor through fines (Archibald and Richards 2002:343–50; Richards 2005:578–79). Many young ex-combatants cited this lack of opportunity, and the unjust system of customary law that sustains it, as having given them an incentive to improve their situation by fighting with an armed group (ibid.).

When transitional justice policymakers sought to incorporate customary law, they initially viewed it as a way to complement and legitimize new, nonprosecutorial transitional justice mechanisms, such as the national truth commissions in Sierra Leone and East Timor. Thus Sierra Leone's TRC was authorized to "seek assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation" (TRC Act 2000, § 7[2]). This TRC did not, however, incorporate customary law as an accountability mechanism but created reconciliation rituals, presided over by chiefs and religious leaders, during the closing ceremonies of the district hearings outside the national capital. Although described as "traditional," these were, in fact, constructed rituals put together from familiar ritual elements such as prayers, invocations, libations, and the sharing and chewing of kola nuts. At the same time, the Commission eschewed local rituals of swearing, which, as Kelsall (2005:385) argues, may have limited its ability to induce confessions. As Shaw observes in this volume, these TRC reconciliation rituals were often effective

in fostering the reintegration of (mostly high-ranking) ex-combatants. Yet the rituals also served to reaffirm young men's subordination to "big men," resentment over which had watered the roots of Sierra Leone's armed conflict in the first place.

In contrast, East Timor's Commission for Truth, Reception, and Reconciliation (CAVR) achieved a more extensive incorporation of customary law into its workings. Nearly three-quarters of its community reconciliation hearings involved adaptations of a local dispute resolution practice, *nahe biti boot*, named for the unfolding of a large woven mat (*biti boot*), where disputants and community notables would resolve differences (CAVR 2006, pt. 9, at 7, 27). Hearings often began with invocations and ended with reconciliation ceremonies that entailed chewing betel nut, sacrificing small animals, and celebratory feasting (CAVR 2006, pt. 9, at 18, 23–24; Judicial System Monitoring Programme 2004:11; Pigou 2003:64, 75). Local ritual leaders generally participated in the hearings and reconciliation ceremonies (Hohe and Nixon 2003:55). According to Elizabeth Drexler (2009), however, many survivors of the violence were dissatisfied. Given the external origins of the violence—the harsh Indonesian occupation that divided the Timorese, promoted the growth of local militias, and culminated in the brutal repression of 1999—no more than a very limited redress was possible through the confessions of local rank-and-file deponents at the hearings. Nevertheless, Drexler notes that these hearings were broadly effective as a vehicle for local reintegration.

While customary law was incorporated as an adjunct to East Timor's truth commission, in the past few years it has also been promoted as a transitional justice mechanism in its own right. In this volume, Waldorf and Finnström examine the two mechanisms that have attracted the most attention in this regard: gacaca courts in post-genocide Rwanda and reconciliation rituals in northern Uganda. Both cases reveal how local accountability mechanisms come under considerable pressure to mete out retributive justice and to serve the state's legitimating needs.

Post-genocide Rwanda has responded to mass violence with mass justice, creating 11,000 community courts (gacaca) to try hundreds of thousands of suspected *génocidaires*. As Waldorf observes, gacaca adds an innovative tool to the transitional justice toolkit. First, it is a homegrown response to mass violence, and one that explicitly contests the international community's preference for international criminal tribunals and national truth commissions. Second, gacaca represents the most ambitious adaptation (and scaling up) of

customary law for transitional justice. At the same time, however, it reinforces the preference within the transitional justice paradigm for state-centered retributive justice and for individualized prosecutions.

Despite claims that gacaca represents "traditional" Rwandan justice, Waldorf argues that it is more accurately described as state-imposed "informalism." The Rwandan government transformed customary gacaca beyond recognition by converting local, ad hoc practices into formal, coercive state structures. Post-genocide gacaca consequently lacks legitimacy and popularity, so the state has to enforce participation. In the short term, at least, gacaca has failed to promote truth telling and reconciliation, while also promoting a dangerous form of collective guilt. Nonetheless, gacaca has managed to achieve some local-level restitution and some recovery of victims' remains. But overall, gacaca provides an object lesson in why it is essential to distinguish carefully between local initiatives produced bottom-up from communities and "customary" processes imposed top-down by states (Merry 2006).

In neighboring Uganda, local practices of accountability and reconciliation pose a profound challenge to the transitional justice paradigm. Just when it looked as though transitional justice had become universalized, normalized, and heterodox (Teitel 2003), the ICC's first arrest warrants for Lord's Resistance Army (LRA) leaders in northern Uganda resurrected the fierce debates and stark choices of the 1980s and 1990s: peace versus justice, amnesty versus impunity, retributive versus restorative justice. But whereas those earlier debates took place around national mechanisms, this time controversy erupted over local mechanisms: Acholi reconciliation ceremonies.

During the current conflict in northern Uganda, some Acholi have adapted such rituals as *nyono tong gweno* ("stepping on the egg") and *mato oput* ("drinking the bitter root") to cleanse, integrate, and reconcile former LRA combatants. Claims and counterclaims concerning the status of these practices have developed as part of a heated debate concerning the ICC's involvement in northern Uganda (Allen 2006, 2007; Baines 2007; Finnström, this volume; Harlacher et al. 2006). In 2003, Uganda's president referred the LRA's crimes in northern Uganda to the ICC. Although the ICC Prosecutor recognized "the need to respect the diversity of legal systems, traditions and cultures" (Office of the Prosecutor of the International Criminal Court 2003), he issued arrest warrants for the LRA leadership over objections from Acholi community leaders, who argued that warrants would prolong the twenty-year civil war and derail efforts to reintegrate ex-combatants. In response, the LRA leadership