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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Transitional Justice + Cyberjustice = Justice²?

PHILIPP KASTNER*

Abstract

The increased use of information and communication technologies arguably represents important opportunities for the field of transitional justice, notably with respect to the optimization of existing mechanisms and the development of new ones. This article focuses on state-based and typically very formal mechanisms, namely international, internationalized and national criminal tribunals as well as truth and reconciliation commissions. These institutions often apply and engage with international law and operate with the involvement or under the close scrutiny of the international community. Moreover, they can be expected to be the first ones to embrace insights from the field of cyberjustice to a significant extent.

Enhancing access to and participation in such mechanisms, rendering them more cost-efficient and facilitating information-sharing would correspond to generally accepted norms relating to both international human rights and justice. However, cyberjustice initiatives may also entrench an already common 'toolkit approach' in the field of transitional justice. This article builds on recent critiques of the dominant legalistic and normatively driven transitional justice paradigm and argues that transitional justice + cyberjustice hence risks furthering a technocratic top-down approach that unduly limits creative solutions. By adopting a critical legal-pluralistic approach that conceives individuals as law-creative actors and that is cognizant of the close relationship between means and ends, the article imagines ways of benefiting from the promises of transitional justice + cyberjustice.

Keywords

cyberjustice; information and communication technologies; international criminal tribunals; truth and reconciliation commissions

1. INTRODUCTION

Introducing insights and practices developed in the relatively new field of cyberjustice into the transitional justice debate has considerable potential. The integration of information and communication technologies represents important opportunities, notably with respect to the optimization of existing transitional justice mechanisms and the development of new ones, such as special criminal tribunals and truth and reconciliation commissions. Enhancing access to and participation in

* D.C.L. and LL.M. (McGill University); Dr. iur. and Mag. iur. (University of Innsbruck); Assistant Professor, Faculty of Law, The University of Western Australia [philipp.kastner@uwa.edu.au]. I would like to thank Elisabeth Roy Trudel as well as the anonymous reviewers for their useful comments.

such mechanisms, rendering them more cost-efficient and facilitating information-sharing, corresponds to widely accepted norms and objectives relating to both international human rights and justice.

However, as this article also argues, transitional justice + cyberjustice, even when only some technologies are used and even if mixed with more traditional approaches, risks entrenching a technocratic, top-down, institutions-before-objectives approach that unduly limits original and creative solutions in the field of transitional justice.[1] Without turning to the technological particulars of cyberjustice, and without imagining in detail its possible applicability by different transitional justice institutions, this article suggests that cyberjustice initiatives, by amplifying an already common 'toolkit approach', may contribute to alienating the communities most immediately concerned. For instance, such initiatives may be met with heightened suspicion in societies having little experience with information technology and by legal traditions that are less vision-centred than the Western legal tradition. In other words, in addition to the lessons that can be learned from domestic cyberjustice initiatives within Western legal systems, some of which have failed because of the reluctance of the main stakeholders to use new technologies against the backdrop of an overly technology-driven approach,[2] introducing cyberjustice into the field of transitional justice represents particular risks.

By adopting a critical and pluralistic approach, this article imagines ways of benefiting from the promises of transitional justice + cyberjustice that genuinely facilitate human agency and give space to actors beyond a narrowly legalistic perspective focused on formal, hyper-rational ways of communication through state or state-like institutions. This approach is also based on the insight that means and ends are inherently interrelated.[3] As Roderick A. Macdonald has argued:

> [since] means cannot be divorced from ends, it follows that one cannot adequately understand how choices about means are made without grounding the question in particular contexts and particular times. Analytical tools and conceptual devices are culturally determined. It is simply inappropriate to assume that they can be projected in some idealized form through time and space.[4]

More careful attention, from a legal point of view, to the means has the potential to increase the prospects of procedural justice and also the materialization of more valuable ends. It is therefore useful to shift the common outcome-focused approach to a process-oriented perspective that takes into account and embraces the complex relationship between means and ends and that conceives of individuals not as

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1 The perhaps somewhat puzzling title of this article – while not implying that the article itself relies on equations and logics derived from mathematics – ironically echoes the penchant for overly technical language that reserves transitional justice discourses to the so-called professional.

2 K. Benyekhlef, E. Amar and V. Callipel, 'ICT-Driven Strategies for Reforming Access to Justice Mechanisms in Developing Countries', in J. Wouters et al. (eds.), *The World Bank Legal Review, Volume 6. Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* (2015), 329–30.

3 For a theoretical argument on this relationship see L. Fuller, 'Means and Ends', in K.I. Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (1981), 61.

4 R.A. Macdonald, 'The Swiss Army Knife of Governance', in P. Eliadis, M.M. Hill and M. Howlett (eds.), *Designing Government: From Instruments to Governance* (2005), 203, at 207. For the importance of 'process pluralism' see C. Menkel-Meadow, 'Peace and Justice: Notes on the Evolution and Purposes of Legal Processes', (2006) 94 *Georgetown Law Journal* 553.

law-receiving subjects but as law-creating and legal knowledge-producing actors.[5] Finally, the examination of some of the potential benefits and risks of information and communication technologies in the context of transitional justice presents itself as a useful angle for critical inquiry into the design and operation of transitional justice-related institutions and into the endeavour of justice itself.

2. THE POTENTIAL BENEFITS OF INTRODUCING CYBERJUSTICE INTO THE FIELD OF TRANSITIONAL JUSTICE

The concept of transitional justice was developed in the context of periods of transition from totalitarian or authoritarian regimes to more democratic regimes[6] and in the aftermath of armed conflicts. It is used to denote several forms of 'justice' and a number of different judicial and non-judicial mechanisms that seek to end impunity, deter future violations of international human rights and humanitarian law, reveal the truth, bring about reconciliation, and promote peace. As summarized in a key report of the United Nations Secretary-General on transitional justice in 2004, the notion:

> comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[7]

A variety of mechanisms is hence associated with transitional justice, including international and national criminal trials, truth and reconciliation commissions (TRCs), traditional justice and reconciliation mechanisms, such as the *gacaca* courts in Rwanda and *mato oput* in Uganda, amnesties, reparation programs, public apologies and institutional reforms, in particular of the military, police and judiciary. State-based and typically very formal mechanisms, namely international, internationalized and national criminal tribunals as well as TRCs,[8] often apply and engage with international law and operate with the involvement or under the close scrutiny of the international community. This does, however, not imply that such formal institutions are more important than or superior to non-official and more

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5 M. Kleinhans and R.A. Macdonald, 'What is a *Critical* Legal Pluralism?', (1997) 12 *Canadian Journal of Law and Society* 25, at 38.

6 By way of example, in her seminal book *Transitional Justice*, Ruti Teitel aims to 'explore the role of the law in periods of radical political transformation'. R.G. Teitel, *Transitional Justice* (2000), 4. As Christine Bell has pointed out, the concept of 'transition' has, in fact, not been defined. C. Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"', (2009) 3 *International Journal of Transitional Justice* 5, at 23. And, as Catherine Turner has noted more recently, 'there has been remarkably little theorisation of the concept of transitional justice itself'. C. Turner, 'Deconstructing Transitional Justice', (2013) 24(2) *Law and Critique* 193, at 194.

7 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, UN Doc. S/2004/616 (3 August 2004), para. 8.

8 For an overview of institutions driven by non-state actors, such as peoples' tribunals see, e.g., B. Kampmark, 'Citizens' War Crimes' Tribunals', (2014) 33(2) *Social Alternatives* 5; C. Chinkin, 'Peoples' Tribunals: Legitimate or Rough Justice', (2006) 24(2) *Windsor Yearbook of Access to Justice* 201.

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community-based mechanisms; to the contrary, justice is an endeavour that goes well beyond the narrow yet still dominant focus on individual human rights and individualized responsibilities for crimes. In the context of transitional justice, this endeavour can include revealing different truths through individual and collective narratives and storytelling, remembering, forgiving and apologizing as well as addressing the root causes of conflicts, such as structural inequalities. This article nevertheless starts with a critique of formal institutions, which are more likely to be exposed to the potential benefits and risks of cyberjustice initiatives in the near future, but it also suggests ways in which elements of cyberjustice could facilitate other responses to past and present forms of violence and injustice and quite radically transform the conceptualization of transitional justice more generally.

Although much literature has been devoted to assessing the usefulness, limits and practical implications of international and internationalized criminal tribunals and other transitional justice-related institutions,[9] no serious efforts have been made to analyze the application of concepts and practices related to information and communication technologies to transitional justice.[10] Cyberjustice, in turn, is an even more recent field that has arisen in the context of the generalized proliferation of such technologies and that deals with the integration of, among others, computers and the internet into the judicial world, with a particular focus on online dispute resolution processes.[11] In a more general sense, cyberjustice also refers to the networking of various stakeholders involved in judicial and quasi-judicial proceedings, which may include videoconferencing during (and the digitization of) proceedings as well as the use of community radios and text messaging.[12] It is worth noting that, as the term cyberjustice suggests, the use of information and communication technologies in this context is deliberately – both semantically and substantively – related to justice. In other words, 'cyberjustice' suggests more than a description of the use of information and communication technologies in the juridical world: it conveys the promise that the 'cyber' element will promote 'justice'.

The following section argues that in the context of transitional justice, cyberjustice – in the form of an increased use of information and communication technologies – could mitigate some of the typical shortcomings of transitional justice institutions and facilitate transitional justice processes by contributing to reducing costs, sharing information, and increasing local ownership.

2.1. The question of efficiency – money matters

Greater use of technological solutions in the context of transitional justice could increase the cost-efficiency of the institutions in question. Money is, indeed, a

[9] See, among others, the articles published in the *International Journal of Transitional Justice*. For a recent empirical study, see L.E. Fletcher and H.M. Weinstein, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals', (2015) 7(2) *Journal of Human Rights Practice* 177.

[10] A few ideas concerning cyberjustice initiatives in the context of transitional justice are sketched in P. Kastner, 'Cyberjustice in the Context of Transitional Justice' (Cyberjustice Laboratory Working Paper No. 9), 2013, available at www.cyberjustice.ca/docs/WP009_TransitionnalJusticeAndCyberjustice_en.pdf.

[11] For an introduction see K. Benyekhlef and F. Gélinas, *Le règlement en ligne des conflits: Enjeux de la cyberjustice* (2003).

[12] Benyekhlef et al., *supra* note 2, at 325.

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significant factor that may determine institutional responses to systematic or widespread violence. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), for instance, have spent billions of US dollars since their creation in 1993 and 1994, respectively. These considerable financial resources are one of the reasons why these tribunals have been severely criticized, and why no other *ad hoc* international criminal tribunal – but rather hybrid or internationalized tribunals like the Special Court for Sierra Leone – has been created since then to deal with a specific situation. Since international criminal trials are indeed relatively costly, and since they do not necessarily contribute to improving the situation of victims – at least not in any directly tangible form – it has even been suggested that this money should rather be invested into reconstruction and development projects.[13]

More specifically, in addition to the inherent complexity of international trials,[14] the location of the ICTY in The Hague, Netherlands, and of the ICTR in Arusha, Tanzania, increased the financial onus. While it is unlikely that such tribunals will again be established in the near future, the situation is similar in the case of the International Criminal Court (ICC), which is located in The Hague, whereas almost all the situations before the ICC originate from African countries. This means that not only the staff of the tribunals, but also the accused, witnesses and experts must travel to a place that is not easily accessible from the respective conflict region. Of course, establishing a tribunal and conducting the proceedings primarily in a presumably neutral location, often at a significant distance from the territory where the alleged crimes were committed, is often desirable in politically unstable situations; the drawback is that the proceedings before such tribunals are, in comparison to domestic trials, very long and costly. They are, therefore, in particular need of optimization.

Obtaining witness and expert statements via video-link, as is increasingly the case in the context of ordinary civil and criminal proceedings in the Western world,[15] reduces the costs related to travel and could contribute to expediting the usually lengthy trials before international tribunals. Improved information and communication technologies and their careful integration into the trial proceedings can also be expected to help reduce the risk that the rights of the accused, for instance because of the inability of the defence to 'directly' cross-examine witnesses, are violated, or perceived as being violated. So far, the international criminal tribunals have, however, made only very restrictive use of video-link for testimonies.[16] Regarding the ICTY, although its Rules of Procedure and Evidence were amended in 2007 to

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13 H. Cobban, 'Think Again: International Courts', (2006) 153 *Foreign Policy* 22.

14 For an analysis of the complexity and efficiency of ICTY trials see S. Ford, 'Complexity and Efficiency at International Criminal Courts', (2014) 29 *Emory International Law Review* 1.

15 See, e.g., A. Salyzyn, 'A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario', (2012) 50(2) *Osgoode Hall Law Journal* 429.

16 See, e.g., M.G. Karnavas, 'Gathering Evidence in International Criminal Trials: The View of the Defence Lawyer', in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007), 144. For a comparative analysis of the use of video technique in domestic proceedings, including its psychological effects, see B. Glunz, *Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik* (2012).

permit proceedings to be 'conducted by way of video-conference link',[17] the judges have identified several criteria that must be fulfilled before testimony via video-link can be allowed, including whether the witness is unable, or has good reasons to be unwilling, to come to the tribunal.[18]

In this sense, the use of information and communication technologies can not only contribute to rendering proceedings more efficient by decreasing costs, but also increase the overall effectiveness of proceedings, in particular by facilitating the protection of victims and witnesses. Examples include the use of testimony via closed circuit television, such as in the case of child witnesses and victims of sexual violence. Before the ICC, for instance, a chamber can, under certain circumstances, order that:

> testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media.[19]

Beyond questions of financial efficiency, the increased use of information and communication technologies can hence help fine-tune the delicate balance between the rights of the accused and the protection of victims and witnesses.[20]

2.2. Increasing access, outreach, participation

It is worth recalling that the frequent establishment and use of transitional justice mechanisms in the context of political transformations or post-conflict situations is a fairly new phenomenon. Although every situation requires specific and different responses, sharing information among similar transitional justice processes, and across different contexts, is certainly useful. No mechanism must start from scratch but can and should build on previous experiences. In other words, international and internationalized criminal tribunals as well as TRCs, despite different mandates, can and ought to learn from each other. This is already the case, at least to some extent, both regarding the institutional framework and the working practices that are passed on by staff members and experts. By way of example, the ICC has clearly learned from the experiences of the ICTY and the ICTR; the Sierra Leonean TRC has built on the experience of the South African TRC; and international criminal justice and transitional justice practitioners have 'hopped'[21] from one tribunal or commission to the next one, maintaining and transmitting 'best practices' and 'institutional knowledge'. Moreover, both judicial and non-judicial mechanisms can be expected to

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17 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.40 (2007), Rule 81 *bis*.

18 For a decision applying these criteria see *Prosecutor v. Radovan Karadžić*, Decision on Accused's Second Motion for Video Link Testimony for Čedomir Kljajić, Case No. IT-95-5/18-T, T.Ch., 30 May 2013, para. 5.

19 Rules of Procedure and Evidence of the International Criminal Court, ICC-PIDS-LT-02-002/13_Eng (2013), Rule 87(3)(c).

20 On the more general relationship between the rights of the accused and the rights of victims see S. Zappalà, 'The Rights of Victims *v.* the Rights of the Accused', (2010) 8 *Journal of International Criminal Justice* 137.

21 On '"tribunal-hopping" of staff and prosecutors', see M. Bohlander, '"Statute? What Statute" – Norm Hierarchy and Judicial Law-Making in International Criminal Law at the Example of the Special Tribunal for Lebanon', (2015) 36(2) *Statute Law Review* 189.

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have, increasingly, recourse to electronic records. In addition to electronic file storing and sharing, which already facilitates access to relevant material, new technologies have further potential to facilitate the exchange of practices and knowledge and thus to strengthen transitional justice mechanisms over time. Regarding the ICTY and ICTR, for instance, the issue of preserving and managing the tribunals' archives, such as the audio and video recordings of thousands of trial days, has been explicitly included in the essential functions to be continued by the follow-up institution, the United Nations Mechanism for International Criminal Tribunals.[22]

Information and communication technologies represent additional opportunities in the context of transitional justice with respect to outreach and to access to and participation in the respective proceedings. Many transitional justice institutions, in particular the *ad hoc* international criminal tribunals, have been severely criticized for not being sensitive to local needs and concerns and for preventing the communities most immediately concerned from assuming ownership over the respective proceedings. As Frédéric Mégret has argued:

> international trials tend to create too great a distance between the place where the crime was committed and the place where it is judged … It is also a "legal distance" in that the crimes will be judged largely according to international norms which, in their abstractness, may have little connection with local legal reality. The impact on transitional justice and the ability of the international community to provide meaningful avenues for healing and redress will be diminished.[23]

Along with such structural challenges, the institutions themselves have arguably done little, or not enough, to explain their mandate and objectives to a broader audience. The local population, especially from remote areas, has often not been able to participate in the proceedings and has not always had an accurate idea of the respective institution's mandate and work. Although the tribunals did employ greater efforts over time to develop and implement more effective outreach programs, few people within the immediately concerned population considered themselves well informed, even years after the establishment of the institutions.[24] This contributed to creating wrong or exaggerated expectations, in particular among local but also among global audiences and a diminished capacity of these institutions to have a positive impact on the societies in transition.[25]

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[22] Statute of the International Residual Mechanism for Criminal Tribunals, UN Doc. S/RES/1966 (2010), Annex 1, Art. 27.

[23] F. Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', (2005) 38(3) *Cornell International Law Journal* 725, at 730.

[24] For a 2002 survey among more than 2,000 Rwandans see T. Longman, P. Pham and H.M. Weinstein, 'Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda', in E. Stover and H.M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004), 213. See also V. Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme', (2005) 3(4) *Journal of International Criminal Justice* 950. For misperceptions of the ICTY among the local population see R. Zacklin, 'The Failings of the Ad Hoc Tribunals', (2004) 2 *Journal of International Criminal Justice* 544.

[25] On oftentimes unrealistic and exaggerated expectations vis-à-vis the peace-making capacity of international criminal justice institutions see P. Kastner, 'Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations', (2014) 12(3) *Journal of International Criminal Justice* 471, at 479. For a case study of the ICTY and biased perceptions of justice in Croatia see R. David, 'International Criminal Tribunals and the Perceptions of Justice: The Effect of the ICTY in Croatia', (2014) 8 *International Journal of Transitional Justice* 476.

New technologies have the potential to increase access to transitional justice institutions and to facilitate communication between the institutions and their constituencies. It should be borne in mind that even if an armed conflict has ended and a society is already 'in transition', security is often still a major concern. Along with destroyed or damaged infrastructure, such as road and rail networks, this factor can diminish the capacity of transitional justice institutions to effectively reach out to local communities. While relatively costly and not easy to install in remote villages, information and communication technologies could, at least in some situations, improve the situation. Audiovisual – ideally live – representation of proceedings held in other areas may be particularly beneficial for communities with low literacy rates. In such communities, radio broadcasting already plays an important role (which was, after all, illustrated by the infamous hate-speech and genocide-inciting *Radio Mille Collines* in Rwanda[26]). The audiovisual can enrich this otherwise more limited, monosensory, experience. By way of example, the ICC organized live screenings of court proceedings in the case against Dominic Ongwen in Northern Uganda, including in villages where some of the crimes for which Ongwen is allegedly responsible were committed, which provoked diverse reactions among community members.[27]

Moreover, although internet access rates are still very low in many countries, with four billion people from developing countries remaining offline in 2015 and less than five per cent of the population using the internet in dozens of countries,[28] other means of mass communication have become more readily available. The use of mobile phones, for instance, has increased dramatically over the past decade, in particular in African countries, where subscriptions per 100 inhabitants have risen from around ten to more than 70.[29] Although the purpose of this article is not to prescribe specific usages of such technology to further goals associated with transitional justice, it is conceivable that outreach programs could include the sending of notifications via text messages[30] and – since mobile phones drive the rapidly growing use of social media in many African countries[31] – also

[26] C.L. Kellow and H.L. Steeves, 'The Role of Radio in the Rwandan Genocide', (1998) 48(3) *Journal of Communication* 107.

[27] For an account of the event in Lukodi and a discussion of some of the challenges regarding logistics and the cultural relevance of such screenings see L.O. Ogora, 'Live from the Hague: The Confirmation of Charges Hearing in Lukodi, Northern Uganda', *International Justice Monitor*, 22 January 2016, available at www.ijmonitor.org/2016/01/live-from-the-hague-the-confirmation-of-charges-hearing-in-lukodi-northern-uganda/ and 'Live Screening of Ongwen Hearing in Northern Uganda: Lessons Learned', *International Justice Monitor*, 25 January 2016, available at www.ijmonitor.org/2016/01/live-screening-of-ongwen-hearing-in-northern-uganda-lessons-learned/.

[28] ICT Facts and Figures: The World in 2015, International Telecommunication Union, May 2015, available at www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf.

[29] Aggregate data for 2005–2015 retrieved from the website of the International Telecommunication Union, available at www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

[30] For the use of mobile technology to deliver legal services, for instance by legal clinics in Latin America, see Benyekhlef et al., *supra* note 2, at 337.

[31] 'Mobile Phones Driving Facebook User Growth in Africa, Where Nigeria, South Africa and Kenya Rule', *Mail & Guardian Africa*, 11 September 2015, available at mgafrica.com/article/2015-09-10-mobile-phones-driving-user-growth-in-africa-where-nigeria-south-africa-and-kenya-rule-facebook. See also 'Internet Use on Mobile Phones in Africa Predicted to Increase 20-Fold', *The Guardian*, 5 June 2014, available at www.theguardian.com/world/2014/jun/05/internet-use-mobile-phones-africa-predicted-increase-20-fold.

connect more directly and dialogically with community members via social media.

In this sense, information and communication technologies could be used not only to increase the flow of information in a unidirectional manner from the institution to local communities but to facilitate dialogical communication. Among the goals of most state-based transitional justice institutions is to deliver justice to those most directly concerned, in other words to the victims of crimes committed during an armed conflict or by an oppressive regime. In the preamble of the ICC Statute, for instance, the signing states parties declare that 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' and that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[32] Moreover, as is stated in Article 53, the Prosecutor must take into account the 'interests of victims' when deciding on the initiation of an investigation.[33] While delivering justice to the victims is certainly not the only goal of an international trial, it still seems striking that institutions like the ICTY, the ICTR and the ICC have done little to hear the voices of those most immediately concerned by the crimes in question. And while the ICC clearly aims to pay more attention to victims of genocide, crimes against humanity and war crimes, among others by allowing them to participate in the proceedings – not only as witnesses but as *victims* – and by providing for reparations through a trust fund, the institution itself can hardly be described as being shaped or informed by the grassroots level.

Transitional justice institutions, however, can be driven by victims' associations, and they should be informed by local knowledge.[34] This can include the original use, modification and creation of technology, and hence radically different forms of participation and local ownership. Indeed, the increased use of the internet, mobile phones and social media in many countries affected by violent conflict opens up a range of possibilities related to transitional justice endeavours: individual and collective narratives may be shared and constructed – and truths revealed – very differently on social media than in formal courtroom or commission settings; violence may be discussed and remembered by connecting distant communities with each other as well as with various institutions.

A related tendency – and arguably requirement – to turn to the local already manifests itself quite strongly in the context of TRCs. When compared to international and internationalized criminal tribunals, the mandate of TRCs is more closely related to different narratives and perceptions about a violent past as well as to individual and collective feelings about the 'other'. As a result, TRCs and similar endeavours must arguably listen more carefully to gather what kind of truth the communities concerned want to reveal, and what kind of reconciliation these communities seek. Top-down approaches that do not sufficiently consider local

[32] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Preamble.
[33] Ibid., Arts. 53(1)(c) and 53(2)(c).
[34] S. Robins and E. Wilson, 'Participatory Methods with Victims: An Emancipatory Approach to Transitional Justice Research', (2015) 30 *Canadian Journal of Law and Society* 217, at 221.

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needs and desires, and that fail to secure popular support, will hardly be successful, as exemplified by the Haitian *Commission Nationale de Vérité et de Justice*.[35] Moreover, such approaches, focused on institutional design, often fail to consider the sometimes very practical obstacles to participation in transitional justice mechanisms, such as the economic situation of those who are invited to participate.[36] Similarly, when it comes to technology, it would seem counterproductive if programmers in the global North were to design and direct, for instance, the use of 'transitional justice apps' for mobile phones; as mentioned above, different communities already use, modify and create technologies in different ways, which means that elements of cyberjustice can take almost infinite forms.

Interestingly, a variety of institutions established by non-state actors, such as so-called peoples' tribunals, have attempted to embrace a more local, bottom-up approach by giving a voice to those that are not heard in official fora. When compared to more formal, state-based institutions, such processes may give more space to individual and collective narratives, in particular of victims.[37] More fundamentally, they may also be an avenue to provide forms of justice and establish truths that are complementary or alternative to those offered (or refused) by official institutions. Indeed, the contribution of community-based institutions arguably goes beyond filling in jurisdictional gaps of formal institutions. Rather, they are sites where a variety of actors articulate, develop and re-negotiate transnational legal norms. It should be noted that a number of official institutions operating in conflict or post-conflict contexts increasingly attempt to take into consideration individual narratives and lived experiences. For instance, and as mentioned above, even the inevitably perpetrator-focused and retributive justice-generating ICC aims to pay appropriate attention to the victims of crimes within its jurisdiction. A general trend in the form of a turn to the local and to the victims and communities most immediately affected is hence discernible. And while local, bottom-up approaches should not be essentialized or romanticized,[38] enabling local communities to provide meaningful input to the transitional justice processes in question and to craft their own responses is salient and can be expected to contribute to enhancing local ownership over such processes. The use of information and communication technologies can certainly facilitate this endeavour, but there are risks associated with overly technology-driven approaches that must be carefully assessed.

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35 On the role of the Haitian diaspora community in the establishment of the Commission and the Commission's failure to gain popular support of Haitians more generally, among others because it did not hold public hearings due to security concerns, see J.R. Quinn, 'Haiti's Failed Truth Commission: Lessons in Transitional Justice', (2009) 8(3) *Journal of Human Rights* 265, at 269, 273.

36 Based on their research in Nepal, Robins and Wilson argue that there is a close connection between poverty and victimhood. Robins and Wilson, *supra* note 34, at 233.

37 See, e.g., Chinkin, *supra* note 8.

38 On the 'apparently natural process of reconciling and healing at the local level' in Mozambique see P.B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011), 201. For an exploration of different 'local realities' in the context of transitional justice see, for instance, the collection edited by A. Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (2011).

3. THE RISKS OF TECHNOCRATIC APPROACHES: CYBER 1 – JUSTICE 0?

Law, and international law more specifically, has a considerable impact on societies emerging from violent conflict. Above all, transitional justice issues, as instantiated by increasingly accepted obligations to end impunity for grave crimes, uncover the truth and envisage reparations in some form, significantly shape these societies. Legal considerations appear to be omnipresent since transitional justice is typically associated with formal institutions established by the state and with certain legal obligations under international law to deal with grave violations of international human rights law and international humanitarian law.[39] However, there is a marked tendency, both in theory and practice, to overemphasize official, state-based institutional responses to deal with past wrongs and to ignore other sites of legal meaning-making in this context.

The following analysis builds on recent critiques of the dominant legalistic and normatively driven transitional justice paradigm[40] and attempts to counter the view, prevalent among both scholars and practitioners, of the various transitional justice mechanisms as being easily transferrable and transplantable elements in a readily available 'toolbox'.[41] Moreover, there appears to be a common focus on institutions and institutional design rather than the needs and priorities of the people concerned.[42] Overly technical responses, as it will be argued, run the risk of further entrenching this toolbox approach. More generally, it is suggested here that we must broaden our perspective and critically assess the current hegemonic framework by seeking ways to take into account alternative epistemologies. By way of example, we must strive to go beyond often oversimplifying good–evil or victim–perpetrator binaries in transitional justice discourses that only lead to further exclusions.[43] Inspired by Boaventura de Sousa Santos, this approach does not only seek to 'involve stakeholders'[44] or to turn to marginalized actors – often precisely those 'victims' to whom 'justice' is to be 'delivered' – in the transitional justice discourse; rather, it calls for attentive listening to the voices of these actors, which may imply 'siding with', or even 'becoming' the victim[45] and turning away from

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39 On the tendency of transitional justice scholars to equate justice with law, 'or to view justice as something that can be achieved through the enforcement of human rights law', see Turner, *supra* note 6, at 207.

40 E.g., K. McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', (2007) 34(4) *Journal of Law and Society* 411; Robins and Wilson, *supra* note 34. Regarding the fact that transitional justice is normatively driven, it can be noted with Turner that '[t]his is not to suggest that there should be no normative orientation to transitional justice. Rather, what is central, is the ability to recognise the potentially coercive effects of the determinate element of law', Turner, *supra* note 6, at 207.

41 E.g., N. Palmer, P. Clark and D. Granville (eds.), *Critical Perspectives in Transitional Justice* (2012).

42 Robins and Wilson, *supra* note 34, at 224.

43 Turner, *supra* note 6, at 194.

44 The collaborative approach suggested by Benyekhlef, Amar and Callipel in their discussion of the potential of cyberjustice initiatives in developing counties, an approach that 'minimizes stakeholders' resistance to technological changes and promotes their understanding and ownership of the project' (Benyekhlef et al., *supra* note 2, at 334) certainly attempts to break with the common top-down approach that is part of the dominant development and transitional justice paradigm. However, as it is argued here, this approach might not challenge the paradigm radically enough.

45 B. de Sousa Santos, 'Three Metaphors for a New Conception of Law: The Frontier, the Baroque and the South', (1995) 29(4) *Law & Society Review* 569, at 580. Or, as Robins and Wilson write regarding their 'Participatory

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prefabricated legalistic responses that may only perpetuate structural inequalities and injustice. This claim is symbolized by the fact that justice may have very different meanings and that its delivery – or rather its endeavour – may thus take different forms. Similarly, truth is not a monolithic entity that can be apprehended objectively. This is particularly noteworthy in the context of transitional justice since both the state-based truth commissions and the civil society-driven truth-telling projects that have been established over recent decades have adopted an 'overly scientific approach to truth-telling'.[46] In sum, the tenet that transitional justice processes are not only tools to deal with past crimes but that they can be emancipatory and transformative is fully embraced.

3.1. Overly technical responses: Entrenching the toolbox approach

The common emphasis on technical institutional responses in the field of transitional justice has tended to standardize mechanisms and processes, thus overlooking particular needs and obstructing the development of original responses. As Clark and Palmer write, '[t]he toolkit approach to transitional justice begins with institutions and appears to work backwards through questions of needs and objectives'.[47] The focus on possible institutional responses is illustrated by a common impulse to ask how we can best make use of an institution that we have already created: 'We have an International Criminal Court. What can we do with it?'[48] It becomes evident that the choice of means constrains the possible ends (although the reverse is also true, with the ends constraining the choice of means).[49] Considering the possible use of particular information and communication technologies in the context of transitional justice runs the risk of constraining the choice of possible ends.[50] In other words, it is not the availability of a certain transitional justice mechanism or a certain technology that should necessarily drive its use; the ICC, for instance, may be an appropriate institution in a variety of situations but the fact that it may have jurisdictions over certain crimes committed does not automatically make it the best forum to investigate and prosecute such crimes. Similarly, outreach programs that are facilitated by social media and the availability of videoconferencing and broadcasting technologies do not necessarily make proceedings before an international tribunal or a TRC better and more effective.

This concern is also related to the fact that in the transitional justice literature, advocacy and analysis are not always easily distinguishable. Slogans like 'no peace without justice', promoted by prominent human rights organizations since the

Action Research' in the context of transitional justice, '[e]mancipatory research endeavours to side with the powerless and is explicitly political. It produces knowledge exposing the structures and conditions that create victims, and in turn empowers victims to enable social change', Robins and Wilson, *supra* note 34, at 221.

46 L. Bickford, 'Unofficial Truth Projects', (2007) 29(4) *Human Rights Quarterly* 994, at 1034.

47 P. Clark and N. Palmer, 'Challenging Transitional Justice', in N. Palmer, P. Clark and D. Granville (eds.), *Critical Perspectives in Transitional Justice* (2012), 1, at 6.

48 This paraphrases Macdonald's example, 'I have a Swiss Army Knife. What can I do with it?', Macdonald, *supra* note 4, at 225.

49 Ibid.

50 Note that there may also be unforeseen consequences, both positive and negative, that result from using a new tool. On such 'unforeseen problems', see ibid., at 228.

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1990s, do not contribute to pursuing an unbiased analysis of particular situations and of the kind of peace and the kind of justice for which a particular society in transition longs. As mentioned above, international and internationalized tribunals are often asked to do too much, although they can clearly not resolve large-scale crises and bring about peace and reconciliation on their own. Furthermore, with the domestic political and legal order being deficient or contested, the call for particular institutional responses, such as an involvement of the ICC, often comes from the so-called international community and not from the communities immediately concerned. Some transitional justice institutions have, therefore, been criticized as a new form of imperialism. This problem is particularly visible in the case of the ICC. Here, one of the main points of criticism concerns the fact that almost all the situations that have, so far, been brought before the ICC stem from African countries.[51] To be clear, establishing an international or internationalized criminal tribunal to try those allegedly most responsible for the crimes committed, or prosecuting a handful of political and military leaders before the ICC, may have a positive impact, both in the short-term and in the long run. It is also true that a multilateral treaty founded the ICC, which means that its jurisdiction is largely dependent on the consent of the respective state.[52] Despite their initial support for the ICC – its Statute has been ratified by roughly two-thirds of all states, including the majority of African states – many African governments now criticize the ICC, notably for the fact that only crimes committed on African soil have been investigated and prosecuted. This has fuelled an intense debate over the usefulness and appropriateness of involving the ICC in such situations. In this debate, internationalized criminal trials, and criminal trials more generally, are often condemned as a 'Western' invention, or even a 'Western' conspiracy that lacks concern for local needs and does not create local ownership.[53] Dealing with the perpetration of past crimes in such ways may thus appear as a top-down or outsiders' construction of justice processes, quite contrary to bottom-up, community-based mechanisms.

If it is already problematic to employ transitional justice mechanisms rooted in the Western legal tradition, these challenges become even more evident when it comes to the use of particular tools in the form of 'modern' information and communication technologies that risk entrenching the outsiders' toolbox approach. Just like the availability of certain institutions, the availability of certain technologies should, in other words, not determine their use. Rather, the danger that such technologies further goals that are associated with only certain forms of justice, such as transparency, expediency and cost-efficiency, must be carefully assessed. Transparency and expediency may, in fact, be opposed to other important goals related to justice that may be achieved through the relating and possibly very time-consuming

[51] The only exception is the situation in Georgia, where the ICC Prosecutor was authorized in January 2016 to open an investigation *proprio motu*.

[52] The only exception is a decision of the United Nations Security Council under Chapter VII of the UN Charter, which may trigger ICC jurisdiction over a specific situation even if the state in question has not accepted the ICC's jurisdiction.

[53] See, e.g., K. Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court', (2012) 34(2) *Human Rights Quarterly* 404, at 435.

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collection of individual and collective narratives. This concern is mirrored by the fact that none of the objectives associated with the main transitional justice institutions are universally accepted and cherished goods. 'Truth', for instance, is of relative importance and may mean different things in different places over time, and the temporality of truth and memories is not necessarily linear or perfectly rational. Testifying before a TRC, whether in South Africa concerning political crimes committed during the Apartheid regime or in Canada regarding experiences of abuse in the Indian residential schools, may have a therapeutic effect for victims and encourage the feeling that the crimes of the past will not be forgotten or repeated. At the same time, such 'truth-telling' is not simply about 'facts'. As Felicity Horne writes:

> There are gaps between experience and memory, event and description, calling attention to the problems of memory and its linguistic representations. Putting anything into language makes it into a reconstruction of a phenomenon, different and distinct from the phenomenon itself. Mediation occurs in any act of verbalisation, which necessarily involves construction – the selection, omission, manipulation and even fabrication of material.[54]

Testifying may also re-traumatize victims, who will, moreover, not gain any particular or easily tangible benefits from the proceedings. By way of example, a nationally representative survey of the South African population, carried out several years after the TRC process had begun, revealed a direct correlation between participation at TRC hearings and feelings of increased distress and anger and decreased forgiveness.[55] Revealing the truth may hence be a first step towards reconciliation, but reconciliation may also become more difficult precisely because of a truth-claiming process compiling countless narratives and counter-narratives. The premise that enhanced information and communication, greatly facilitated by modern technology, will more or less automatically lead to greater justice must hence be taken with at least a grain of salt. We might even have to conclude that the degree of information and communication is not directly proportional to the degree of justice achieved.

3.2. Changing communication – changing cultures

It appears obvious to caution that new tools can and should not be applied without due concern for and understanding of the specific context, and yet this *caveat* has not been given due attention. Socio-historical aspects are particularly important in the field of transitional justice, where symbols and rituals play a central role. This, as it should be emphasized, is true in every context, whether in presumably modern, Western societies or elsewhere. Since it is, for instance, virtually impossible to conceive adequate material forms of reparation or compensation to victims in

54 F. Horne, 'Can Personal Narratives Heal Trauma? A Consideration of Testimonies Given at the South African Truth and Reconciliation Commission', (2013) 39(3) *Social Dynamics* 443, at 450.

55 D.J. Stein et al., 'The Impact of the Truth and Reconciliation Commission on Psychological Distress and Forgiveness in South Africa', (2008) 43(6) *Social Psychiatry and Psychiatric Epidemiology* 462. See also F.C. Ross, 'On Having Voice and Being Heard: Some After-Effects of Testifying before the South African Truth and Reconciliation Commission', (2003) 3(3) *Anthropological Theory* 325.

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the immediate aftermath of mass violence, the symbolic value of trials, hearings of TRCs, public apologies and similar mechanisms increases in importance.[56]

The fact that modern information and communication technologies could hardly play a significant role in the context of certain processes is illustrated by proceedings like the *gacaca* courts in Rwanda. These courts, a traditional form of resolving local disputes, were remodelled after the genocide to try low-level perpetrators within their community. One of the ideas behind using the *gacaca* courts system was to allow direct confrontation between perpetrators and victims and, at the same time, to promote reconciliation and empowerment through increased popular involvement.[57] In fact, most truth-telling and reconciliation-building endeavours are built on proximity. As Catherine M. Cole has noted with reference to the South African TRC: 'The TRC staged and remade the past through a complex dynamic of watching, seeing, testifying and bearing witness … this was a commission of words and voices, speaking and listening, *interacting face to face*.'[58]

While it would be important not to exoticize such mechanisms and not to entrench an unhelpful polarization between Western and non-Western justice discourses, it still seems that a technocratic toolkit approach that imposes – or is perceived as imposing – certain mechanisms and methods can do more harm than good. Increased technologization of the proceedings, which may appear valuable and cost-efficient from an institutional design perspective, may contribute to alienating the primary constituency of the transitional justice mechanism in question. A TRC, for instance, will have difficulty establishing its credibility in a region without having held local hearings and without at least some of the commissioners being physically present. In many instances, it is the immediate and very personal involvement of victims, perpetrators and authoritative figures, such as judges, religious leaders, or village elders, that lays the groundwork for reconciliation and will eventually allow the individuals and communities concerned to 'move on'. At the same time, technology can contribute to bridging otherwise distant communities and can enable forms of participation and local ownership that would otherwise not be possible.

In addition to changing obvious aspects of communication, technology also alters the meanings of communication and influences its outcomes. As pointed out above, every act of communicating a past event involves constructing and reconstructing this event, which means that the ways in which this reconstruction occurs – how it is sent and received – play a significant role. Formal court proceedings have, of course, already been altered by technology, with international trials, especially, having changed in rhythm, tempo and accent due to the introduction of so-called

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56 For the different uses of symbolic reparation in the context of international criminal justice see F. Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation', (2009) 16(2) *International Review of Victimology* 127.

57 For a critical analysis of the different interpretations of popular involvement in the *gacaca* courts see P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (2010), 142–53.

58 C.M. Cole, *Performing South Africa's Truth Commission: Stages of Transition* (2010), 6 (emphasis added). Moreover, the hearings of the TRC can be considered to have been much more important than the formal output of the Commission, i.e., its final report, written in a language that is not understood by many South Africans and prohibitively expensive for most of them. Ibid., at 7.

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simultaneous translation.[59] To give another example, silence plays a particular role in conversations in certain Aboriginal cultures, which also have different preferences regarding direct eye contact.[60] Such fairly subtle aspects must be taken into account when considering the use of information and communication technologies in the context of transitional justice. Otherwise, such technologies will only contribute to privileging certain ways of communication and to further entrenching the hegemony of vision in the field of transitional justice – and of Western modernity's notion of law more generally[61] – thus preventing the creation of richer and innovative ways of expressing and symbolizing justice.

An important *caveat* to these *caveats* should be made here. It is certainly not suggested that cultures and traditions cannot – and should not – change. Legal traditions, and cultures more generally, have always influenced each other;[62] change is often inevitable and may even be healthy and desirable. However, certain changes may be too abrupt and hence be harmful,[63] and certain results may be contrary to the specific objectives pursued. It would, for instance, be particularly ironic to use information and communication technologies with the objective of increasing access to and participation in transitional justice mechanisms but to contribute, through these technologies, to alienating and, in the end, re-victimizing already vulnerable individuals and groups.

Generally speaking, it seems obvious that integrating information and communication technologies to facilitate the establishment and operation of transitional justice institutions will be less complicated and more easily acceptable for the community in question if technologies such as computers and the internet are not an entirely new phenomenon associated with strangers, different worldviews and a foreign lifestyle. Nevertheless, even if village elders – to evoke an admittedly clichéd image – may not instantly recognize the usefulness of new technologies, social media and new methods of dispute resolution,[64] traditional mechanisms have always evolved and changed over time. They can adapt, and, with the required attention to the respective beliefs, needs, and demands, they can also be integrated into new processes. The result will largely depend on the intensity and carefulness of such collaborative efforts, and on the capacity and willingness of the actors involved – the communities most directly concerned, state authorities, civil society actors and foreign experts and donors – to understand each other and to give each other the necessary time and space to do so.

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59 For a rich study of the ICTR and an analysis of the auditory dimensions of legal experiences more generally, see J. Parker, 'The Soundscapes of Justice', (2011) 20(4) *Griffith Law Review* 962.

60 A. Wallace, '"Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia', (2008) 19 *Journal of Law, Information and Science* 1, at 15.

61 I would like to thank Elisabeth Roy Trudel for this insight.

62 As an example, the chthonic, talmudic, later roman and islamic legal traditions have greatly influenced each other. See H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2014), 127.

63 The suggestion to pursue cyberjustice initiatives through a 'modular approach', i.e., step-by-step, is therefore welcomed. Benyekhlef et al., *supra* note 2, at 330–1.

64 The familiarity with information and communication technologies of socially marginalized actors should, however, not be underestimated. For surprising findings regarding individuals who are homeless see S. Bouclin and M.-A. Denis-Boileau, 'La cyberjustice comme réponse aux besoins juridiques des personnes itinérants: son potentiel et ses embûches', (2013) 31 *Windsor Yearbook of Access to Justice* 23.

4. Conclusion

This article has focused on the potential of information and communication technologies to affect existing transitional justice mechanisms and to contribute to imagining new ways of achieving justice in transitional settings. Such technologies can render state-based institutions, such as the tribunals and commissions that were created over recent decades in numerous countries, more efficient, transparent and better connected to their constituencies. However, the typically centralized, somewhat elitist and hierarchical structure of these institutions has many obvious disadvantages that cannot necessarily be alleviated through the use of technology. Reconciliation, for instance, will have to transpire at the inter-personal and very local level, something that large institutions established in the national capital or in The Hague will hardly be able to generate. These institutions are, moreover, not always able to deal with different local grievances; simpler, community-based mechanisms may be much more effective in this regard. For many societies emerging from violent conflict, it would, therefore, be useful to encourage decentralized, bottom-up approaches that give a greater voice precisely to those to whom 'justice' is to be 'delivered', even in the planning phase of a particular mechanism. The result may be a both more personalized and collective – and collectively owned – process, exactly what is needed to deal with situations of mass trauma.[65] In this context, the use of information and communication technologies cannot only facilitate communication between and among the communities involved; through the more active participation in the design of and during the implementation of the process, it may also turn the whole process into a continuously evolving one and contribute to developing a feeling of interconnectedness and to promoting social cohesion.

However, imagining new transitional justice endeavours should be done with an important *caveat*: it would not be sensible to attempt to first conceive new tools or mechanisms – including 'transitional justice apps' for mobile phones – and then to find an application for them. Rather, the specific conditions, traditions and priorities of a particular community should drive the use and creative development of such tools. New approaches should be carefully integrated into existing ways of communicating, of resolving disputes and of aspiring to achieve justice. Ideally, this would lead to customized solutions that can be shared with other communities but that are never imposed. Finally, the concern not to force technocratic solutions on 'other' communities should not blind our eye to a self-critical examination. Modern information and communication technologies may be seen as a given in many Western societies, but their increased use privileges certain forms of justice – whether transitional or other – and of communication, which may further marginalize certain already underprivileged individuals and groups.

[65] For an analysis of the external and intrapsychic dynamics of the encounters between victims/survivors and perpetrators after mass trauma see P. Gobodo-Madikizela, 'Empathetic Repair after Mass Trauma: When Vengeance is Arrested', (2008) 11(3) *European Journal of Social Theory* 331.

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