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Embodiments and frictions of statehood in transnational criminal justice

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Abstract

Outside of criminology, dominant conceptions of postcolonial statehood in the Global South as ‘fragile’ or ‘failed’ have long been criticized. In criminology, however, the theoretical outcomes of this critique have been scarce. In this article we therefore ask how ideals and practices of transnational criminal justice are informed by and productive of specific (Global North) conceptions of statehood. Exploring encounters between transnational and local criminal justice in the context of international state-building in Mali and Liberia, we observe frictions in which statehood divergences and global hierarchies become apparent. Through penal aid, we argue, a particular kind of penal statehood is produced wherein the options of how to perform penalty are increasingly limited by the embeddedness in global power asymmetries.

Keywords

cybercrime, gender-based violence, Global South, Liberia, Mali, performativity, statehood, transnational criminal justice

Introduction

Transnational criminal justice implicitly embodies specific notions of statehood. In international discourse on criminal justice and police cooperation, countries in the Global South have tended to be portrayed as the ‘weak link’ that, due to their ineffective and

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underdeveloped criminal justice systems, provide safe havens for transnational criminals (Andreas and Nadelmann, 2006). Put differently, postcolonial statehood¹ is often portrayed as ‘fragile’, ‘weak’ or ‘failed’ with regard to performing state functions such as those of criminal justice (Duffield, 2007). This view has prompted the necessity for international organizations and countries in the Global North to provide ‘penal aid’ to ‘develop credible criminal justice institutions and reform penal practice throughout the world’ (Brisson-Boivin and O’Connor, 2013: 515). As we aim to illustrate in this article, through penal aid practices, state-builders also *perform* the crime control functions of African states together with local officials, thereby attempting to produce states that govern transnational crime responsibly.

While classical criminology has been state-centric, the view that the state’s institutions are and should be the primary agents of criminal justice and crime control has increasingly been questioned by criminologists (see, for example, Christie, 1977; Garland and Sparks, 2000; Jamieson and McEvoy, 2005; Lohne, 2020; McEvoy, 2007). Foucauldian analyses, in particular, have understood state power as decentred and dispersed political technologies of control (Rose and Miller, 1992) entailing both ‘technologies of the other’ and ‘technologies of the self’ (Garland, 1996, 1997). Still, however, Katja Franko notes that referrals to ‘the state’ in ‘criminological scholarship almost without exception means the western state, mainly North American, UK, Australia, Western Europe, occasionally Russia, while examples of “lesser statehood” are far more seldom considered’ (Aas, 2012: 15). This observation echoes criminological scholarship critiquing the implicit Global North centrality of the discipline that ignores colonial history and silences epistemologies from the Global South (Agozino, 2003; Carrington et al., 2015; Fonseca, 2018). Yet, the postcolonial critiques posed by the strands of ‘southern’ and ‘Africana’ criminology have not taken into account the theoretical discussion on statehood in the African studies literature, something we aim to remedy with this article. Thus, we ask, as Franko does: ‘Which state? Where is it situated and what are its historic and geopolitical contexts?’ (Aas, 2012: 15). Moreover, we add: how are ideals and practices of transnational criminal justice (TCJ) informed by and productive of specific conceptions of statehood? By doing so, we respond to her ‘invitation to examine some of the prevalent assumptions about statehood and consider theoretical accounts which diverge from the western ideas and ideals of statehood’ (Aas, 2012: 16).

In the following section we outline the ‘failed states critique’ in the literature on international state-building and TCJ: noticing that in criminology, theoretical outcomes of this critique have at best been scarce, even in the strands of ‘Africana’ or ‘southern’ criminology that have otherwise excelled in unravelling the Occidentalism of much criminological theory. After a note on case selection, methods and data (section three), we draw on two empirical examples of encounters between transnational and local criminal justice in Mali and Liberia respectively to illustrate how these performances of TCJ implicitly embody attempts to transfer Global North conceptions of statehood within asymmetrical power relations (sections four and five). This leads to frictions—understood as ‘heterogenous and unequal encounters [that] can lead to new arrangements of culture and power’ (Tsing, 2005 in Aas, 2011: 414)—wherein the discrepancies between different ideas and ideals of statehood become apparent. Section six discusses the theoretical implications of these findings for criminology, and suggests that a particular kind of penal statehood is produced through TCJ performances that reproduce global hierarchies.

Postcolonial critique, statehood and transnational criminal justice

To date, few criminologists have analysed and conceptualized the meeting point between transnational and local criminal justice in the context of international state-building, and those who have done so have focused in particular on police reform and training (Blaustein, 2015; Bowling and Sheptycki, 2012; Brogden and Nijhar, 2005; Ellison and Pino, 2012; Goldsmith and Sheptycki, 2007; Pino and Wiatrowski, 2006). Importantly, these scholars have brought attention to the fact that the ‘one size fits all’ crime control and policing models exported and transplanted embody Global North notions of ‘democracy’, ‘rights’ and ‘stateness’ which do not take into account the local ‘history, politics, culture, legal norms, the existence of a functioning state infrastructure and the presence of elite groups who are normatively committed to democratization’ (Ellison and Pino, 2012: 56). As such, international assistance to crime control in the Global South is often misplaced (Ellison and Pino, 2012), becomes distorted in the local context (Stambøl, 2021) and may even produce harmful and adverse effects locally (Blaustein, 2016; Bowling, 2011; Stambøl, 2019).

Scholars working on the interface between transnational and local criminal justice in political anthropology, International Relations (IR) and African studies (e.g. Beek and Göpfert, 2015; Biecker and Schlichte, 2006; Fuest, 2010; Hills, 2008; Hönke and Müller, 2012; Kyed, 2009) have arrived at similar conclusions regarding the transferability of Global North policing and criminal justice ideas and models and their potential for changing local practices in the Global South. For instance, Beek and Göpfert (2015: 472) found that such Global North models tended to be adapted ‘to local rationalities, often in effect completely subverting these models’ and often with limited effect in transforming the site of these reforms (i.e. the police). Criminal justice institutions in African countries were found to be remarkably resilient to change—which does not however mean that they were not impacted by these reform efforts in some way (Beek and Göpfert, 2015; Hills, 2008). The interaction between Global North and South actors set in motion a dialogue and exchange of stories about ‘who they are and what they actually do’ (Beek and Göpfert, 2015: 473). Or, as Fuest (2010) found in the ‘workshop culture’ of international and local NGOs in Liberia, the constraints between top-down (neo)liberal peace-building approach combined with a naive bottom-up approach of including certain actors without considering their legitimacy locally in these workshops could lead to escalation of conflict in local communities. Thus, criminology can expand conceptual and empirical knowledge in this cognate literature on the meeting points between transnational and local criminal justice form in the Global South. We argue that central to understanding the meeting point between transnational and local criminal justice are its implicit conceptions of (Global North) statehood.

Global North interventions such as donor-funded criminal justice projects in African states are often based on an assumption that African states are ‘weak’, ‘fragile’ or ‘failed’ (Bates, 2008; Jackson and Rosberg, 1982). In other words, the image of the African state belongs to what Das and Poole (2004: 7) describe as ‘an always incomplete project that must constantly be spoken of—and imagined—through an invocation of the wilderness, lawlessness, and savagery that not only lies outside its jurisdiction but also threatens it

from within'. Aimed to counteract state failure, then, penal aid is mainly directed at state actors such as police, gendarmerie, criminal courts, intelligence services, penitentiary authorities and Ministries of Interior and Justice—while non-state actors tend to be viewed as threatening and in opposition to the state (Abrahamsen, 2016). International assistance to crime control and criminal justice thus assumes a fixed model conception of the state as a particular material form performing particular roles; entailing an opposition between the weak/fragile/failed state and the ideal legal-rational Weberian state,² and the binary between state and non-state actors (Abrahamsen, 2016; Schroeder and Chappuis, 2014). In other words, the states in focus diverge radically from what many Global North scholars understand as the 'state' (Schouten, Forthcoming), which is further problematized by the state being both the site and agent for reconstruction and transformation (Fuest, 2010: 3).

International donors have to some extent internalized this critique, having recently become more inclined to include non-state actors in rule of law projects (Berger, 2017), and supported 'networked' forms of state-building where the state should steer and regulate rather than row and provide (Abrahamsen, 2016; Rose, 2000). However, such state-building measures still purport a unilinear development trajectory towards Global North ideals, which is deeply ahistorical because postcolonial states were created very differently from European ones, namely out of European imperial competition (Abrahamsen, 2016). Therefore, political anthropology and African studies have developed empirically grounded analyses of what statehood in Africa *is* instead of what it is not, and have suggested theorizing statehood as performance (e.g. Bierschenk and Oliver de Sardan, 2014; Blundo and Le Meur, 2009; Eriksen, 2011; Lund, 2016; Migdal and Schlichte, 2005; Solhjell, 2019). Instead of assuming the African state as dysfunctional according to a parochial understanding of what the state should be, these scholars rather see the state as practices coming alive through performance and effect (Bourdieu, 1999; Butler, 1988; Dunn, 2010; Foucault, 1994; Mitchell, 1999). Building on these theorizations, we argue that one instance through which the Global North conception of statehood comes alive is through performances of TCJ. In other words, neither TCJ nor the state are fixed things or entities but rather 'rel[y] on constant acts of performativity to call [them] into being', as Dunn (2010: 80) argues. This way of thinking subscribes to what Foucault (1994) terms 'effects of reality' to describe that a discourse, which does not exist per se, still has effects on reality. Thus, just as these statehood theorists argue that the state is not solely a discourse, an ideal, but also takes material and bodily forms such as paperwork, people and territorial borders to name a few examples (Mitchell, 1991: 94), we argue that penal aid—such as assistance to transposition of transnational/international criminal law and training workshops of criminal justice professionals—entail performances that embody statehood ideals that become visible and 'real' (Ringmar, 2016: 118). In other words, TCJ is shaped by both ideals and practices of Global North statehood and is dependent on being performed in order to be 'real' (Butler, 1988). As such, state-building initiatives, like the building of the state's crime control functions and justice apparatus, are all examples of the intensity of performing statehood and serve as a clue to understanding citizen- and subject-making as part of the state effect. We further illustrate this argument through examples from fieldwork in West Africa.

Cases, methods and data

The article draws on two empirical studies of encounters between transnational and local criminal justice in Mali and Liberia to illustrate how these performances of TCJ implicitly embody attempts to transfer Global North conceptions of statehood within asymmetrical power relations. While there are obvious examples of Global North penal aid attempts at building TCJ in the Global South according to Weberian and Westphalian statehood ideals, such as for instance border security-building to fight drug trafficking, terrorism and migrant smuggling which simultaneously enforce the territorial nation-state ideal (Stambøl, 2021), we have chosen two very different examples where this seems not only unapparent but even counter-intuitive: cybercrime and gender-based violence (GBV). By doing so, we seek to make an even stronger argument for the implicitness of Global North statehood in TCJ: showing that this is even the case in the least likely or apparent examples.

Cybercrime is seen to 'know no boundaries' and therefore renders territorially based nation-states with different jurisdictions and criminal definitions obstacles to effective policing and prosecution (Grabosky, 2004; UNODC, 2013). In other words, there is a dominant understanding that TCJ to counter cybercrime needs to somehow transcend Weberian/Westphalian statehood to be effective. However, it has been argued that despite this rhetoric, the transnational criminal legal and prosecutorial regimes put in place to fight cybercrime, predominantly established and globally diffused by Global North countries, are in fact *reinforcing* the Weberian and Westphalian notions of statehood rather than challenging them (Dalla Guarda, 2015).

GBV on the other hand, is neither an apparent case of implicit Global North statehood ideals nor even of TCJ. UN Security Council Resolution 1325 (2000) on Women, Peace and Security is usually considered as international rather than transnational criminal law although the boundaries between the two are not always clear (Dalla Guarda, 2015). Still, transnational advocacy networks and feminist movements were central in bringing the ignored issue of GBV to the top of the international agenda, specifically with regard to criminalizing and promoting a criminal justice response to sexualized violence in (post)conflict settings (Houge and Lohne, 2017). Just like other cases of TCJ, this Resolution has given the impetus to penal aid practices across Global South countries, where Global North countries and international organizations are shaping penal codes and criminal justice reform processes to deal with GBV. From being relegated to a private and domestic sphere, GBV has now become a matter for the global penal state.

The two West African countries studied in this article, Mali and Liberia, represent conflict and post-conflict countries in Africa in which such penal aid practices take place as part of broader state-building initiatives. Stambøl conducted fieldwork in Mali as part of a larger fieldwork in West Africa (including Niger and Senegal) and Europe (Brussels) between 2017 and 2019. Data included 101 interviews (39 of which were conducted in Mali) with European and international actors implementing criminal justice projects (e.g. the EU, the USA, United Nations Office on Drugs and Crime (UNODC), Interpol), local beneficiaries in the countries' criminal justice chains (e.g. police, border police, prosecutors, judges, penitentiary authorities, civil servants in the Ministries of Interior and Justice), civil society and human rights organizations, and Touareg rebel groups. Solhjell

conducted fieldwork in Liberia in March–April 2016, in the Grand Bassa county; an area relatively close to the capital Monrovia and representing plural legal systems. By plural legal systems, we refer to how Liberia—a geopolitical space—contains a co-existence of several bodies of law, from one body of law associated with the state apparatus to laws generated by different religious, social or other legitimate authorities (Von Benda-Beckmann and Von Benda-Beckmann, 2006: 14). Data included interviews of social actors from different legal systems, specifically two district commissioners, six tribal governors and several zone leaders and town chiefs in the rural areas. In addition, interviews with legal representatives of the statutory system, the police and NGOs were conducted.

Training on combating cybercrime in Mali

A banner with the text ‘Sahelian Security College’ and the EU logo in the bottom left corner hangs by the entrance of a newly built, modern three-storey house with large windows standing on a hilltop overlooking the Malian capital Bamako. This is the venue for one of the many efforts by European actors to teach West African criminal justice professionals how to fight transnational crime. This particular day in November 2017, I have been invited to observe a workshop on cybercrime (one of the many topics on which criminal justice actors are trained among others such as money laundering, illegal gold mining and drug trafficking). My interlocutor, a French law enforcement officer, explains that the added value of the Sahelian Security College vis-a-vis the numerous other counter-crime trainings ran by international donors is that they comprise pupils from all the G5 Sahel countries (Burkina Faso, Chad, Mali, Mauritania, Niger) together, not just from one country. Indeed, arriving in the coffee break, I can observe how the police, gendarmes and magistrates (five from each country, making them 25 in total) mingle around with their coffees and cakes to fulfil the objective of informal bonding which is assumed to later facilitate their joint cross-border investigations. Back in the classroom, people are strategically placed so that they sit next to a counterpart from a different country. The workshop focuses on Council of Europe (CoE) legislation on cybercrime which the EU wants African countries to ratify, implement and comply with. The trainer (who is contracted through the French Ministry of Interior’s technical cooperation operator, Civipol, and flown in to teach this one-week training course) explains that they were supposed to have trained the pupils on UN legislation on cybercrime but since it does not exist as countries could not agree on it, they had to train them on CoE legislation instead. The workshop goes on with presentations by a magistrate from each Sahelian state on what legal and institutional frameworks are in place in their country to counter cybercrime. Starting out, the Burkinabe magistrate keeps pointing to his text-heavy PowerPoint while going through the laws that were adopted in the aftermath of the terrorist attacks, highlighting Burkina Faso’s increased cooperation with Interpol. He concludes that ‘cybercrime is a real threat in Burkina Faso, and structures and laws are now put in place to respond to this threat’.

As this act of performance illustrates, transnational cybercrime law and institutional structures to enforce it are, just as other examples of TCJ, developed and globally diffused by countries in the Global North. The Council of Europe Convention on Cybercrime of 2001 (also known as the Budapest Convention), currently ratified by 65 countries,³

constituted the first transnational cybercrime law and is considered the baseline legislative framework for countries seeking to address cybercrime (Dalla Guarda, 2015: 217). The CoE model has been emulated by regional bodies to draft regional counter-cybercrime regimes across the globe, such as those of the Asia-Pacific Economic Cooperation (APEC), the Organization of American States (OAS) and Economic Community of West African States (ECOWAS). In the case of the latter, however, states were considered ‘weaker’ and there was a particularly strong element of external pressure: due to online fraud originating in West Africa (Nigeria in particular) targeting European victims, Global North countries together with international organs (the World Bank) and multinational corporations (Microsoft Inc, Western Union VISA) pushed ECOWAS to adopt the framework (Dalla Guarda, 2015). The result was that the ECOWAS Draft Directive came to be marked by a ‘notable level of influence from foreign state and non-state actors’ (Dalla Guarda, 2015: 219).

Still, insisting that ECOWAS criminalize cybercrime was in itself not sufficient; TCJ has to be performed in order to become ‘real’ (see Butler, 1988). European donors’ training, mentoring and advising on how to counter cybercrime—such as the workshop example above—thus involve what Garland (1997) referred to as ‘technologies of the other’ through external pressures, as well as ‘technologies of the self’ by which local police and criminal justice actors are trained to work on themselves to create their own subjectivities (Merlingen and Ostrauskaite, 2007). TCJ then comes to life through ‘the quotidian functioning of microphysical power’, where even short-term trainings with limited budgets ‘are able to mobilize non-sovereign forms of power that evade and undermine the material, juridical and diplomatic limitations placed on them’ (Merlingen and Ostrauskaite, 2007: 29). These transnational encounters which ‘entail subtle and yet fundamental exchanges of ideas and policing practices (. . .)—many of which do not take place during the official programme but in coffee breaks—are less about lectures and more about telling stories’ (Beek and Göpfert, 2015: 466). They put in circulation implicit understandings of criminal justice and ‘policeness’ (Beek and Göpfert, 2015; Hills, 2014) that have relational and constitutive effects. Yet, we argue, such performances of TCJ also implicitly embody specific Global North conceptions of statehood—which are performed and thereby sought produced through these trainings and workshops as well.

Cybercrime is, perhaps more than any other category of crime, ‘borderless’ (Grabosky, 2004) or ‘stateless’ (RAND, 2017) with perpetrators, victims and evidence potentially located in entirely different places of the world. Obstacles to effective prosecution of cybercrime have been identified to encompass ‘[f]ragmentation at the international level, and diversity of national laws, in terms of cybercrime acts criminalized, jurisdictional bases, and mechanisms of cooperation (. . .) divergences derived from underlying legal and constitutional differences, including differing conceptions of rights and privacy’ (UNODC, 2013: xix). In other words, problems stemming from state sovereignty. However, instead of giving birth to a supranational regime regulated by ‘post-Westphalian states’, ‘transnational cybercrime regimes are inextricably linked to their origin as products of a Westphalian state system that is using traditional regulatory tools to address a novel threat’ (Dalla Guarda, 2015: 228). States simply adapted and transplanted their traditional state functions onto the transnational plane, creating ‘disaggregated states’—and thereby continued to reproduce the shortcomings in governing cybercrime

(Dalla Guarda, 2015: 241). Yet some states were more active in transplanting their functions than others, and the transnational order institutionalizes inequalities between states. This is illustrated by the following phrase, common to policy discourses of TCJ: ‘many nations are rising to [the] challenge [of cybercrime], individually and collectively, but the web of international cooperation does have its holes and those nations that lag behind the leaders risk becoming havens for cybercriminals of the future’ (Grabosky, 2004: 146). This hierarchy between states seems to also be mentally internalized by state representatives such as criminal justice professionals from countries that ‘lag behind the leaders’. In the workshop example above, the Burkinabe magistrate is *staging* his state as taking international responsibility in the fight against transnational cybercrime, in line with what is to be expected from his audience of neighbouring criminal justice colleagues and especially European donor representatives. Indeed, ‘*stagecraft*’ is an important aspect of performing TCJ, something which is done in different ways according to different (national or international) audiences (Neumann and Sending, 2020). In the theatric of cybercrime training, the ideals of Global North statehood thus seem to take on a form of power of their own: an internationally recognized ‘proper’ state is one which takes the threat of cybercrime seriously, where laws and structures to counter it are in place, and which has functioning police and judicial cooperation with neighbouring countries and international bodies such as Interpol. In mediating the global norms of TCJ responsible statehood is produced.

Still, encounters between Global North models of TCJ and local practices in the Sahel sometimes create contradictions and frictions—and it is in these frictions that the divergences between ideas, ideals and practices of statehood and sovereignty become especially apparent. In the case of Mali, two such frictions are particularly evident, both of which have to do with the structures of global inequality in which TCJ is embedded and which are reproduced by it: one has to do with TCJ mirroring Global North problem formulations that ignore Global South realities (see Bowling, 2011); and the other shows explicit Malian contestation and resistance against a transnational order shaped and dominated by hegemonic states in the Global North.

A major obstacle that researchers face when they travel to Sahelian countries such as Mali and Niger is the very poor quality or often non-existence of Internet connection. In more remote areas, this lack can encompass electricity in general. During fieldwork in Bamako, many hours were spent waiting for a one-page pdf document to be uploaded to emails to interlocutors. In the Nigerien capital Niamey, few hotels seemed to have functioning wifi at all, and many ‘internationals’ (from the Global North) who needed wifi for their work would hang out on the terrace of the luxurious Grand Hotel—one of the few places in town with a stable Internet connection. The exception to this rule is apparently international offices and missions, like those of the EU and the UN, that can afford expensive satellite Internet. The Sahel seemed like an exceptionally bad choice of ‘haven’ for cybercriminals. Another question hard to ignore was whether, in some of the poorest countries in the world facing multi-faceted crises encompassing the lack of access to basic goods such as water, food and electricity, and experiencing attacks by various armed group fractions, cybercrime is really an important challenge. Furthermore, if it is (after all, many people have smartphones where the connection works to some extent), whether penal prosecution and the diversion of strained police resources is the best

solution to it. The problem of cybercrime and the solutions diffused across the world to combat it, are clearly formulated by and for states in the Global North.

The scholarly literatures note that although Global North penal aid rarely has the intended effects on resilient African criminal justice institutions and professionals (Beek and Göpfert, 2015; Fuest, 2010; Hills, 2008), it does tend to have the effect of generally cementing existing power structures by supporting political elites; thus, ironically, often counteracting democracy and democratically responsive policing (Blaustein, 2015; Ellison and Pino, 2012). Yet while analytical frameworks on patron–client relations (e.g. concepts like ‘patronage politics’ or ‘neopatrimonialism’) are typically reserved to make sense of political orders and forms of governing in ‘areas of limited statehood’ (Börzel et al., 2018) in the Global South, less attention is afforded to the close relations of former colonial powers with the political elites of their liberated colonies. France still sees itself as the security guarantor of its former colonies—*Françafrique*—and is considered by other international actors as having the expertise and know-how of, and international leadership with regard to, the territories it once possessed (Charbonneau, 2008; Gegout, 2017). The fact that much criminal justice assistance and training (often regarded as apolitical technical assistance) is given by French officials is thus seen as unproblematic and natural by international actors (and often legitimized by such pragmatics that they speak the same language). Yet teaching on how criminal justice is supposed to function in modern, proper and responsible states finds uncomfortable parallels in the past—and has been interpreted by some Malians as new manifestations and configurations of the *mission civilisatrice*. In Mali, domestic as well as global hierarchies were recently explicitly challenged by months of public protests, specifically against the corruption and inaction of President Ibrahim Boubacar Keïta (who kept good relations with France). Many Malians have also been vocal against the large presence of international and European actors, and especially against the French military force *Barkhane* to fight terrorism and transnational crime, seen by some as a neo-colonial force encroaching on Malian sovereignty. Protests culminated in a group of Malian army officers taking matters into their own hands and deposing President Keïta in a coup d’état on 18 August 2020. This exemplifies how hierarchies co-created and seen as legitimate by international donors (including former colonial powers)—as they provide ‘stable partners’ in the fight against transnational crime—do not always find the same legitimacy domestically (see also Fuest, 2010). In terms of global hierarchies, however, the image of Mali as a ‘fragile state’ incapable of modern democratic political transition is now (again) reinforced. Similar frictions resulting from Global North dominance and its (re-)enforcement of global and local hierarchies can also be observed in TCJ performances in other West African countries such as Liberia.

Gender-based violence and legal pluralism in Liberia

The building of the main court in Grand Bassa County, part of Liberia’s statutory justice system, is full of people waiting for their case to be heard. My colleague and I state our research purpose to the receptionist and ask if we can talk to one of their lawyers. After a while, as we walk through the hallway to reach our interviewee, we glance into the crowded courtrooms where people are waiting patiently. We ask the lawyer if gender-based violence

(GBV) is something he comes across in his line of work, which he confirms, and we ask about the legal mechanisms for handling such cases. He explains the co-existence of legal systems, but the statutory system requires first that the police handle the evidence, which in itself can be challenging in GBV cases. However, another challenge, he asks rhetorically: 'How do you get witnesses if they can't be reached? People cannot leave their farms for two weeks. The kind of easy, affordable access to justice is constrained. We [statutory] are doing our best.' Contrary to my assumption that a practising lawyer in the Liberian Circuit Court would talk warmly about using the statutory system, he goes on to state the following:

I believe in customary practices. Not reduced to only GBV but generally. (. . .) We can use the customary to serve and support the statutory. We should cherish our own cultural practices, but we should also reform them to adapt to local circumstances. If we are not mindful, we have no cultural practices left.⁴

What this example illustrates is the reluctant performance of an ideal type of justice where GBV is placed as 'a public matter'; that is, a statutory concern. Our informant also points to what we interpret as an empty stage, namely the historical limit of the state in providing justice for 'the public' and its missing actors on the stage ('people cannot leave their farms for two weeks'). Since Liberia was established as a country for freed slaves from the USA, the country has had a plural legal system, one which is referred to as a statutory system and another system that runs parallel consisting of a body of rules by actors who draw their legitimacy from 'religious' and/or 'traditional' status (Brown, 1982; Isser, 2011; Isser et al., 2009; Von Benda-Beckmann and Von Benda-Beckmann, 2006). These systems are not self-contained units with a set of ideologies and boundedness that separates the 'state law' from the 'customary law' but they are, as Von Benda-Beckmann and Von Benda-Beckmann (2006: 18) argue, 'treated as if they do, and these ideas usually influence the thoughts and interactions of social actors'. In practice, such as when our informants speak, they are referred to as statutory or customary. In other words, the separation between legal systems has effects on reality in the sense of citizenship and belonging to different Liberian rules. On the one hand, the statutory rule has mainly been for a small elite, entitled Americo-Liberians, while most Liberians rely on other bodies of law for their everyday justice, especially in the hinterlands (Graef, 2015; Pajibo, 2008; Schia and De Carvalho, 2015). However, as (Berger, 2020) argues, 'the state is only one among many possible sources of normative and legal reasoning' in the Global South. Yet, the presence and effects of the international community in post-conflict Liberia have downplayed or even seen non-state actors as threatening and in opposition to the state (Abrahamsen, 2016) in an effort to support a modern state system.

The struggle to perform justice for GBV victims stems from a broader power struggle embedded in the women, peace and security agenda as set forth in the UN Security Council Resolution 1325 (2000). At the heart of this struggle was moving women from the 'back stage' to the 'front stage' (see Goffman, 1959) of global peace and security matters by establishing a language for taking gender perspectives into TCJ. Resolutions by the Security Council are, as Houge and Lohne (2017: 764) state, not only formal expressions but 'also legally binding upon members states and arguably compromise the highest level of international political authority'. The 1325 agenda emerged from and

thrived in ‘transnational advocacy coalitions (. . .) to mobilize and generate the political will to act on the issue[s]’ (Haddad, 2011: 120; see also Keck and Sikkink, 1998) of the Resolution. In many ways, the Resolution forms a normative universe and an imagined community of shared ideas (Whitworth, 2004: 122–123). At the same time, Resolution 1325 contains a narrow political agenda; the problem of sexual violence in war (victimhood) and women in leadership positions (agency). Post-conflict Liberia represents a country that has placed both issues on the front stage, namely strong female leadership combined with a transnational legal focus on criminalizing conflict-related sexual and gender-based violence (SGBV). This image conveys a strong message of embodied experience (Ringmar, 2016) and call for recognition that resonates with Global North states. In particular, seeking criminal justice for SGBV in conflict and post-conflict situations is an issue that ‘transgress[es] national boundaries’ (see Sheptycki, 2000: 168) and is a field shaped by local, national and international actors advocating for rule of law to ‘end impunity’ (Houge and Lohne, 2017: 772). By placing SGBV as a matter of transnational justice, national and international actors perform their roles ‘in a global community of aid, alliances, and diplomatic negotiations’ (Clarke, 2009: 18). As the data demonstrate, criminal accountability for (S)GBV in Liberia is informed by a specific conception of statehood, namely as a statutory issue expected to be performed by state-like actors rather than actors who draw their legitimacy from ‘religious’ and/or ‘traditional’ status (Von Benda-Beckmann and Turner, 2018).

Invoking rule of law transformation when it comes to GBV in Liberia forms part of what Humphreys (2010: 7) calls the ‘articulation and justification of overarching public policy orientations’. In practice, this has meant that international human rights organizations and the UN mission in Liberia have led campaigns on what kinds of crime can and cannot be handled by non-state law: highlighting that state law does not permit the other legal systems to handle serious criminal offences such as murder, rape and assault. This has been done without asking the question of whom does the statutory system serve (see McEvoy, 2007). This divergent perspective of statehood produces frictions between different Liberians’ everyday embodied experiences and internationally led state-building efforts. In a group discussion with zone leaders in Grand Bassa, one zone leader explained the position of their views on how GBV cases are being handled:⁵

The government has made GBV so grave and fearful like Ebola that no one wants to handle it. There are some elderly women who could handle GBV cases traditionally. What I am experiencing is that the western culture is gradually taking our customs away. (. . .) The people who brought in the issue of rape have confused the people in the villages.

Instead of responding to the call in favour of legal pluralism as debated in the quotation above, the TCJ field has been informed by a state-centric ideal of justice. In other words, TCJ is performed in a discourse that the statutory system serves ‘better justice’ than the other legal systems when it comes to gender equality issues. This idea is closely tied to Global North perceptions of modernity and modern rule under a state-centric system. The other systems in Liberia have been criticized for their limited performance in international human rights, using ‘savage methods’ such as Sassywood (trial by ordeal) or having dominance of male tribal leaders. This corresponds to an overall understanding among international donors

and human rights actors to respond to an ‘outdated’ system and under-utilized formal justice apparatus (Humphreys, 2010) or systems that invoke ‘wilderness, lawlessness, and savagery’ (Das and Poole, 2004: 7). As Humphreys (2010: 179) argues, from an international human rights norm, legal systems outside the state ‘cannot perform statehood’ and only survive or thrive ‘under the wing of a protecting state’ that is ‘absent, weak, or illegitimate’. By portraying certain crimes such as GBV and rape cases as more serious and hence solely trialled in statutory law, the international human rights apparatus is effectively performing a subordination of justice systems that incorporate the majority of Liberians.

In the meeting point between international human rights norms and the plural justice forms in Liberia, we see frictions between the access to justice, on the one hand, and the framing of where justice is best fit. In a practical sense, the systems of rule by other social actors are by far the most accessible justice form for the majority of Liberians. However, the transformation of Liberian society after the civil war led to changes where these social actors draw their legitimacy and shifting power in terms of transforming territories and social spaces. This is not simply forced upon Liberians from external donors or human rights activists but rather the fluctuating nature and ongoing negotiation of statehood in any society (see Hagmann and Péclard, 2010). Territoriality and the question of who controls what and whose criminal justice became ever more complicated and fluctuating; creating new and dismantling old political, military and economic social spaces (Lefebvre, 1991 [1974]). The legitimacy and representativeness of social actors in charge of plural legal systems are insufficiently questioned by development agents and this unintentionally reinforces conflict lines (Fuest, 2010: 4).

These frictions between transnational, national and local justice performance represent divergences of statehood ideals. In TCJ performance, most Liberians are not included in the polity of criminal justice where such norms are performed. The performance of justice for GBV victims at the statutory level is, unintentionally from the side of international actors, part of a segregationist logic to the indigenous inhabitants of the Liberian hinterlands, viewed as subordinate to the African-American colonizers. In other words, international actors are performing what Hönke and Müller (2012: 386) would refer to as ‘postcolonial relations’. At the same time, it opens up the statutory system—theoretically speaking—to a broader conception of citizenship and belonging to a public, not limited to a status of Americo-Liberian. The focus on GBV in different legal systems is also affecting the status of women and men in TCJ. In other words, and although the criminal justice changes take many forms, the engagement between international and Liberian actors has opened what Beek and Göpfert (2015: 474) have referred to as ‘narrative space’ where Liberians from different societal statuses examine and raise critical questions about their plural legal systems. These socio-political struggles of inclusion and exclusion in different and changing criminal justice systems form part of the wider fluctuating understanding of statehood.

Transnational criminal justice and the co-production of penal statehood

Both our examples showed how ideals and practices of TCJ in Mali and Liberia were informed by and productive of specific Global North conceptions of statehood. In this section we draw on these empirical encounters to further a theoretical discussion on the

production of penal statehood by practices and performances of TCJ. By that we mean that through international actors' performances of TCJ in the Global South together with local (state) actors, a particular kind of penal state is produced—one in which the options of how to perform penalty are increasingly limited by the embeddedness in global power asymmetries and transnational hierarchies. This does not necessarily lead to development and progress as assumed by the discourse of TCJ, we argue, but often creates contestations and frictions that play into local and global hierarchies and may even aggravate conflict lines.

As Neumann and Sending (2020) explain, states 'become states by engaging in and performing practices recognized as having to do with statehood'. In this understanding, statehood is an ongoing process with no particular end or beginning and something that can evolve across different places, spaces and times (see also Solhjell, 2019). Yet the ideas of what the state should do and how are also circulating on a transnational plane: 'the idea of the sovereign state appeared at the same time as the notion of a "world stage" on which it was placed as an actor' (Ringmar, 2016: 117). Criminal justice is defined in Global North conceptions of Weberian and Westphalian statehood to be the quintessential expression of state sovereignty, namely the internal security apparatus enforcing a monopoly of force within a given territory, yet the dominant ideas and ideals of what should be included within its remit are ever-evolving. Our examples are illustrative as both cybercrime and GBV are relatively new criminal categories, and it is only rather recently that they have become regarded as matters of the state and of transnational/international criminal justice.

Global power asymmetries have resulted in the performance of statehood at a most basic level of states deemed 'fragile' to some extent being taken over by 'other actors [who] move in to perform core tasks associated with statehood (. . .) and thereby undermine the sovereign control of the state' (Neumann and Sending, 2020: 1). In our two examples, performances through trainings and workshops on transnational criminal justice ideals—such as the state's policing and penal prosecution of cybercrime and GBV—make them take on forms of microphysical power of their own, which glosses over the situatedness of local (colonial) history, culture, traditions, social control and political power, and in doing so ultimately contributes to (re-)enforcing existing global and local hierarchies. This often creates contestations and frictions.

Frictions expose the diverging ideas and ideals of statehood, as Global South realities are meagrely if at all represented in the performance of TCJ. In Mali, the state's penalty is trained to perform state functions transplanted transnationally by Global North countries; yet the alleged threat of 'cybercrime havens' is likely to be prevented not so much by penal prosecution as by bad Internet connection. In Liberia, the performance of state-centric penal justice for victims of GBV is obstructed because the actors on the stage—the victims and witnesses themselves—cannot afford to leave their farms and travel to the statutory courts in the cities, while the forms of non-state-centric justice they would normally rely on have become downgraded or even disappeared due to international penal aid practices. Thus, in both examples international actors engaged in TCJ are simultaneously performing 'postcolonial relations' and the colonial state (Hönke and Müller, 2012: 386) where the Global North conception of problem formulations, solutions, penalty and statehood ideals take the front stage. In the most extreme cases, the

frictions within these global hierarchies and asymmetric power structures between states provoke explicit acts of resistance.

Conclusion

The perception that Global South countries are ‘weak links’ that undermine transnational crime control by providing safe havens for criminals—and therefore in need of aid to build more effective criminal justice systems modelled upon ‘leading’ Global North countries—permeates the discourses and practices of TCJ and penal aid. Still, the ‘failed states critique’ in adjacent disciplines has as yet produced meagre theoretical outcomes in criminology; something this article sought to ameliorate through furthering a conceptual discussion on statehood and TCJ.

By drawing on two empirical studies of encounters between transnational and local criminal justice in Mali and Liberia, we illustrated how performances of penal aid to combat cybercrime and gender-based violence implicitly embody Global North conceptions of statehood. These encounters entail the circulation of ideas and stories about state-centric justice that have relational and constitutive effects. Responsible and ‘proper’ statehood is then produced through the mediation of the allegedly universal norms of TCJ. However, as Franko has argued: access to the universal is unevenly distributed (Aas, 2012). The discrepancy between TCJ norms diffused through ‘postcolonial relations’ (Hönke and Müller, 2012: 386) and social realities in the Global South creates contestations and frictions, and sometimes outright resistance.

Our theoretical contribution has thus been to show the performativity and constitutive effects of the global penal state, but also to expose the global hierarchies within which it is embedded and which are reproduced by it—which limit the options of how to perform penalty globally.

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Notes

1. With postcolonial statehood we refer to states that were under formal European colonial rule (on a discussion of notions of postcolonies, postcoloniality and the postcolonial condition with regard to the governance of (in)security, see Hönke and Müller, 2012). Further, we take the Global South, which tends to be used as a shorthand for postcolonial countries in Asia, Africa and Latin America, to be a ‘relational category that describes a subdued position in a

- structural relationship of domination between interconnected entities within a global system' (Berger, 2020: 2).
2. Weber (1991: 78, emphasis in original) famously argued that 'a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory'. The point to be made about territory and the monopoly of violence is that states can be defined by how they work, not what ends they seek. Weber's writing sees states' characteristics and capabilities limited, ultimately, only by the human imagination. Similarly, the Westphalian state system (seen to originate with the peace in Westphalia in 1648) refers to international principles of law that states have sovereignty over their territory and domestic affairs.
 3. <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures> (accessed 17 February 2021).
 4. Personal interview, 25 April 2016 in the Magisterial Court of Buchanan, part of the Judicial Circuit Court in Grand Bassa County.
 5. Group meeting with 40 zone and community leaders in Buchanan town hall, 22 April 2016.

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