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Justice and Economic Violence in Transition

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Justice and Economic Violence in Transition

Springer

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Introduction: Addressing Economic Violence in Times of Transition

Dustin N. Sharp

An increasing consensus has arisen at the level of practice, policy, and theory that the various mechanisms of transitional justice should be mobilized as part of a response to violent conflict and must serve as a pillar of postconflict peacebuilding.[1] More than ever, the question is not whether there will be some kind of transitional justice, but what the timing, modalities, and sequencing might be and which of the mechanisms from the transitional justice "toolbox"—including trials, truth commissions, vetting and lustration, reparations, and broader institutional reform—will be put in place. Together with the demobilization, disarmament, and reintegration of ex-combatants, security sector reform, broader "rule of law" programs, and elections, transitional justice initiatives have become a routine part of

[1] *See* Ruti G. Teitel, "Transitional Justice in a New Era," *Fordham International Law Journal* 26, no. 4 (2002): 894 (noting the emergence of a "steady-state" phase of transitional justice in which "the post-conflict dimension of transitional justice is moving from the exception to the norm"); *see also* Rosemary Nagy, "Transitional Justice as a Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008): 276 (noting the standardization of transitional justice).

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the postconflict checklist.[2] Viewed from an historical perspective, the emergence of this transitional justice consensus some 20 years after the term was coined is nothing short of remarkable.[3]

Despite the seeming consensus as to the necessity to "do something," the increasingly privileged place of justice in international affairs and postconflict reconstruction begs some very important questions: *Justice for what, for whom, and to what ends?*[4] In particular, while there is increasing momentum behind the notion that the tools of transitional justice must be marshaled in response to large-scale human rights atrocities and *physical violence*—including murder, rape, torture, disappearances, and other crimes against humanity—the proper role of transitional justice with respect to *economic violence*—including violations of economic and social rights, corruption, and plunder of natural resources—is far less certain. Indeed, historically, economic violence and economic justice have sat at the periphery of transitional justice work.[5] To the extent that transitional justice has dealt with economic issues, these concerns have been treated as little more than useful context in which to understand the perpetration of physical violence.[6]

In recent years, the need to address economic violence in times of transition has been the subject of increasing attention by academics, policymakers, and a handful of truth commissions, yet for the most part ignorance of economic violence continues to be one of the principle blindspots of the field of transitional justice. While the blindspots of transitional justice mirror historic divisions and hierarchies within international human rights law, they also parallel the liberal international peacebuilding consensus in which Western liberal market democracy is

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[2] *See* International Crisis Group, *Liberia and Sierra Leone: Rebuilding Failed States,* Africa Report no. 87 (Dakar/Brussels: International Crisis Group, December 2004), 9 (criticizing a mechanistic "operational checklist" approach to postconflict peacebuilding in which the international community assumes it can safely withdraw after rote implementation of a series of initiatives: Deployment of peacekeeping troops, disarmament, demobilization and reintegration of ex-combatants, the repatriation and return of refugees and internally displaced persons, security sector and judicial reform, transitional justice initiatives, and, finally, a first election).

[3] For an interesting discussion of how this seeming consensus masks a deeper politicization and debate, *see generally* Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008): 95.

[4] *See* Nagy, "Transitional Justice as a Global Project," 280–286 (employing the categories of when, whom, and what in order to challenge the "standardization" of field of transitional justice). For a discussion of the idea that it may not always be the case that we need to "do something" in the transitional justice context, *see* Prisilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2011), 183–205.

[5] *See* Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Politics* 40, no. 1 (2007): 4 (discussing why "economic, social, and cultural rights have not traditionally been a central part of transitional justice initiatives").

[6] *See* Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 275–276.

assumed to be the wished-for end product of postconflict reconstruction and a "package" of interventions is tailored to suit.[7] This parallel suggests that despite some 30 years of evolution, the field of transitional justice has not moved far from its origins in which the "transition" in question was assumed to be a transition to a Western-style liberal market democracy.

As the field of transitional justice moves beyond its historic origins in the wave of democratic transitions in Eastern Europe and Latin America in the 1980s and 1990s and away from its roots in law and legalism to a United Nations (UN)-sanctioned global phenomena tied to peacebuilding and conflict prevention more generally, the almost exclusive emphasis on civil and political rights and justice for physical violence appears increasingly untenable. As has been noted by Zinaida Miller, such an emphasis leads to a distorted narrative of conflict premised on the notion that economics and conflict can be neatly separated.[8] When seen through this lens, conflicts become one-dimensional, when in reality they are a messy and complicated mix of political, social, economic, and cultural factors. Compounding matters, relegating economic issues to the background of transitional justice concern serves to limit and bias the range of policies imagined to be necessary in the wake of conflict. Because poverty and economic violence can be associated with the onset of conflict, exacerbated by conflict, and continue afterward as a legacy of conflict, failure to strike a better balance between a range of justice concerns in transition is unlikely to generate policies and interventions that respond to "root causes" and may serve to obfuscate and legitimate very serious human rights abuses.[9] The language of "never again" has little meaning if the self-imposed blindspots of the field distort our understanding of the conflict and limit our range of possible solutions.

While greater inclusion of economic issues within the transitional justice agenda therefore seems necessary, it also raises difficult questions that have yet to be worked out at the level of theory, policy, and practice. For example, some would find unobjectionable the idea that transitional justice mechanisms should

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[7] *See* Roland Paris, "Peacebuilding and the Limits of Liberal Internationalism," *International Security* 22, no. 2 (1997): 56; *see also* Chandra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21, no. 4 (2007): 580–581.

[8] *See* Miller, "Effects of Invisibility," 268.

[9] *See* Paul Collier et al., *Breaking the Conflict Trap: Civil War and Development Policy* (Washington: World Bank and Oxford University Press, 2003), 22 (arguing that civil wars are more likely in low-income countries, have disastrous effects on poverty rates, and have negative effects that persist well after formal cessation of hostilities). Collier once famously argued that over 50 % of civil wars reignite within a period of five years of their supposed settlement. *See* Paul Collier and Anne Hoeffler, "On the Incidence of Civil War in Africa," *Conflict Resolution* 46, no. 1 (2002): 17. However, both figures have been disputed by some and revised by Collier himself. *See,* e.g., Astri Suhrke and Ingrid Samset, "What's in a Figure? Estimating Recurrence of Civil War," *International Peacekeeping* 14, no. 2 (2007): 197–198 (explaining how they and others have arrived at figures closer to 20 % after using the Correlates of War data set, and citing Collier's 2006 working paper, which established a 23 % war recurrence rate for the first four years after the cessation of conflict).

address accountability for egregious violations of economic and social rights that rise to the level of war crimes.[10] In many ways, such a narrow approach to questions of economic violence would but mirror the traditional modalities of transitional justice that have tended to focus on accountability for egregious violations of physical integrity. Yet the question arises as to whether transitional justice should also engage deeper issues of distributive justice and structural violence that predate conflict and which may have in part helped to precipitate it. If we find ourselves focusing on issues of deep-rooted structural violence, is this the proper work of the field of transitional justice, or should it be left to the work of "development" and longer-term political and social processes?[11] In sum, at what point would we be asking too much of transitional justice by suggesting that it grapple with larger and deeper dimensions of economic violence?

This chapter seeks not to answer any of these questions definitively, but argues that a more nuanced, contextualized, and balanced approach to a wider range of justice issues faced by societies in transition is necessary. To this end, this chapter proposes that one way to achieve a more balanced approach is to reconceptualize and reorient the "transition" of transitional justice not simply as a transition to democracy and the "rule of law," the paradigm under which the field originated, but as part of a broader transition to "positive peace" in which justice for both physical violence and economic violence receives equal pride of place.[12] Such a reorientation would not guarantee or even mandate greater emphasis on economic concerns in all cases. The notion of "positive peace" could ultimately be subjected to limiting constructions and understandings that would in effect reimpose a version of liberal international peacebuilding, and thereby exclude many economic and distributive justice issues from its purview. Nevertheless, I argue that insofar as the very idea of "positive peace" has at its core issues of structural violence, it calls upon one to attend to a broader set of concerns than has historically been considered in transitional justice practice. Reorientation around the concept could be an important step in the direction of bringing economic violence into the foreground of transitional justice practice and policy.

This chapter proceeds in three parts. The first part sets forth the traditional focus and preoccupations of transitional justice, a field which has historically been rooted in law, human rights, and the felt imperatives of a political transition to Western liberal democracy, but which is increasingly allied with broader notions of peacebuilding. The next part discusses the relationship between transitional justice and economic violence, a broad constellation of issues that have largely been excluded

[10] *See* Evelyne Schmid, "War Crimes Related to Violations of Economic, Social and Cultural Rights," *Heidelberg Journal of International Law* 71, no. 3 (2011): 3, 5, 9–17.

[11] *See* Roger Duthie, "Transitional Justice, Development, and Economic Violence," in this volume.

[12] As discussed in greater detail below, the term "negative peace" refers to the absence of direct violence. It stands in contrast with the broader concept of "positive peace," which includes the absence of both direct and indirect violence, including various forms of "structural violence" such as poverty, hunger, and other forms of social injustice. *See generally* Johan Galtung, "Violence, Peace, and Peace Research," *Peace Research* 6, no. 3 (1969): 167.

from transitional justice work to date. It articulates some of the arguments against inclusion of economic violence and argues that any costs are largely outweighed by the benefits. The final part examines the relationship between transitional justice and the emerging field of peacebuilding, including the critique of liberal international peacebuilding, and sets forth the heart of my argument that one way to promote greater focus on issues of economic justice in transition would be to reconceptualize the field of transitional justice as a transition to "positive peace."

A note about terminology is in order before proceeding. In this chapter, together with others in the volume, the terms "physical violence" and "economic violence" are used as shorthand to refer to a range of phenomena. "Physical violence" refers to murder, rape, torture, disappearances, and other classic violations of civil and political rights. In contrast, "economic violence" refers to violations of economic and social rights, corruption, and plunder of natural resources. While the violence that characterizes what I call "physical violence" is often direct, "economic violence" is typically more indirect. Both terms are clearly oversimplifications. For example, not all violations of civil and political rights involve direct physical violence, and many violations of economic and social rights—hunger and starvation, for example—are arguably a form of physical violence. While most of the "physical violence" discussed in this chapter constitutes a violation of civil and political rights under international law, the concept of "economic violence" includes, but is broader than, violations of economic and social rights under international law.[13] Nevertheless, as a form of shorthand, both terms constitute loose categories that are useful to a discussion of the historical emphasis and blindspots of the field of transitional justice. In addition, the conceptualization of things like corruption as a form of violence is intended to convey the very real harm and suffering that it brings to individuals and societies, akin to the devastation caused by widespread acts of physical violence.

The Origins and Preoccupations of Transitional Justice

Many of the practices associated with the modern field of transitional justice—trials, truth commissions, reparations schemes, and broader reform of abusive institutions—have deep historical roots.[14] Nevertheless, transitional justice, as a domain of policy, practice, and academic study, has its origins in the late 1980s

[13] *See,* e.g., chapter by Chris Albin-Lackey in this volume, which explains how corruption may in some instances be tantamount to a violation of economic and social rights under international law, while in other instances such a case may be impossible to make.

[14] For a review of the use of what have become known as the tools of transitional justice dating back to more than 2,000 years ago in ancient Athens, *see generally* Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004). Other authors looking to the historical underpinnings of transitional justice practice identify the Nuremburg tribunal as a key juncture initiating the first "phase" of transitional justice. *See* Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 70.

and early 1990s with the wave of transitions in both Eastern Europe and Latin America that followed in the wake of the end of the Cold War.[15] Definitions of transitional justice vary and have evolved and broadened over time.[16] Broadly speaking, "transitional justice" relates to a set of legal, political, and moral dilemmas about how to deal with past violence in societies undergoing some form of political transition.[17] Arguments for the necessity of some form of transitional justice are often grounded in notions of atrocity prevention and deterrence ("never again"), nation building (building or restoring democracy and the "rule of law"), and moral necessity (just deserts).[18] While the precise type of political transition to be undergone is not always made explicit, the transitional justice practice, policy, and scholarship in the 1990s largely focused on the felt necessities and dilemmas of a transition from more authoritarian forms of government to Western-style democracy, with a consequent focus on those mechanisms thought best to bring about the specific political transition in question.[19] As discussed in greater detail below, the notion of transition as transition to democracy was "crucial to structuring the initial conceptual boundaries for the field."[20]

Although a number of the concerns and preoccupations of transitional justice were similar to those of the human rights community from which many early transitional justice scholars and practitioners were drawn, including particularly concerns with accountability and impunity for massive human rights violations, the field of transitional justice distinguished itself in its attempt to balance twin

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[15] *See generally* Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I. General Considerations* (Washington: United States Institute of Peace, 1995). While the term "transitional justice" was coined some 20 years ago, it has been argued that transitional justice did not coalesce as a distinct "field" until sometime after 2000. *See* Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 329–332 (tracing the history of the use of the term "transitional justice"); Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field,'" *International Journal of Transitional Justice* 3 (2009): 7 (arguing that transitional justice did not emerge as a distinct field until after 2000).

[16] Many of these definitions have been quite narrow and legalistic. For example, Ruti Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." Teitel, "Transitional Justice Genealogy," 69. For a review of how some of these definitions have broadened over time, *see* Nagy, "Transitional Justice as a Global Project," 277–278.

[17] *See* Sriram, "Justice as Peace?" 582–583.

[18] *See* Bell, "Interdisciplinarity," 13 (discussing the different overlapping conceptions of the field of transitional justice).

[19] *See* Arthur, "How 'Transitions' Reshaped Human Rights," 325 (arguing that transition to democracy was the "dominant normative lens" through which political change was viewed in the early years of transitional justice practice and scholarship); *see also* Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," *Journal of Law and Society* 35, no. 2 (2008): 273 (arguing that "'[t]ransition', as normally conceived within transitional justice theory, tends to involve a particular and limited conception of democratization and democracy based on liberal and essentially Western formulations of democracy").

[20] *See* Arthur, "How 'Transitions' Reshaped Human Rights," 326.

normative aims: The demands of justice and accountability on the one hand, and the assumed needs of a political transition on the other.[21] Thus, formative debates in the field focused on the possible dilemmas and trade-offs associated with justice in times of political transition, including the so-called peace versus justice debate.[22] Influential articles by Guillermo O'Donnell and Samuel Huntington, canonized in Neil Kritz's seminal three-volume work, viewed the parameters of justice in times of transition to democracy as a function of a series of bargains between elite groups, with more or less justice available depending on the extent to which elite perpetrator groups were able to dictate the terms of the transition.[23]

Although dealing with massive human rights violations while undergoing a political transition might arguably call for the range of expertise of a variety of professions and disciplines, including history, psychology, economics, education, and religion, to name only a few, early transitional justice advocates were largely drawn from the legal and human rights communities, and early transitional justice scholarship was primarily anchored in law and political science.[24] Today, the field of transitional justice is increasingly interdisciplinary, yet law, legalism, and human rights approaches to the questions and dilemmas of transition continue to dominate in many ways, leading to a continued critique of the "narrowness" or "thinness" of traditional transitional justice work and calls to give greater attention to those issues often set in the background of legal and human rights discourse, including religion, culture, economics, and local tradition.[25]

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[21] Ibid., 358.

[22] In recent years, transitional justice advocates have tended to see the various and sometimes contradictory goals of transitional justice as complementary. *See* Leebaw, "Irreconcilable Goals," 98. The mutual complementary of peace, justice, and democracy has also become a United Nations (UN) doctrine at least since the 2004 publication of a report on transitional justice. *See* United Nations Secretary General, "The Rule of Law and Transitional Justice in Post-conflict Societies," UN Doc. S/2004/616 (August 23, 2004), 1 (arguing that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives").

[23] *See* Samuel P. Huntington, "The Third Wave: Democratization in the Late Twentieth Century," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I. General Considerations*, ed. Neil Kritz (Washington: United States Institute of Peace, 1995), 65–81; Guillermo O'Donnell and Philippe Schmitter, "Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies," in Kritz, *Transitional Justice,* 57–64.

[24] *See* Arthur, "How 'Transitions' Reshaped Human Rights," 333.

[25] *See* Kora Andrieu, "Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm," *Security Dialogue* 41, no. 5 (2010): 541 (noting the "strong and persistent influence of legalism on transitional justice"); Bell, "Interdisciplinary," 9 (discussing the broadening of the field to include disciplines beyond law); Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 417 (criticizing the legalistic penchant of transitional justice and arguing that "legalism tends to foreclose questions from other complementary disciplines and perspectives which transitional lawyers should be both *asking* and *asked*"). *See generally* Wendy Lambourne, "Transitional Justice and Peacebuilding After Mass Violence," *International Journal of Transitional Justice* 3, no. 1 (2009): 28 (calling for a revalorization of local and cultural approaches to justice and reconciliation).

Since the birth of the field in the 1980s and 1990s, the more overt preoccupation with transition as transition to democracy has receded. Increasingly, transitional justice is associated with nation building and peacebuilding in the postconflict context more generally.[26] Once considered a jurisprudence of exception and deviation from rule of law standards in times of political transition, transitional justice has been normalized, institutionalized, and mainstreamed.[27] In attempting to trace "three generations" of transitional justice, starting with Nuremburg and moving into the present, Ruti Teitel refers to this latest phase as "steady-state" transitional justice in which the postconflict dimension of transitional justice is moving from the exception to the norm.[28] The "transition" in transitional justice today is "ostensibly neutral" and the goals promoted, including conflict resolution and the rule of law, are less explicitly political.[29] Other more recent and influential definitions of transitional justice make little use of the concept of "transition" at all, rooting the field instead in the promotion of a number of goals, including accountability and reconciliation.[30]

The most iconic mechanisms associated with transitional justice continue to be prosecutions and truth commissions.[31] Beyond this, however, the field has broadened a great deal since the early 1990s to include a range of mechanisms and practices designed to encourage reconciliation and forms of accountability far short of a prison sentence. Thus, fostering community-level dialogue between former perpetrators and survivors of human rights abuses and the construction of public memorials to preserve memory of the conflict are as much a part of transitional justice as a prosecution before a war crimes tribunal. Despite new and innovative practices around the margins, however, "steady-state" transitional justice is persistently criticized for being "top-down" and "one-size-fits-all," rote application of a mere template to contexts and situations to

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[26] Chandra Sriram, Olga Martin-Ortega, Johanna Herman, "Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice," JAD-PbP Working Paper Series No 1. (May 2009), 13 (discussing increasing linkages between transitional justice and a broader set of peacebuilding activities).

[27] McEvoy, "Beyond Legalism," 412. For an argument that the "dilemmas" of transitional justice are not exceptional, but in fact resemble those of "ordinary justice," *see generally* Eric A. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117, no. 3 (2003): 761.

[28] *See* Teitel, "Transitional Justice in a New Era," 894; Teitel, "Transitional Justice Genealogy," 89–92.

[29] Leebaw, "Irreconcilable Goals," 103, 106.

[30] For example, according to a landmark UN report, transitional justice "comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." *See* United Nations Secretary-General, "The Rule of Law and Transitional Justice," 8.

[31] *See* Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" *International Journal of Transitional Justice* 2, no. 3 (2008): 315.

which it is perhaps ill-suited.[32] It is perhaps to be expected that as transitional justice becomes mainstream, scholars and practitioners attempt to deconstruct the assumptions, constructed boundaries, limitations, and blindspots implicit in the template.[33]

After several decades of evolution, transitional justice practice and policy is today stitched together from strands of overlapping and at times competing narratives. It is, at various times, a battle against impunity rooted in human rights discourse, a set of conflict resolution techniques related to the formation of a new social and political compact in the wake of conflict, and a tool for international intervention and state building.[34] The multiplicity of narratives suggests an open-textured project subject to contest and reconceptualization. At the same time, many transitional justice narratives share a common denominator of being firmly grounded in neutral, technical, and apolitical vocabularies of human rights and the rule of law that have the potential to obscure the politics of the transitional justice project itself.[35] The decision to use the mechanisms associated with the transitional justice template—prosecutions, truth commissions, vetting and lustration, reform of abusive security institutions—and not other mechanisms, just like the decision to focus on abuses of civil and political rights and not economic and social rights is itself a political choice with important policy consequences that have implications for distributive justice in the postconflict context. The next Part explores the relationship between transitional justice and "economic violence," a category that subsumes a wide range of issues rarely brought to the core of transitional justice work.

Transitional Justice and Economic Violence

As the Cold War recedes in time, conflicts across the globe are increasingly intrastate in nature, less fueled by a grand global ideological battle than by local struggles for resources and control of government.[36] The majority of these conflicts now take place

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[32] *See,* e.g., Lundy and McGovern, "Whose Justice?" 271 (criticizing the "one-size-fits-all" and "top-down" approaches to transitional justice).

[33] *See* Dustin Sharp, "Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice," *Harvard Human Rights Journal* 26 (2013): 149–178.

[34] Bell, "Interdisciplinarity," 13–15.

[35] McEvoy, "Beyond Legalism," 420–21 (positing that "a crude characterization of human rights in contemporary transitional justice discourses would suggest that human rights talk lends itself to a 'Western-centric' and top-down focus; it self-presents (at least) as apolitical; [and] it includes a capacity to disconnect from the real political and social world of transition through a process of 'magical legalism'").

[36] This is not to minimize the legacies of colonialism and Cold War politics, or the role of the modern-day scramble for resources in shaping many conflicts in the developing world. Indeed, there has been a persistent failure of transitional justice mechanisms to account for the effects of "outside actors" on the course of conflict. *See* Hayner, *Unspeakable Truths*, 75–77. There are exceptions to this trend, however, including the work of truth commissions in Chad, Chile, El Salvador, and Guatemala.

in some of the poorest countries on earth. As the reports of media, human rights, and conflict resolution organizations vividly illustrate, societies emerging from civil war and other forms of conflict are often completely devastated: Civilians have been killed and traumatized; critical infrastructure—from roads and the electric grid to schools and hospitals—has been destroyed; and key institutions of governance have been hollowed out by years of conflict, corruption, and mismanagement. Despite the best efforts of local and international communities to build peace in the wake of conflict, a significant number of these conflicts will reignite in the years following their apparent settlement.[37]

Transitional justice and international prosecutions are, of course, global phenomena. Nevertheless, for a number of reasons, both political and economic, it seems likely that much of their application in the coming years will be in the poorer countries of the global south, particularly sub-Saharan Africa.[38] The causes of the conflicts that lead to calls for the application of transitional justice are multiple and complex, the full extent of which is beyond the scope of this chapter. While poverty and economic violence are only pieces of this larger conflict resolution puzzle, they remain important ones, central to conflict dynamics in many countries.[39] It is against this backdrop of poverty and the persistent failure to resolve violent conflict in so many parts of the world that greater engagement with questions of economic violence by transitional justice institutions should be considered today.

Economic Violence in Transitional Justice Practice

Violent conflict devastates both lives and livelihoods, yet ways of understanding what constitutes "violence" and who counts as a "victim" vary a great deal. From the trials at Nuremburg, to the international tribunals for the former Yugoslavia and Rwanda, to truth commissions in South Africa and elsewhere, the conception of violence implicit in most transitional justice initiatives has been an exceedingly narrow one. The overwhelming focus of most transitional justice interventions across time has been on accountability for physical violence—murder, rape, torture, disappearances—and

[37] Paul Collier et al., *Breaking the Conflict Trap*, 155.

[38] Indeed, the sheer number of indictments emanating from the International Criminal Court involving African countries has generated significant controversy on the continent, leading in part to an African Union vote to halt cooperation with the Court with respect to the indictment of Sudan's Omar al-Bashir. *See* BBC News, "African Union in Rift with Court," July 3, 2009, http://news.bbc.co.uk/2/hi/africa/8133925.stm. Although countries such as China, Israel, Russia, and the United States also would likely benefit from the application of transitional justice practices, great-power politics and Security Council vetoes continue to make this appear less likely than in the smaller, poorer countries of the world.

[39] *See* Paul Collier et al., *Breaking the Conflict Trap*, 20–31, 53 (arguing that civil wars are more likely in low-income countries, have disastrous effects on poverty rates, and cause negative effects which persist well after formal cessation of hostilities).

violations of civil and political rights more generally.[40] A broader conception of violence that would encompass often equally devastating forms of "economic violence"—including violations of economic and social rights, endemic corruption, and large-scale looting of natural resources such as oil, diamonds, and timber—has been largely absent.

To take a famous example, under the South African Truth and Reconciliation Commission ("TRC") Act, the category of "victim" is limited to individuals who suffered gross violations of human rights, including killing, abduction, torture, or ill-treatment.[41] The social, economic, and political system of apartheid, in many ways the very embodiment of the concept of structural violence, was largely treated as context to instances of egregious bodily harm that became the TRC's principal focus. When viewed through this lens, the quotidian violence of poverty and racism, and the victims and beneficiaries of the apartheid system itself, receded into the background.[42] As we approach two decades since the end of white rule in South Africa, apartheid has ended, but the de facto economic and social status quo has not changed to the degree many would have hoped. Poverty, inequality, and crime remain high.[43] Although transitional justice has addressed horrific forms of violence in South Africa that took place under the apartheid system, it may have also had the perverse effect of obfuscating and legitimating other abuses of power, leaving many of those who benefitted most from the apartheid economic system comfortable in the status quo.

The "constructed invisibility" of economic concerns can have serious long-term effects, both in terms of our understanding of conflict itself and in terms of the remedies thought necessary to prevent recurrence.[44] As Zinaida Miller argues, pushing economic issues to the periphery of transitional justice concerns helps to shape a distorted and one-dimensional narrative of conflict in which economics and conflict can be neatly separated.[45] At best, economic issues become part of the context, helping to explain why the physical violence that is the focus of a truth commission's work may have occurred, but are of little further policy relevance. At worst, a truth commission's work may be almost completely decontextualized, presenting a diagnosis of human rights violations that is abstracted from reality and the dynamics of social power and conflict.[46]

If the dynamics that produced massive human rights violations are poorly understood, creating a distorted narrative of conflict that relegates economic issues to the

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[40] *See* Nagy, "Transitional Justice as a Global Project," 284.

[41] *See* Pablo de Greiff, "Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 8.

[42] *See* Nagy, "Transitional Justice as a Global Project," 284 (discussing the standardization of transitional justice).

[43] *See* Patrick Bond, "Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition," *International Affairs* 60, no. 1 (2006): 141.

[44] *See* Miller, "Effects of Invisibility," 280–287.

[45] Ibid., 268.

[46] Lisa Laplante, "Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework," *International Journal of Transitional Justice* 2, no. 3 (2008): 337.

background, this may in turn limit and bias the range of policies imagined to be necessary in the wake of conflict. When conflicts are viewed through a one-dimensional lens, prevention of human rights abuses becomes a simplistic function of punishment and impunity. At the same time, the emphasis on physical violence and violations of civil and political rights more generally likely means that the issues of economic violence and inequality that may have in part helped to generate the conflict will go unaddressed by the various mechanisms of transitional justice. Thus, we are more likely to see a focus on prosecution of a handful of members of abusive security services, vetting and dismissals, and perhaps more general judicial and security sector reform rather than things like affirmative action, redistributive taxation, or land-tenure reform.[47]

Even where the mechanisms of transitional justice have looked to economic violence as part of their work, the human toll of economic violence rarely receives equal treatment when it comes to the recommendations and policies that are articulated as part of the work of prevention and follow-up. For example, the Commission for Reception, Truth, and Reconciliation in East Timor actually documented violations of economic and social rights in some depth, yet when it came time to decide who was a "victim" for purposes of receiving reparations, the definition was limited to victims of violations of civil and political rights.[48] Whether justified under the banner of resource constraints or not, such practices have the effect of promoting hierarchies of rights and granting de facto impunity to the architects and authors of economic violence.

Where transitional justice mechanisms do grapple with the economic impacts of conflict and abusive governments, they rarely do so using a human rights paradigm, even though many of the abuses in question may constitute violations of international law.[49] Lisa Laplante, for example, explores how truth commissions in Guatemala and Peru exposed decades of structural violence and other socioeconomic injustices as one of the causes of wars in their countries, but did not frame their analysis or recommendations in terms of violations of economic and social rights.[50] While the work of these truth commissions is important in that it can help provide "a causal connection between violence and structural inequalities," Laplante argues that

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[47] *See* Arthur, "How 'Transitions' Reshaped Human Rights," 362.

[48] *See* Commission for Reception, Truth and Reconciliation in Timor Leste (CAVR), *Chega!, The Report of the Commission for Reception, Truth and Reconciliation in Timor Leste, Final Report* (2005), 40–41, 140–145.

[49] Beyond the International Covenant on Economic, Social and Cultural Rights, economic, social, and cultural rights have the status of binding law in a number of international human rights treaties. Examples include the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of Persons with Disabilities; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the European Social Charter; and the African Charter on Human and Peoples Rights.

[50] *See* Laplante, "Transitional Justice and Peacebuilding," 335; *see also* Lisa Laplante, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development," *Yale Human Rights and Development Law Journal* 10 (2007): 148, 159–161 (providing a more detailed analysis of the work of the Peruvian truth commission).

the failure to help different constituencies understand that in many instances economic violence also constitutes a violation of economic and social rights deprived "national groups a powerful lobbying tool to challenge the government's inaction or resistance."[51] Without rights-based scaffolding, subsequent development programs and other initiatives targeting inequality then become mere charity or government largesse rather than responses to concrete violations of international human rights law to which individuals are entitled. By framing instances of physical violence in terms of violations of rights, yet failing to do the same with respect to violations of economic and social rights, this approach further contributes to the conception that economic and social rights are not "real rights," but mere aspirations.

Understanding the Marginalization of Economic Violence in Transition

From the potential for deterrence inherent in criminal prosecutions to the cries of "never again," transitional justice has long been rooted in the rhetoric of the prevention of future abuses. Given the potential to misdiagnose the causes of conflict and bias the necessary remedies, understanding why an entire subset of issues so central to conflict dynamics has historically been so far from the core of transitional justice work and preoccupation is no easy task. While the factors underpinning historically narrow approaches to questions of justice in transition are many, there are at least two factors that are central to understanding the marginalization of economic violence in transitional justice work: (1) an importation of implicit distinctions and hierarchies from mainstream human rights discourse and practice and (2) the consequences of viewing transitional justice as a transition to a Western-style democracy rather than a transition to positive peace.

International human rights discourse and practice self-consciously wraps itself in an aura of impartiality and universality. It is part of an ostensibly apolitical project, and the rights contained in the core international covenants relating to both civil and political as well as economic and social rights are repeatedly said to be "indivisible," as per the UN mantra.[52] In practice, the seeming consensus regarding universality and indivisibility masks a series of deep and abiding controversies and debates relating to the proper place of economic and social rights under international law. The Cold War roots of this debate, which split the atom of the universal declaration of human rights into two separate covenants to be championed by competing world powers are well known and will not be rehearsed here in detail.[53] Key for current purposes is the fact that the

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[51] Laplante, "Transitional Justice and Peacebuilding," 350.

[52] *See* World Conference on Human Rights, June 14–25, 1993, "Vienna Declaration and Programme of Action," UN Doc. A/CONF.157/23, July 12, 1993; *see also* United Nations General Assembly, Resolution 55/2, "Millennium Declaration," UN Doc A/RES/55/2, Sept. 18, 2000.

[53] *See* Arbour, "Economic and Social Justice," 6 (discussing the Cold War roots of the current status of economic and social rights).

ripple effects of the implied hierarchical distinction between so-called first-generation and second-generation rights continue to be felt many years after the Cold War's end.

During much of the 1990s, the "formative years" for the field of transitional justice, even the world's largest human rights organizations, Amnesty International and Human Rights Watch, were slow to include documentation of violations of economic and social rights in their work and did so only gradually. Although some of this reluctance has been attributed to "methodological difficulties," it is also true that a number of high-profile activists of the time, including Aryeh Neier, were publically skeptical as to whether economic and social rights were "real," and staunchly believed that civil and political rights should be the exclusive focus of human rights organizations such as Human Rights Watch.[54] One might add that the historic ambivalence toward economic and social rights within the human rights community mirrors a similar ambivalence within mainstream justice and criminal law about social justice more generally.[55] It is perhaps not surprising, therefore, that many of the lawyers drawn into the early human rights movement may have brought this ambivalence with them. As previously discussed, many transitional justice scholars and advocates were drawn from the human rights community of this period.[56]

While the implicit hierarchies of rights created by decades of human rights practice are only slowly starting to unravel,[57] the backgrounding and foregrounding of

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[54] *See* Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26, no. 1 (2004): 64 (explaining the particular methodological challenges associated with trying to apply a "naming and shaming" documentation strategy to violations of economic and social rights); *See generally* Curt Goering, "Amnesty International and Economic, Social, and Cultural Rights," in *Ethics in Action; The Ethical Challenges of International Human Rights Nongovernmental Organizations*, eds. Daniel Bell and Jean-Marc Coicaud (Cambridge: Cambridge University Press, 2006).

[55] *See* Arbour, "Economic and Social Justice," 5.

[56] *See* Arthur, "How 'Transitions' Reshaped Human Rights," 333.

[57] Human Rights Watch, for example, has in recent years published a number of reports looking at the linkages between natural resources, corruption, and violations of economic and social rights. *See,* e.g., Human Rights Watch, *Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria*, vol. 19, no. 2(A) (New York: Human Rights Watch, January 2007), 15–18, 40–53 (contending that the local government in Rivers State, Nigeria, has violated its duty to progressively realize rights to health and education through widespread and flagrant corruption and mismanagement of oil revenues); Human Rights Watch, *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*, vol. 16, no. 1(A) (New York: Human Rights Watch, January 2004), 57–59 (arguing that, due at least in part to mismanagement and corruption, the government of Angola has impeded Angolans' ability to enjoy their economic, social, and cultural rights, including healthcare and education, in violation of the government's own commitments and human rights treaties to which it is a party). This is in stark contrast to their work in the previous decade when violations of economic and social rights would only be examined to the extent that they were associated with violations of civil and political rights such as racial or gender-based discrimination.

economic and social rights and civil and political rights in many ways mirror broader trends in human rights discourse and practice, which were also imported into transitional justice work. The following chart summarizes the various historic dichotomies and oppositions that have been broadly reflected in both human rights discourse and practice and in transitional justice policy and practice (Table 1).[58]

Table 1 Set in the foreground and set in the background

Set in the foreground	Set in the background
Civil and political rights	Economic and social rights
The public	The private
The state, the individual	The community, group, corporation
The legal	The political
The secular	The religious
The international	The local
The modern	The traditional
Form, process, participation, procedure	Substance
Formal, institutional enforcement	Informal, cultural, social enforcement

Critical literature in both transitional justice and human rights has attempted to bring elements of the background into the foreground of thinking and policy. Thus, one persistent trope in the critique of mainstream transitional justice is the need to reemphasize local rather than international agency, and local cultural traditions of justice and reconciliation rather than Western and international approaches.[59] Similarly, there is a critique of the more technocratic and legalistic bent of mainstream transitional justice, and an effort to underscore the importance of considering local political contexts as well as the political and distributional consequences of certain approaches.[60] In this way, one might situate the

[58] While in some ways a gross oversimplification, the implicit politics of human rights discourse and practice that is embedded in these oppositions have long been the subject of criticism. *See*, e.g., David Kennedy, "The International Human Rights Movement: Part of the Problem?," *Harvard Human Rights Journal* 15 (2002): 109–110 (discussing the foregrounding and backgrounding of human rights discourse); Makau Wa Mutua, "The Ideology of Human Rights," *Virginia Journal of International Law* 36, no. 3 (1996) 604–607 (criticizing the peripheral nature of economic and social rights and local and traditional approaches to justice under the mainstream Western approach to human rights thinking and practice).

[59] For a review of some of the debates regarding the incorporation of local justice mechanisms into transitional justice initiatives, *see generally* Roger Duthie, "Local Justice and Reintegration Processes as Complements to Transitional Justice and DDR," in *Disarming the Past: Transitional Justice and Ex-Combatants*, eds. Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf (New York: Social Science Research Council, 2009), 228.

[60] *See*, e.g., Lundy and McGovern, "Whose Justice?" 273–274; McEvoy, "Beyond Legalism," 417–418.

emerging critique of the "constructed invisibility" of economic concerns within transitional justice as part of a wider project of resistance to mainstream transitional justice.[61]

Beyond importation of implicit hierarchies from human rights discourse and practice, the second factor key to understanding the peripheral status of economic violence in the transitional justice agenda is found in the notion of transition itself. The idea of transition suggests a journey from a starting point toward an unspecified destination. It suggests a period of exception, of time-bounded rupture. While the exact duration of the transition in question is never made explicit, the very notion of transition might have the tendency to narrow one's temporal focus to a relatively brief period of the most egregious abuses, excluding the potentially deep and complex socioeconomic roots of conflict, and to suggest measures that are themselves narrowly time limited. Thus, transitional justice institutions are more likely to view human rights abuses—torture, for example—as functions of the excesses of certain segments of the security sector or possibly the orders of higher-level government officials in an attempt to cling to power, and not as deeper expressions of racism, rampant inequality, historic deprivations, or other issues of structural violence.

Because transition can also suggest a particular destination, it may dictate in part the exceptional measures necessary to reach the intended goal. Not only does the diagnosis affect the prescribed remedy, but our very notion of what it means to be healthy also helps determine the course or treatment. Thus, Paige Arthur queries, how might the transitional justice "toolbox" look different if the paradigmatic transitions in the 1990s were considered to be transitions to socialism rather than transitions to democracy, and largely Western forms of democracy at that?[62] Might there have been a greater emphasis on issues of distributive justice, including the need for progressive taxation in countries experiencing radical inequality, land-tenure reform in countries where land-based conflict has been a driver of violence, and affirmative action in countries with historically marginalized classes? While one can only speculate, what can be said is that the notion of transition as transition to liberal Western democracy surely had a limiting and narrowing effect on the "toolbox" that exists today.

Potential Objections to Greater Focus on Economic Violence in Transition

Putting these historical constructions and limitations aside, even while greater emphasis on issues of economic violence within the transitional justice agenda seems necessary, striking a better balance between physical and economic

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[61] For a much more detailed exploration of this point, *see* Dustin Sharp, "Interrogating the Peripheries."

[62] *See* Arthur, "How 'Transitions' Reshaped Human Rights," 359.

violence also raises difficult questions that have yet to be worked out at the levels of theory, policy, and practice. For example, while some would find unobjectionable the idea that transitional justice mechanisms should include in their ambit economic and social rights violations that took place during the conflict itself—a group of rebels stealing food from a village, for example, in violation of the laws of war, or a warlord who sold off diamonds and timber to buy weapons—should we also include broader distributive justice and structural violence issues that predate the conflict, and which may have in part helped to precipitate it?

We might characterize these two approaches as broad and narrow means of addressing economic violence in the transitional justice context. Taking a relatively narrow approach and looking only at the economic violence perpetrated during the conflict itself might prove to be relatively uncontroversial. Suppose, however, that in a given country there is an attempt during a transitional period to address some of the deeper legacies of abusive systems of governance, such as income inequality, the need for deeply redistributive taxation, and wide-scale land-tenure reform. Such was arguably the case in South Africa at the end of apartheid, yet it is also recognized that leaving the economic status quo largely intact was one of the "bargains" struck and the price paid for a bloodless transition.[63] While some have argued that addressing economic legacies of conflict in transition might in fact enlist more support from the general population and therefore be even more feasible than seeking accountability for violations of civil and political rights, this does not account for the role of elites.[64] A group of elites might be willing to see a handful of army officers or warlords prosecuted, but attempting radical revision of the political and economic status quo that has existed for decades might be another story. In the end, many transitions depend on some measure on the "buy-in," or at least on the lack of resistance on the part of elite constituencies. Thus, relatively robust or broad approaches to addressing historical economic violence might create the possibility of backlash, reanimating the "peace versus justice" debate along economic lines.

While more thinking and research would be needed to predict the potential for backlash based on configurations of elites and their role in the transition itself, it should be noted that the risk of a hostile and possibly even violent response is not a dilemma unique to addressing economic violence in transition. Indeed, much has already been said about how the parameters of transition justice may be shaped by the extent to which elites and perpetrator groups dictate the terms of the transition.[65] One might note, however, that in those few instances where truth commissions have made recommendations related to addressing socioeconomic

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[63] *See* Bell, "Interdisciplinarity," 14.

[64] *See* Roger Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 307.

[65] *See*, e.g., Huntington, "The Third Wave," 65–81; O'Donnell and Schmitter, "Transitions from Authoritarian Rule," 57–64.

inequalities, those recommendations tend to be ignored by policy makers.[66] This may be a more likely outcome than backlash, though if framed properly, such recommendations might nevertheless serve as a strong lobbying platform for civil society actors who wish to press for reforms.[67]

Beyond the potential for backlash, one of the most frequently noted objections relates to the additional cost and complexity that would stem from an expansion of the mandates of transitional justice mechanisms to include economic violence.[68] It is a fact widely noted that the costs of even a narrow approach to transitional justice, particularly prosecutions, can be enormous, especially at a time when most governments, reeling from the effects of conflict, have little money to spare.[69] Compounding the cost issue is the risk of expanding the mandate of truth commissions and other transitional justice mechanisms so broadly that it will be nearly impossible to fulfill in the limited time typically allotted.[70] It would seem sensible to question whether this is really the context for trying to grapple with "broad-based development or distributive justice policies that aim to redress widespread violations of the economic and social rights of poor citizens."[71] But while the cost and time issues are far from specious, it should be noted that many transitional justice mechanisms are already funded in part by outside actors.[72] It is quite possible that measures to address economic violence in the transitional justice context would find support from complementary constituencies, particularly insofar as they touch upon questions of national economic development. Some have also argued that attempting to recoup money lost to economic violence in the form of embezzlement and corruption could be one way to help fund transitional justice initiatives focusing on economic issues.[73]

There are also broader concerns associated with the dilution of the transitional justice enterprise.[74] If one were to take a robust or broad approach to legacies of

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[66] *See*, e.g., Laplante, "Transitional Justice and Peacebuilding," 350 (discussing how the Guatemalan government largely ignored key recommendations of the Guatemalan Commission on Historical Clarification, including a progressive tax system and increased state spending on human necessities).

[67] Ibid., 333–334, 350.

[68] *See* Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development," *International Journal of Transitional Justice* 2, no. 3 (2008): 256 (discussing the problems with the high cost of transitional justice measures in development).

[69] Ibid.

[70] *See* Duthie, "Toward a Development-Sensitive Approach," 306–307.

[71] Ibid., 299.

[72] Ibid., 302–303.

[73] *See* Carranza, "Plunder and Pain," 324–325.

[74] For a powerful articulation of some of these concerns, *see generally* Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social and Legal Studies* 21 (2012): 171–186.

economic violence in times of transition, shifting the paradigm from transition to what some have called "transformation," at what point does this better suit the work and expertise of traditional economic development actors and longer-term political and social processes?[75] Seeking accountability for violations of physical integrity alone has been a monumental task, but over several decades, this work has made an impact on the normative and institutional global landscape.[76] That is no small achievement, and trying to do too much could risk even the modest change that has been achieved. As Naomi Roht-Arriaza has argued, "broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless."[77]

While concerns that transitional justice efforts may become too diffuse are entirely legitimate and need to be taken seriously, ignoring a significant portion of the drivers of conflict and resulting violations of international law carries its own risks. There will always be a risk of trying to do too much, risking the legitimacy and capital of the transitional justice enterprise by reaching beyond the possibilities for social and political change at any given time. The point, however, is that the dividing line between "too much" and "too little" transitional justice should not be an arbitrary one based on distinctions between physical and economic violence. Rather, it should be based on a careful analysis of the drivers of conflict and the social, political, and financial capital that can be marshaled to effect change via the various mechanisms of transitional justice in the wake of conflict.

In the end, working through these and other questions related to greater engagement with legacies of economic violence will require years of effort, experimentation, and study. In this sense, they are little different than the dilemmas and trade-offs associated with civil and political rights in the transitional justice context, most of which have yet to be fully worked out some 30 years after the birth of the field. Key to providing the impetus for such a complex and sustained process will be a change in thinking about the nature of the transitional justice enterprise and the notion of transition itself. The following Part explores what it might mean to reframe transitional justice not as a transition to democracy, the rule of law, or some kind of postconflict stability, but as a transition to "positive peace."

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[75] *See* Lambourne, "Transitional Justice and Peacebuilding," 46 (advocating a "transformative" justice model of transitional justice); *see also* Laplante, "Transitional Justice and Peacebuilding," 332 (arguing that truth commissions might contribute to longer-term processes of political and economic transformation).

[76] *See* Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 1–8. *See generally* Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton and Co., 2011) (discussing accountability in the context of prosecutions for human rights abuses).

[77] Ibid., 2.

Transitional Justice, Peace, and Peacebuilding

In the context of transitional justice debates, the concept of "peace" has at times been mobilized as one of the resistances to the advance of particular transitional justice mechanisms and policies.[78] This is manifest most clearly in the so-called peace versus justice debate, in which some form of transitional justice, typically a prosecution, is imagined to stymie or preclude chances for a negotiated peace agreement.[79] The debate also arises when it comes to the choice as among different elements of the transitional justice "toolbox," including whether to have prosecutions or a truth commission and whether to have international prosecutions or mechanisms of accountability rooted in local tradition and custom.[80] While there are an increasing number of concrete examples in which prosecutions have arguably advanced the cause of peace, and while the UN has officially embraced the notion that peace and justice are mutually complementary, the peace versus justice debate has proved to be an enduring one, resurfacing most recently in International Criminal Court indictments of Omar al-Bashir of Sudan and Joseph Kony of the Lord's Resistance Army in Uganda.[81]

The concept of peace is not part of the daily working vocabulary of many lawyers and human rights advocates who comprise the communities that provided the initial intellectual capital to the transitional justice enterprise, and few transitional

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[78] *See*, e.g., Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice verses Peace in Times of Transition* (New York, Frank Cass, 2004).

[79] As an example of this phenomenon, in 2003, the then chairman of the Economic Community of West African States, President John Kufuor of Ghana, urged the UN to set aside the indictment of Charles Taylor by the Special Court for Sierra Leone on the grounds that it was necessary to facilitate a negotiated settlement to Liberia's civil war. *See* IRIN Humanitarian News and Analysis, "*Liberia: ECOWAS Chairman Urges UN to Lift Taylor Indictment*," June 30, 2003.

[80] Increasingly, there is a recognition that no one mechanism of transitional justice can hope to fulfill the many aspirations ascribed to it, and multiple overlapping mechanisms are thought to be necessary. For an exploration of the "truth versus justice" debate, *see generally* Miriam Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal* 15 (2002): 39; Reed Brody, "Justice: The First Casualty of Truth?," *The Nation*, April 30, 2001, 25. For an argument that international prosecutions can subvert local judicial and reconciliation practices while unwittingly playing into national-level politics, *see generally* Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21, no. 2 (2007): 179.

[81] *See*, e.g., United Nations Secretary-General, "The Rule of Law and Transitional Justice," 1 (positing that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives"); Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice* (Geneva: Centre for Humanitarian Dialogue, November 2007), 8–9 (arguing that the indictment of Charles Taylor advanced the peace process in Liberia, even though it was criticized at the time as potentially undermining peace negotiations); Louise Arbour, "Justice v. Politics," *The New York Times*, Sept. 16, 2008. (justifying her decision to indict Slobodan Milošević by showing that it ultimately advanced the cause of peace, even though it was criticized at the time for threatening the peace process).

justice scholars today situate their work in the context of peace or peacebuilding.[82] Nevertheless, the notion of peace is perhaps no more or less nebulous than the concepts of "justice," "accountability," "reconciliation," and the "rule of law" that typically pepper transitional justice discourse. Although rarely defined as such, the concept of peace that is put in opposition to justice in the context of the "peace versus justice" debate is typically that of "negative peace," meaning the absence of direct physical violence.[83] Thus, if the threat of prosecution is feared to prevent a group of rebels from signing a peace agreement, and the guns may keep firing, justice could be said to undermine (negative) peace.[84] A similarly narrow view of peace can be found when Ruti Teitel expresses the fear that as transitional justice mechanisms become increasingly associated with nation building, they will give up on the "ambitious goals of establishing the rule of law and democracy" in favor of the more modest aims of "maintaining peace and stability."[85]

The notion of negative peace that has often been employed in transitional justice discourse and debates is a much narrower concept of peace than the notion of positive peace discussed in this chapter, which involves not just the silence of AK-47s and the absence of the direct violence of hot conflict, but also the absence of more indirect forms of violence, including forms of structural violence such as poverty, corruption, radical economic, social, civil, and political inequalities, and other forms of social injustice.[86] Positive peace may well embrace but is broader than many of the traditional goals of transitional justice, including establishing democracy and building the rule of law. After all, there are many modern democracies in which the rule of law is firmly established that nevertheless manifest high levels of poverty and other forms of structural violence.

Without making use of the term, transitional justice advocates often seem to assume that accountability will lead to a type of positive peace.[87] Thus, for example, the concept of peace might be marshaled by the advocates for transitional justice as part of an argument that a potential amnesty agreement will not secure "lasting peace" or that the particular type of justice to be meted out by transitional justice

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[82] Andrieu, "Civilizing Peacebuilding," 539 (noting that "few transitional justice scholars have yet situated their research in the context of peacebuilding, seeing it instead through the dominant lens of legalism and human rights"); *see* Lambourne, "Transitional Justice and Peacebuilding," 29 (noting that "few researchers have analysed the relationship between justice, reconciliation and peacebuilding").

[83] *See* Galtung, "Violence," 167; Lambourne, "Transitional Justice and Peacebuilding," 34.

[84] *See*, e.g., Jeffrey Gettleman and Alexis Okeowo, "Warlord's Absence Derails Another Peace Effort in Uganda," *The New York Times*, Apr. 12, 2008 (discussing the refusal of Joseph Kony, leader of a rebel group known as the Lord's Resistance Army that is responsible for widespread human rights abuses in Uganda and neighboring countries, to attend peace negotiations due in part to indictments from the International Criminal Court).

[85] Teitel, "Transitional Justice in a New Era," 898.

[86] *See generally* Galtung, "Violence," 167 (discussing different constructions of "positive peace" and "negative peace").

[87] *See* Alexander Boraine, "Transitional Justice: A Holistic Interpretation," *Journal of International Affairs* 60, no. 1 (2006): 26.

mechanisms is necessary to "long-term peace." It is perhaps then assumed that the transition that is set in motion will allow the type of social and economic development that may lead to positive peace. As Alexander Boraine has argued, "[t]he overall aim [of transitional justice] should be to ensure a sustainable peace, which will encourage and make possible social and economic development."[88] More typically, however, transitional justice advocates debate issues of amnesty and prosecutions in a more legalistic idiom, asking, for example, whether there is a duty to prosecute under international law, or whether amnesties are compatible with international law.[89] In these discussions, broader notions of peace are often relatively absent.

International Peacebuilding

The concept of positive peace overlaps but is not synonymous with the evolving concept and field of peacebuilding. At the international institutional level,[90] the field and practice of peacebuilding in the postconflict context evolved out of the much more limited peacekeeping operations of the Cold War in which neutrality, consent, and minimum force were considered paramount (often referred to as "first-generation" peace keeping).[91] With the end of the Cold War, these limited operations soon gave way to more complex and multidimensional initiatives in which the UN was called upon to address underlying economic, social, cultural, and humanitarian problems inextricably linked with local politics. The seemingly inevitable involvement in increasingly complex postconflict initiatives culminated in the 2005 creation of the UN Peacebuilding Commission, which has been tasked with facilitating integrated approaches to postconflict reconstruction throughout the UN system and beyond.

The term "peacebuilding" was not defined as part of the Peacebuilding Commission's creation, but has continued to evolve along with emerging policy and practice. According to a working definition adopted by the UN Secretary-General's

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[88] Ibid.

[89] *See generally* Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, no. 8 (1991): 2537 (discussing the duty to prosecute or grant amnesty under international law).

[90] I distinguish here between what I am calling peacebuilding at the "international institutional level," which emanates from the United Nations and other international institutions, and the various types of interpersonal, community-level, and "track-two" peacebuilding that are done by individuals, religious groups, and NGOs.

[91] Some refer to three different generations of peacekeeping, which evolved in quick succession in the early 1990 s. *See*, e.g., Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), 238. Others, such as Roland Paris, distinguish between "traditional peacekeeping" and "peace operations." *See* Roland Paris, "Peacekeeping and the Constraints of Global Culture," *European Journal of International Relations* 9, no. 3 (2003): 448–450.

Policy Committee in 2007, it "involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development."[92] Despite the apparent breadth of this working definition, at the level of major international institutions, including the UN and multi- and bi-lateral donors, peacebuilding today typically consists of a more-or-less standardized package of initiatives that include demobilization, disarmament, reintegration, security sector reform, broader "rule of law" initiatives, elections, and, increasingly, the various mechanisms of transitional justice.[93] In this way, transitional justice initiatives have become a routine part of the "postconflict checklist" that is associated with liberal international peacebuilding.[94]

Using a Positive-Peace Paradigm

The principal contention of this chapter is that one way of giving equal pride of place to justice for both physical and economic violence in the transitional justice context, thereby creating a more balanced approach to both civil and political, and economic and social rights, would be to reconceptualize transitional justice not as a simply political transition, democratic or otherwise—the paradigm out of which the field evolved—but as part of a broader transition to positive peace. Grounding the field in such a conception would be one way of helping to push past the boundaries of mainstream transitional justice and liberal international peacebuilding.

Anchoring the field of transitional justice in the concept of positive peace could potentially have at least three positive effects. First, it would likely broaden the approach from a relatively narrow and legalistic one focused on physical violence and civil and political rights to one that would also grapple, where appropriate, with questions relating to legacies of economic violence. Second, as the achievement of positive peace is a long-term endeavor, the notion of justice for positive peace implies preventative strategies that look beyond the confines of an unspecified political transition. In doing so, transitional justice mechanisms may be conceptualized more holistically and implemented in ways that build synergies with

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[92] United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (New York: United Nations, 2008), 18.

[93] *See* Nagy, "Transitional Justice as a Global Project," 280 (noting various transitional justice initiatives associated with peacebuilding).

[94] *See* Andrieu, "Civilizing Peacebuilding," 538 (describing how transitional justice has become "an apparatus within the wider peacebuilding 'package'"); Sriram, "Justice as Peace?," 585 (arguing that "responses to recent mass atrocities or human rights abuses are now an integral part of peacebuilding by bilateral donors, regional organisations, and international institutions such as the United Nations and the World Bank").

broader development and peacebuilding initiatives associated with postconflict reconstruction.[95]

Third, the notion of justice for positive peace suggests that the determination of the modalities and mechanisms of transitional justice should be grounded in a context-based inquiry into the particular roots and drivers of the conflict in question. This stands in contrast to a package of mechanisms drawn from a toolbox of "best practices" with some sort of predetermined political endpoint, be it elections or democracy, or based on a more abstract set of deontological goals, including accountability and just deserts. Best practices, packages, and toolboxes in one country might have little relevance to building positive peace in another. For example, Paige Arthur has speculated that while many of the dominant themes and responses to violence of mainstream transitional justice evolved out of the Latin American experience, these responses might not be optimal for countries with "different histories, cultures, and positions within the world economy."[96] Many countries in Africa with a history of neopatrimonial government, corruption, and very weak-state institutions might need to focus on a different set of issues through a different set of mechanisms.[97] Focusing on positive peace as the ultimate goal of the mechanisms of transitional justice could be one way to refocus attention on the context-specific interventions needed to move in that direction.

A paradigm shift in the direction of positive peace would not dictate a broad or narrow approach to economic violence in transition, or even ensure that economic violence would be addressed at all. As with all transitional justice mechanisms and modalities, the needs and limits of the context would have to be considered. Depending on the context, addressing economic violence might not always be necessary, or even desirable. As Chandra Lekha Sriram argues, simply presuming that more justice necessarily generates or equates to more peace is potentially problematic.[98] This presumption should be avoided with respect to both mainstream transitional justice and a more holistic form of transitional justice that would also grapple with legacies of economic violence.

The Critique of Liberal International Peacebuilding

In attempting to ground the field of transitional justice in a paradigm of positive peace, it is important to be wary of limiting constructions in which the notion of positive peace would simply be reshaped to fit and support existing practices and

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[95] For a more detailed look at potential connections between transitional justice and development, *see generally* Duthie, "Transitional Justice, Development, and Economic Violence"; Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

[96] Arthur, "How 'Transitions' Reshaped Human Rights," 360.

[97] Ibid., 361.

[98] Sriram, "Justice as Peace?" 580.

paradigms. Despite the potentially expansive nature of the field and concept of peacebuilding as discussed above, a trenchant critique has been that actual peacebuilding practice, if not theory as well, tends to reflect a paradigm of liberal internationalism in which faith in market economies and Western-style liberal democracy is conceived as the unique pathway to peace.[99] Because many developing countries have little experience with democracy, the emphasis on elections, democracy, and free markets associated with the typical package of postconflict peacebuilding interventions can be both dangerous and destabilizing.[100] In a number of ways, the critique of liberal international peacebuilding parallels the critique of mainstreamed transitional justice, in which the transition is implicitly conceived of as a transition to Western liberal democracy and elements of economic violence and social justice are moved to the periphery.[101]

These historic constructions of the fields of transitional justice and peacebuilding illustrate how the concepts of peace, peacebuilding, and justice can be marshaled in ways that are both limiting and expansive; ways that can empower but also can obfuscate hierarchies of power and further perpetuate inequalities. Thus, any attempt to build the notion of transitional justice as transition to positive peace requires special attentiveness to these dynamics. Nevertheless, one might argue that the benefit of the positive-peace paradigm is not that it offers a concrete goal that is any more precise or less subject to being co-opted than "justice," "democracy," "reconciliation," or the "rule of law." In the end, these may all be "essentially contested concepts."[102] At the same time, because the very core import of the concept of positive peace calls upon one to attend to a broader set of concerns than has historically been the practice of both liberal international peacebuilding and mainstream transitional justice, it may offer a better starting point than existing paradigms.

Conclusion

In recent decades, the field of transitional justice has distinguished itself from its parent field of international human rights, in part due to its more overt grappling with the hard policy choices that lie at the intersection of law and politics and of justice and peace. At the same time, there has been an implicit politics at work in the backgrounding and foregrounding of various aspects of transitional justice concern. If mass atrocities and physical violence have been placed in the

[99] *See* Paris, "Peacebuilding and the Limits," 56; *see also* Sriram, "Justice as Peace?" 580.

[100] For this reason, Roland Paris advocates what he calls "institutionalization before liberalization," which would prioritize strengthening institutions and regulations before any rush to elections. *See* Paris, "Peacebuilding and the Limits," 57–58.

[101] For a more elaborate discussion of this point, *see generally* Sriram, "Justice as Peace?" 579.

[102] Bell, "Interdisciplinarity," 27.

spotlight, issues of equally devastating economic and social justice have received little attention.

The choice of which justice issues to focus on in a given context, be it physical violence, economic violence, or some combination of the two, is itself a political choice with distributional consequences. The goal of reorienting transitional justice as a transition to positive peace is not to remove politics or pretend that transitional justice is or ever could be an apolitical project. Rather, the concept of positive peace calls upon us to be attentive to these choices, whether justice is imagined to serve the needs of a political transition to liberal market democracy, or something else. Thus, the goal is not to do away with politics, but to bring them back to the surface and free them from the confines of a technocratic and legalistic discourse that too often serves to obscure and legitimize the implicit politics at work.

While addressing a wider range of justice concerns than has previously been the case will create serious challenges, failure to address these concerns may ultimately undermine the goals of transitional justice itself, including the prevention of a relapse into conflict. The hope therefore is to replace the historic emphasis and exclusion of economic violence with a more nuanced, contextualized, and balanced approach to the full range of justice issues faced by societies in transition. In this, we would take one step forward in moving beyond the constructed and self-imposed blindspots and biases of the field of transitional justice.

Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?

Chandra Lekha Sriram

Introduction

As Dustin Sharp clearly articulates in the introduction to this volume, transitional justice measures have become part of the post-conflict "toolkit" in many countries, often as part of peacebuilding missions.[1] Yet, while economic grievances are often identified as underlying causes of conflict alongside numerous other causes such as corrupt governance, state abuses, ethnic divisions, and scarce or plentiful lootable resources, the putative economic causes are often least addressed in peacebuilding or transitional justice processes. In this chapter, I will elaborate upon why this may be the case. I take a broad view of "socioeconomic concerns" deliberately, so as to be able to draw upon several interwoven literatures dealing with the violation and protection of economic, social, and cultural rights, the economic dimensions of violent conflict, economic justice and redistribution, and development. This is not to presume that all of the claims of these literatures are aligned, but rather to recognize the diversity of arguments about what socioeconomic

[1] Dustin Sharp, "Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice" in this volume; see also Sharp, "Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique," Chicago Journal of International Law 14 (2013): 165–196.

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issues are in the wake of conflict, and how if at all transitional justice processes should address them. I agree with other scholars that transitional justice processes seldom take account of socioeconomic issues, and argue that to the degree that transitional justice processes are embedded in liberal peacebuilding, they are unlikely to do so.

In this chapter, I build on my earlier argument that transitional justice processes, as increasingly integral to and integrated into peacebuilding processes, suffer from some of the latter's limitations.[2] Following the liberal peacebuilding critique, which suggests that contemporary peacebuilding processes overemphasize democratization and economic liberalization, I elaborate how transitional justice measures partially do the same, to the exclusion of addressing economic harms. I do not argue that liberal peacebuilding causes or is the sole cause of this exclusion; transitional justice processes emphasize past abuses which take the form of physical and psychological harm to persons in response to demands of victims and human rights advocates and with good reason. However, physical harm is not the only form of suffering which persons experience in conflict-affected or repressive states. Individuals may also suffer serious discrimination affecting economic prospects or access to land, displacement from their homes, and appropriation of property, issues which are seldom addressed through transitional justice measures, and indeed which are often specifically designated as lower priorities than that subset of post-conflict issues typically addressed by transitional justice. In this chapter, I examine why this may be the case, together with limited exceptions where economic harms or harms by economic factors have in fact been addressed by certain aspects of transitional justice processes. While these limited exceptions may be indicative of wider opportunities to address socioeconomic issues in transitional justice, given trends in post-conflict peacebuilding and transitional justice, such opportunities may be limited.

Transitional Justice and Peacebuilding

The term "transitional justice" covers a wide range of activities, including criminal trials at domestic and international courts for past abuses, commissions of inquiry, vetting and institutional reform processes, amnesty (conditional or blanket), and reparations and memorials. While early processes followed transitions from authoritarian rule in Southern Europe in the 1970s and Latin America beginning in the 1980s, since the end of the Cold War transitional justice mechanisms have been utilized both in countries undergoing democratization and those emerging

[2] Chandra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21, no. 4 (October 2007): 579–591.

from violent conflict.[3] While these processes were designed in the first instance to respond to demands for accountability for past abuses, specifically enforced disappearances, extrajudicial killings, torture, sexual- and gender-based violence, and massacres, often constituting crimes against humanity, war crimes, and genocide, additional expectations were also placed upon them. Specifically, advocates of human rights and programmers of transitional justice have argued that the range of justice processes serves one or more of many goals: Promotion of democracy, promotion of rule of law, promotion of future respect for human rights, recognition of the needs of victims and response to their demands, and the promotion of peace and stability. Skeptics of transitional justice argue the reverse: That such processes may be destabilizing and make democratic consolidation more difficult. While debates as to the efficacy and risks of transitional justice are important, they are beyond the scope of this chapter.[4]

Despite the claims often made regarding the impact of transitional justice processes on core aspects of peacebuilding noted above, they have not always been viewed as integral to peacebuilding processes. Indeed, some scholars and practitioners continue to view promoting peace and promoting accountability as in sharp tension. However, peacebuilding activities have increasingly incorporated elements of transitional justice processes, often linked to human rights and rule of law promotion activities within peacebuilding.[5] Scholars and practitioners, recognizing these developments, have sought to identify how they might work better together. The connection was recognized most notably in several United Nations documents, beginning with the landmark 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* and the follow-up report in 2011, both of which emphasized the importance of transitional justice in conflict-affected societies, particularly making the case for its utility in addressing

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[3] The literature on transitional justice is extensive, so I note only a few theoretical and comparative sources here: Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: United States Institute of Peace Press, 1995); Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001); Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (London: Frank Cass, 2004); Bronwyn Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30 (2008): 95–118; Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace, 2010).

[4] See, e.g., Olsen, Payne and Reiter, *Transitional Justice in Balance;* Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: Norton, 2011); Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human rights and Democracy* (London: Routledge, 2009); Oskar N.T. Thoms, James Ron, and Roland Paris, "State-Level Effects of Transitional Justice: What do We Know?" *International Journal of Transitional Justice* 4, no. 3 (2010): 329–354.

[5] Chandra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21, no. 4 (October 2007): 579–591.

past violence to prevent future cycles of violence and promote peace.[6] The World Bank's 2011 World Development Report makes a similar point, though emphasizing promotion of citizen security and justice as well as transitional justice as helping to avoid spirals of violence.[7] The United Nations Integrated DDR Standards even include a module on transitional justice, advocating greater coherence between measures of accountability and peacebuilding programming not frequently associated with it, the disarmament, demobilization, and reintegration of ex-combatants.[8]

The Liberal Peacebuilding Critique and Transitional Justice

Liberal Peacebuilding: A Very Short Summary

Liberal peacebuilding is a somewhat elusive concept, with greater detail provided in the critique than in any attempt at a holistic definition. This is perhaps not surprising, as liberal peacebuilding is a construct developed by scholars to describe a range of activities undertaken by international financial institutions, intergovernmental organizations such as the United Nations and the European Union, international nongovernmental organizations, and bilateral donors to promote stability, democratization, and development in countries emerging from violent conflict. According to critics of the concept, there are two pillars of liberal peacebuilding: the promotion of free markets and the promotion of democracy. The emphasis upon free markets has focused upon macroeconomic growth and the creation of reliable systems for foreign investment, not least via rule of law promotion and privatization and deregulation of industries; there has been an increasing emphasis upon the role of the private sector in peacebuilding as well, emphasizing the contributions of business to fledgling economies and their need conversely for stability.[9] The emphasis on democratization relies upon institutional reform, including rule of

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[6] United Nations Secretary General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," UN Doc. S/2004/616 (August 23, 2004); "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," UN Doc. S/2011/634 (October 12, 2011). This is not to suggest that there is one single approach to transitional justice, although such policy documents do treat it as a relatively stable "toolkit."

[7] World Bank, *World Development Report 2011, Conflict Security and Development* (2011).

[8] United Nations, *IDDRS Module on Transitional Justice* module 6.20 (2010); Chandra Lekha Sriram and Johanna Herman, "DDR and Transitional Justice: Bridging the Divide?" *Conflict, Security & Development* 9, no. 4 (2009): 455–474.

[9] Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004); Allan Gerson, "Peace Building: The Private Sector's Role," *American Journal of International Law* 95 (2001): 102–119; Angelika Rettberg, "The Private Sector, Peacebuilding, and Economic Recovery: A Challenge for the UNPBA," CIPS and NUPI Working Paper (Ottawa 2010).

law and security sector reform to ensure an infrastructure for elections and democratic legislative processes, and particularly as the practice of peacebuilding developed in the early 1990s initially relied upon rapid free elections. As Lars Waldorf observes, liberal peacebuilding, premised on a liberal peace thesis which claims that liberal market democracies are less war-prone, emphasizes the institutional elements which are essential for democratization and marketization.[10]

The Critique of Liberal Peacebuilding

As liberal peacebuilding has become the dominant mode of practice by international and national organizations in the wake of conflict, many scholars have offered a strong critique of it and the liberal model of governance underpinning it. They have argued both that it is wrong to presume that democratization and marketization enable peace, and that in many cases they are, at least in the short term, destabilizing. Other related critiques have challenged the top-down nature of much liberal peacebuilding and suggested it may lack legitimacy and fail to promote long-term peace.

Critical scholars have argued that many states emerging from conflict have little or no experience with market economies or democracy, and rapid movement to either, with all of the upheaval that entails, could be destabilizing.[11] They build on scholarship on democratization, which often confirms that while democracies are stable, democratization processes are dangerous, encouraging competition, which can promote conflict.[12] This is particularly the case in divided societies with visible cleavages, where groups formerly in competition remain extremely suspicious of one another and will fear attempts by others to consolidate power.[13] Peacebuilding efforts may have some capacity to mitigate the risk of violence, at

[10] Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social & Legal Studies* 21 (2012): 173. *See generally* Michael Doyle, "Liberalism and World Politics," *American Political Science Review* 80, no. 4 (December 1986): 1151–1169; Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law* 6 (1995): 53–81; *c.f.* José E. Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory," *European Journal of International Law* 12 (2001): 183–246.

[11] Roland Paris, "Peacebuilding and the Limits of Liberal Internationalism," *International Security* 22, No. 2 (Fall 1997): 54–89; Paris, *At War's End.*

[12] Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York: W.W. Norton, 2000); Edward Mansfield and Jack Snyder, "Democratization and the Danger of War," *International Security* 20, no. 1 (1995): 5–38. *See generally* Mahmood Monshipouri, *Democratization, Liberalization, and Human Rights in the Third World* (Boulder, CO: Lynne Rienner, 1995).

[13] Jack Snyder and Robert Jervis, "Civil War and the Security Dilemma," in *Civil Wars, Insecurity, and Intervention,* ed. Barbara F. Walter and Jack Snyder (New York: Columbia University Press, 1999), 15–37; Barry R. Posen, "The Security Dilemma and Ethnic Conflict," *Survival* 35, no. 1 (Spring 1993): 27–47.

least so long as there is a large international presence, but greater tensions may become visible when they withdraw.[14] Thus, critics of the liberal peacebuilding paradigm such as Roland Paris argue that "[t]he central tenet of this paradigm is the assumption that the surest foundation for peace, both within and between states, is market democracy, that is, a liberal democratic polity and a market-oriented economy."[15] In most cases, critics generally challenge not the value of liberal market democracy per se, but rather question its appropriateness for states emerging from armed conflict, suggesting that it may be more likely to promote conflict than peacebuilding.[16] As Ted Gurr argued that "[t]he most dubious expectation of all is that authoritarian states such as Sudan, Iraq, and Burma might be able to defuse ethnopolitical wars by moving toward democracy."[17]

The political strand of the liberal peacebuilding critique argues that it overemphasizes a rapid move to democratization and elections. The risk, under this line of argument, is that rushing to elections in societies where access to political power may have been a fundamental source of violent conflict, will generate rather than alleviate conflict. It may help to revive existing rifts in society, given that groups, which were previously privileged or perceived as such will have a greater ability to pursue elected office; at the same time, new political players including former non-state armed groups may find adjustment to peaceful contestation a challenge or simply lack the capacity to compete effectively.[18] Thus, some scholars argue, making the transition from conflict to a functioning democracy is dangerous.[19]

Finally, scholars have criticized the liberal peacebuilding approach to reform of the state as top-down, failing to properly engage the grassroots, and in some instances itself illiberal.[20] Such approaches, they argue, fail to take account of what those for whom peace is being built actually need or demand, focusing on building state institutions rather than those types of social reconstruction that may

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[14] Stephen D. Krasner, "Sharing Sovereignty: New Institutions for Collapsed and Failing States," *International Security* 29, no. 2 (Fall 2004): 85–120.

[15] Roland Paris, "Peacebuilding and the Limits of Liberal Internationalism," 56.

[16] Many critical social theory scholars challenge the free market as destructive per se as well of course. *See*, e.g., David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007).

[17] Ted Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (Washington, DC: USIP Press, 1993), 138.

[18] For a critique of the push for rapid elections, see Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2005), 204–235. In *Peace as Governance: Power-Sharing, Armed Groups and Contemporary Peace Negotiations* (London: Palgrave 2008), I discuss challenges for the participation of armed groups.

[19] Roland Paris, *At War's End*, 44–46.

[20] Kora Andrieu, "Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm," *Security Dialogue* 41, no. 5 (2010): 537–558.

have more legitimacy with important local constituencies.[21] These scholars advocate either a turn away from liberal peacebuilding to bottom-up approaches or hybrid approaches. Whether liberal peacebuilding necessarily dictates top-down approaches and is therefore antithetical to grassroots peacebuilding remains a subject of debate.[22]

Critics of the economic facets of liberal peacebuilding often challenge the emphasis on marketization and economic growth, arguing at a minimum that it may be destabilizing, and in some cases that this emphasis overlooks important underlying causes of conflict. The precise role of economic factors in creating and perpetuating conflict remains a subject of active debate in the academic and practitioner communities. However, both communities recognize that absolute poverty and relative inequality, alongside competition for scarce and/or valuable resources, can contribute to conflict.[23] Where inequality and maldistribution of wealth were articulated as fundamental to a conflict, as they were in El Salvador, there will be significant demands on peace processes and peacebuilders to address those inequalities. Nonetheless, in most cases, international peacebuilders have sought largely to put in place the institutional apparatuses needed to promote a market and economic growth, relying heavily on rule of law reform to provide insurance for foreign investors. The danger inherent in such approaches is that promoting marketization without dealing with past grievances over inequitable resource distribution may lead to the revival of old grievances or create new ones.[24] James

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[21] Andrieu, "Civilizing Peacebuilding," 541; Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008): 275–289; Roger MacGinty and Oliver Richmond, "Myth or Reality: Opposing Views on the Liberal Peace and Post-war Reconstruction," *The Liberal Peace and Post-War Reconstruction: Myth or reality?* ed. Roger MacGinty and Oliver Richmond (London: Routledge 2009), 1–8.

[22] See the debates in Oliver P. Richmond and Audra Mitchell, eds., *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism* (London: Palgrave 2012); Oliver Richmond, "From Peacebuilding as Resistance to Peacebuilding as Liberation," and Annika Björkdahl, "Deliberating and Localizing Just Peace," *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* ed. Karin Aggestam and Annika Björkdahl (London: Routledge, 2012), 64–92; *c.f.* Roland Paris, "Saving Liberal Peacebuilding," *Review of International Studies* 36 (2010), 363 and Sharp, "Beyond the Post-Conflict Checklist," and Lambourne, "Transitional Justice and Peacebuilding After Mass Violence".

[23] *See*, e.g., Mats Berdal and David M. Malone, eds., *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, CO: Lynne Rienner, 2000); Karen Ballentine and Jake Sherman, eds., *The Political Economy of Armed Conflict* (Boulder, CO: Lynne Rienner, 2003). The contribution of economic causes to cycles of violence is also emphasized in the 2011 *World Development Report* in part I. *See also* James Ahearne, "Neoliberal Economic Policies and Post-Conflict Peace-Building: A Help or Hindrance to Durable Peace?" *POLIS Journal* 2 (Winter 2009): 1–44 at http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ma-winter-09/james-ahearne-winter-09.pdf.

[24] Roland Paris, *At War's End*, 112–134, discusses this issue in peacebuilding operations in Central America. These missions often failed to address socioeconomic grievances and inequalities. Chandra Lekha Sriram, "Dynamics of Conflict in Central America," *Exploring Subregional Conflict: Opportunities for Conflict Prevention,* ed. Chandra Lekha Sriram and Zoe Nielsen (Boulder, CO: Lynne Rienner, 2004), 131–167.

Ahearne thus suggests that what matters is not only growth, but the type of growth, and whether it benefits marginalized areas and addresses the relative disparities, which may have helped to spark conflict.[25]

In many peace processes, there are demands for, and promises of, land reform and other economic programs, even where they may conflict with marketization.[26] These are rarely fully implemented in peacebuilding processes. For example, in El Salvador, only about 50 % of the funds needed for land transfers recommended in the peace accords and to be implemented via the National Reconstruction Program were made available, and only about 10 % of land was ultimately transferred.[27] When such redistributive programs are developed, they are notably designed to address political demands articulated during conflict regarding distribution of wealth by specific combatant/political groups and seldom articulated as programs to protect economic rights or address past violations of economic rights. This is undoubtedly at least in part because redistributive demands are resisted during negotiations by military and political elites who benefit from the preexisting economic order. Further, as some scholars have suggested, liberal prescriptions for marketization and privatization create new opportunities for "political elites and war entrepreneurs to cheaply gain control of economic assets," entrenching corruption and new incentives for conflict or legitimating inequitable ownership and power structures.[28] At the same time, while liberalization often entails decentralization, which might in principle address inequalities, entrenched patronage patterns may affect efforts to reform elite-mass relations under these types of initiatives.[29] Thus, as one analyst has argued, transitions from conflict and authoritarianism in Central America, arguably the first laboratory for internationally-driven liberal peacebuilding, ultimately ensured continued maldistribution, in part because preexisting social and political patterns were difficult to break. Liberal peacebuilding concerned with economic growth and stabilization, not redistribution or what is sometimes broadly termed socioeconomic justice, is ill-designed to address these entrenched patterns.[30]

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[25] Ahearne, "Neoliberal Economic Policies and Post-Conflict Peace-Building," 6.

[26] *See,* e.g., Frances Stewart, "Policies Towards Horizontal Inequalities in Post-Conflict Reconstruction," (no date), at http://www.hicn.org/papers/Stewart_philadelphia.pdf (last accessed 3 June 2006).

[27] Ahearne, "Neoliberal Economic Policies and Post-Conflict Peace-Building," 28.

[28] Dominik Zaum and Christine Cheng, "Corruption and Post-Conflict Peacebuilding," City University of New York Graduate Center, Program on States and Security (not dated).

[29] Michael Pugh, "Local Agencies and Political Economies of Peacebuilding," *Studies in Ethnicity and Nationalism* 11, no. 2 (2011): 308–320; Melissa T. Labonte, "From Patronage to Peacebuilding? Elite Capture and Governance from Below in Sierra Leone," *African Affairs* 111, no. 442 (2011): 90-115.

[30] Sabine Kurtenbach, "Why is Liberal Peacebuilding so Difficult? Some Lessons from Central America," *GIGA Working Paper* No 59 (September 2007).

What Does this Mean for Transitional Justice?

The tools of transitional justice may frequently, although perhaps not always, suffer from part of the same critique as liberal peacebuilding, particularly that of an excessive emphasis on the building of free markets and democratic institutions. Certainly, transitional justice measures have traditionally prioritized responses to violations of civil and political rights but not socioeconomic rights, even prior to their association with liberal peacebuilding. With these historical patterns in mind, I would argue that the increased embedding of transitional justice activities in liberal peacebuilding and democratization or rule of law strategies may mean addressing socioeconomic concerns is more difficult than before. I have argued previously that the subsumption of transitional justice by the liberal peacebuilding apparatus potentially subjects transitional justice to some of the same flaws and critiques of the political liberalization strand of the liberal peacebuilding agenda.[31] I suggested in an earlier piece that transitional justice strategies may not be as prone to the second critique, which related to marketization strategies. I suggested that the only clear link was that the costs entailed in transitional justice processes would place a strain upon developing economies that are struggling to rebuild, post-conflict, and to liberalize markets at the same time.[32] Clearly, financial concerns may partially underpin the prioritization of legal and institutional reforms, rather than claims to economic or social justice; however the emphasis on the former rights is not based upon cost alone.[33] Such an approach relies upon a presumption that the rights of concern to transitional justice are only, and should only be, civil and political rights, and I will discuss the challenges to this presumption below.

The argument in favor of including socioeconomic concerns in transitional justice processes may run as follows: if significant harm results from violation of socioeconomic rights, including via corruption, maldistribution, and expropriation and contributed to the underlying conflict, peacebuilding, and by extension transitional justice measures, may need to take better account of such socioeconomic rights and perhaps wider socioeconomic harms. However, the economic liberalization policies pursued in peacebuilding, and the transitional justice processes

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[31] Sriram, "Justice as Peace?"

[32] This may particularly be the case if reparations are part of the transitional justice process. See discussion of the project on reparations at the International Center for Transitional Justice: http://www.ictj.org/en/tj/782.html. Recent scholarship also demonstrates that there is a political economy of transitional justice, whereby financial constraints do affect a country's transitional justice choices. See Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, "At What Cost? The Political Economy of Transitional Justice," *Taiwan Journal of Democracy* 6, no. 1 (July 2010): 165–184.

[33] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–367. Christine Bell notes that transitional justice might rightly be understood as just a subset of a range of issues to be dealt with during transition, including transitional economics and governance. "Transitional Justice, Interdisciplinarity, and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice* 3 (2009): 5–27, 23.

emphasizing civil and political rights violations (including those violations, which arise in response to demands for economic justice), fail to address economic rights violations, and may contribute to future instability.[34] This is according to some a missed opportunity, given that the economic restructuring which accompanies transition may create the space, temporarily, to address past economic rights violations and to address inequality.[35] Some, therefore, have advocated transitional justice policies which deviate from neoliberal prescriptions through, for example, truth commission reports and recommendations which address fundamental inequalities and identify past modes of corruption and expropriation, and propose state intervention for redistribution, and other potential modes of rectifying them such as accountability and legal and political reform. I turn next to an analysis of the relative absence of socioeconomic issues in transitional justice processes, and of the various modes in which these issues have been introduced or in which scholars have argued that they should be introduced.

Socioeconomic Issues in Transitional Justice

The Call for Inclusion

With a speech in 2006, then-UN High Commissioner for human rights, Louise Arbour, helped to provoke discussion regarding the place of economic and social rights, or even more broadly, economic and social justice, within the transitional justice enterprise.[36] In this speech, she diverged from the narrower understanding of the rights which transitional justice should address, as embodied in the 2004 UN Secretary-General's report on the subject, and argued instead:

> Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that preexisted the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social, and cultural rights.[37]

Those who argue for the treatment of past economic rights violations through transitional justice measures make (at least) three types of arguments.

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[34] This seems to be the claim made by Zinaida Miller, "The Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2 (2008): 266–291, at 267.

[35] Miller, "The Effects of Invisibility," 272.

[36] Louise Arbour, "Economic and Social Justice for Societies in Transition," Speech at New York University School of Law (25 October 2006), http://www.chrgj.org/docs/Arbour_25_October_2006.pdf.

[37] Arbour, "Economic and Social Justice for Societies in Transition," 2.

First, the indivisibility/rights-based argument. Advocates have argued that the division between civil and political rights and economic, social, and cultural rights is partly an artifact of the Cold War, and that it is artificial. They suggest that these rights are indivisible, and mutually rely upon one another to function.[38] Alternatively, they argue for the fundamental nature of economic rights and the need to recognize them as well as political rights, observing that transitional justice mechanisms, which exclude economic issues implicitly suggest that certain violations are permissible.[39] As Ruben Carranza puts it, "An impunity gap is created when transitional justice mechanisms deal with only one kind of abuse while ignoring accountability for large-scale corruption and economic crimes."[40] Thus, on this account, transitional justice processes seeking to address past human rights violations should not limit themselves to violations of bodily integrity and political freedoms. Further, as scholars such as Rama Mani have pointed out, transitional justice has more than retributive dimensions, and may include redistributive ones.[41] Certainly, victims before many truth commissions, and when interviewed separately, are interested in redress for violations of civil and political rights, but also consistently raise concerns about economic needs and inequalities.[42]

Second, the pragmatic, conflict-prevention argument. If economic inequality and deprivation of economic rights contributed to the original conflict, they argue, then longer-term stability requires addressing them. This is a task, in principle, for peacebuilding and development actors, but arguably also for transitional justice factors.[43] Relatedly, addressing economic violations may have more resonance for populations in conflict-affected countries, who also frequently live in poverty while those who have fomented conflict prosper. Transitional justice mechanisms which address violations of civil and political rights are certainly important to them, but so are basic resources to survive, which may have been harmed not only by conflict, but by active violation of their economic rights through displacement,

[38] Lisa J. Laplante, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development," *Yale Human Rights and Development Law Journal* 10 (2007): 141–177.

[39] Miller, "The Effects of Invisibility," 268; Evelyne Schmid, "Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice," *PRAXIS: The Fletcher Journal of Human Security* XXIV (2009): 5–28.

[40] Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" *International Journal of Transitional Justice* 2 (2008): 329.

[41] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Oxford: Polity Press, 2002).

[42] Lisa J. Laplante, "Transitional Justice and Peace Building," *International Journal of Transitional Justice* 2 (2008): 351. In my interviews in Sierra Leone in 2011, I was repeatedly told that the "real trauma" for most people in the country was poverty.

[43] Miller, "The Effects of Invisibility," 267; Schmid, "Liberia's Truth Commission Report," 14–15.

expropriation, and corruption.[44] As Lisa Laplante argues, transitional justice processes that address only civil and political rights violations without dealing with economic and social inequalities have the effect of "…treating the symptoms while leaving the underlying illness to fester."[45] Miller suggests that "[a]s part of the post-conflict 'package,' transitional justice institutions might be conceptualized less as a bridge from past to present or as a measure of memorialization and more as a tool of conflict prevention," continuing by suggesting that therefore economic factors should be treated as more salient, so as to recognize the economic underpinnings of conflict and on-going grievances.[46] She emphasizes both the continuing effects of what is termed structural inequality, as wells as the degree to which conflicts which were ostensibly ethnic may have significant economic underpinnings.

A third argument is that of linked cycles of impunity, or that to the degree that the two sets of rights are linked, so too are their violations. Arbour argues that "[v]iolations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights."[47] If this is the case, then impunity in one arena is likely to contribute to continuing violations in another, and thus comprehensive transitional justice would require addressing not only violations of civil and political rights but also economic, social, and cultural rights. Carranza points to the "experience of developing countries abused by dictators or warlords who have been *both* brutal and corrupt."[48] After all, he argues, dictators and rebel groups from Chile to the Democratic Republic of Congo have used their resources to maintain power, and have engaged in violent repression to ensure access to both resources and power. Even when they leave power, addressing only their political crimes may appear not only unjust, depriving victims and the state of much-needed plundered resources, but leave former abusers with ample resources to continue interfering in politics.[49]

Explaining the Relative Absence of Socioeconomic Issues

As transitional justice has evolved, whether we date it to the post-World War II tribunals, the transitions in Southern Europe in the 1970s or more recent transitions in Latin America, Eastern Europe, Africa, and Asia, it has emphasized responses to a specific type of past abuses. Measures have thus been designed to respond to

[44] Carranza, "Plunder and Pain," 315, points to the challenge of creating a sense of ownership of transitional justice processes in impoverished countries if economic issues are excluded. This dovetails with a wider strain of arguments in peacebuilding and transitional justice literature for more "bottom-up" approaches. *See*, e.g., Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," *Journal of Law and Society* 35, no. 2 (June 2008): 265–292, at 265.

[45] Laplante, "Transitional Justice and Peace Building," 333.

[46] Miller, "The Effects of Invisibility," 287.

[47] Arbour, "Economic and Social Justice for Societies in Transition," 4.

[48] Carranza, "Plunder and Pain," 310.

[49] Carranza, "Plunder and Pain," 311–314.

violations of civil and political rights, emphasizing harm to bodily integrity and deprivation of liberty without due process.[50] As international criminal law has matured, it has solidified this emphasis, through the codification of several core crimes, namely genocide, war crimes, crimes against humanity and torture.[51] The emphasis on past violations of a specific set of human rights and international humanitarian law violations can be found in policy documents such as the Office of the High Commissioner for Human Rights' rule of law tools, which emphasize the use of transitional justice processes for what are largely international crimes. However, as Carranza argues, "[t]he range of crimes that form part of this prosecutorial strategy assumes the exclusion of economic crimes, despite the otherwise strategic role of these crimes in maintaining systems of abuse."[52]

Why this exclusion? A range of reasons have been adduced by analysts, largely those who are advocates of expanding the remit of transitional justice measures to address specific violations of economic rights, or more broadly, to promote economic justice and redistribution. The most obvious explanation is the division between economic, social, and cultural rights and civil and political rights embodied by the creation of two distinct international covenants and politicized during the Cold War. As is well known, socialist states insisted that the former should have primacy, while western capitalist states insisted on the latter.[53] With the end of the Cold War and the apparent triumph of liberal capitalist democracy, the emphasis on civil and political rights as of primary concern has if anything become more embedded. Human rights advocates in the West, both during and after the Cold War, and now major international human rights organizations operating globally, have focused their campaigns until recently largely on violations of civil and political rights, in part because they have viewed them, explicitly or implicitly, as hierarchically more important. Monitoring and enforcement institutions have emphasized these rights, and temporary transitional processes have followed suit. Another related reason may be less political and more practical. Human rights campaigners have argued that to be successful, they need to have a clear violation, violator, and remedy. While specific violations of civil and political rights such as torture or disappearance make clear targets, economic inequalities may be far more difficult to pin down.[54] This may help to explain why, historically, international human rights NGOs have campaigned largely against violations of civil and political rights. Kenneth Roth, the executive director of

[50] This trend is thoroughly addressed in Sharp, "Addressing Economic Violence in Times of Transition," in this volume; Schmid, "Liberia's Truth Commission Report," 8.

[51] All are now codified in the Rome Statute of the International Criminal Court except for torture, which is an element of several crimes; all save crimes against humanity are the subject of distinct multilateral treaties and conventions as well. Miller emphasizes this as a result in part of legalism and of a political preference for civil and political rights to be addressed. Miller, "The Effects of Invisibility," 275–276.

[52] Carranza, "Plunder and Pain," 316.

[53] Laplante, "On the Indivisibility of Rights," 149.

[54] Miller, "The Effects of Invisibility," 277.

Human Rights Watch, has observed that it is difficult for some human rights advocacy groups to make the case for economic rights purely as a matter of distributive justice. He argues that campaigns addressing such violations must emphasize that the violations are a result of discrimination or arbitrariness.[55]

Limited Inclusion in Transitional Justice Processes

While there are transitional justice measures that address the economic dimensions of past harms, they are often fairly limited in scope. In this section, I examine four domains in which economic harms and transitional justice may and have been linked, although not to the same degree and in very different ways: Through judicial measures, through truth commissions, through reparations, and through development programming. In some instances, responses to economic harms have taken place outside of official transitional justice processes, although in situations in which transitional justice processes either exist or might also have been contemplated.

Judicial Processes

There have been relatively few attempts to pursue legal responsibility directly for economic crimes committed in the context of conflict (beyond the treatment of plunder as an element of war crimes), and even less litigation on the violation of economic rights per se in conflict-affected countries. Rather, the majority of cases have focused upon violations committed by states and non-state factors, which involve economic harms, but which result in violations of specific civil and political rights. In the United States, a significant number of cases have been filed under the Alien Tort Claims Act (ATCA) of 1789, allowing for civil suit for violations of the law of nations committed by aliens. Thus, a range of corporations, from Coca-Cola to Unocal, have faced civil charges, and in some cases, agreed to settlements for complicity in serious violations of human rights as part of their commercial activities in countries such as Colombia and Myanmar. A lawsuit against Barclays and other banks for their support to the apartheid regime in South Africa continues in the US under the same statute.[56] While ATCA cases often involve situations where economic and social rights may have been violated, at their core, they focus

[55] Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by Organization," *Human Rights Quarterly* 26 (2004): 63–73.

[56] Sriram, *Globalizing Justice for Mass Atrocities* 61–77; *Khulumani et al. v. Barclay Nat. Bank Ltd.,* 504 F3d 254 (2007). Phil Clark, Teddy Harrison, Briony Jones, and Lydiah Kemunto Bosire, "Justice for Apartheid Crimes: Corporations, States, and Human Rights," (Oxford Transitional Justice Research, 2009).

on traditional civil and political rights violations. This may be in part a result of the historic dichotomy noted above, and in part to do with judicial interpretation of what constitutes the "law of nations" for the purposes of the statute.[57] The Barclays case may turn out to be an exception if subsequent decisions support the plaintiffs' allegations that this bank and others aided and abetted the apartheid system, which, they emphasize, promoted socioeconomic discrimination. In the United Kingdom, there has been a growing number of lawsuits on behalf of poor communities harmed by corporations, such as against Trafigura for dumping of toxic waste in Côte d'Ivoire and British Petroleum for oil spills in Colombia, but these have largely been couched as environmental and product liability issues rather than rights claims; criminal charges against Trafigura in the Netherlands similarly relied upon Dutch environmental and export regulations.[58]

Regional human rights mechanisms may be diverging (if slowly) here. In several landmark cases, the Inter-American Court of Human Rights has found that the Nicaraguan government violated its international legal obligations in entering into logging contracts, which affected indigenous populations, violating their cultural rights (though not so clearly, in these decisions, their economic rights).[59] The African Commission on Human and Peoples' Rights similarly found state responsibility in relation to a toxic waste deposit.[60] These clearly involve economic activities, and to a degree recognition of cultural rights, but no clear recognition of violations of economic rights per se.

There have of course been some trials of former state leaders for corruption, such as Hosni Mubarak of Egypt, Alberto Fujimori of Peru, and Zine el Abidine Ben Ali of Tunisia, although these have not generally been couched as violations of economic rights. Yet such prosecutions are often limited because those who benefited from economic plunder in conflict or under authoritarian rule remain politically powerful and/or able to retain their spoils, which are hidden abroad or in the form of property, which they are not compelled to return. Alternatively, external actors responsible for economic crimes may escape responsibility altogether, save perhaps for the relatively rare civil suits noted above. Thus, in Egypt,

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[57] This requires a longer digression into debates about textual interpretation in US jurisprudence than is appropriate for this chapter, but the limitations are enunciated in *Sosa v Alvarez-Machain* 542 US 692 (2004).

[58] Leigh, Day & Co has litigated many of these cases—for more details see their website at http://www.leighday.co.uk/Our-team/partners-at-ld/Martyn-Day; Amnesty International, "Trafigura Guilty Verdict Upheld in Toxic Waste Dumping Case," at www.amnesty.org (December 23, 2011).

[59] Patrick Macklem and Ed Morgan, "Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in *Awas Tingni v. Republic of Nicaragua*," *Human Rights Quarterly* 22, no. 2 (2000): 569-602; Oswaldo R. Ruiz-Chiriboga and Gina P. Donaldo, "Indigenous Peoples and the Inter-American Court: Merits and Reparations," *Comentario a la Convención Americana sobre Derechos Humanos* (forthcoming 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094289.

[60] Clark et al., "Justice for Apartheid Crimes," 14–15.

scholars and activists have lamented the fact that while former president Hosni Mubarak was put on trial both for ordering the shooting of activists and for illegally enriching himself while in power, the many economic rights violations they say his regime committed will not be tried, nor will external governments or corporations who colluded with him likely face trial.[61]

Truth Commissions as Analysts of Socioeconomic Dimensions of Conflict

Given that transitional justice processes tend not to directly address past violations of economic rights or economic crimes through many of the same mechanisms used to address violations of civil and political rights, that is to say through trials, vetting, and institutional reform, how do they address the former violations? The answer lies largely, at least at the moment, in reports of truth commissions. While such commissions are seldom mandated to expressly address violations of economic rights, they are frequently expected to address the wider socio-political context underlying the violence they examine. Thus, reports often analyze socioeconomic elements underpinning conflict, but are unable to mandate significant change. The South African Truth and Reconciliation Commission notably did not even directly address corruption or economic violations in its report because it was not in the mandate, to the disappointment of civil society.[62] Scholars such as Mahmood Mamdani strongly criticized the commission for its oversights, as failing to see apartheid as the fundamental crime, or to address the wide range of silent beneficiaries of it.[63] The report of the Sierra Leonean commission, by contrast, devoted significant space to the underlying causes of conflict, highlighting corrupt and poor governance and valuable resources, among others. The Truth and Reconciliation Commission's report in Liberia emphasized poverty, corruption and inequality as underlying causes of the conflict but, argues Evelyne Schmid, did not provide any legal analysis of the violations of economic, social, and cultural rights.[64] The truth commission in Timor-Leste held dedicated hearings dealing with forced displacement and famine. The truth commission in Chad was mandated to identify assets of the former regime, and its report includes a list of those

[61] Reem Abou-El-Fadl, "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," *International Journal of Transitional Justice* 6 (2012): 1–13; Michaelle Browers, "How Mubarak's Trial Brings Justice to Egypt," *Foreign Policy* (August 17, 2011).

[62] Carranza, "Plunder and Pain," 313–314.

[63] Mahmood Mamdani, "Reconciliation without Justice," *Southern African Review of Books* 46 (1996): 3–5.

[64] Evelyne Schmid, "Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice," *PRAXIS: The Fletcher Journal of Human Security* XXIV (2009), 5–28.

responsible for plunder and includes a recommendation for vetting of those individuals and separating their assets.[65]

Dustin Sharp observes elsewhere in this volume that while truth commissions have made great strides in analyzing economic violence, and in a number of cases made recommendations to rectify it, they have rarely addressed economic violence as a violation of specific economic and social rights.[66] And indeed, authors such as Laplante advocate a greater role for truth commissions in addressing violations of economic, social, and cultural rights. She argues that such commissions, given their mandates to examine the underlying causes of conflict, are particularly well-placed to diagnose the socioeconomic causes, which contributed to conflict, and to issue recommendations, which will potentially address these causes. The Peruvian commission devoted a volume to the causes of conflict, examining socioeconomic and cultural inequalities as underpinning the conflict, but the ultimate reparations policies do not reflect these findings.[67] Expanded mandates would mean that truth commissions could not only take account of socioeconomic issues in their contextual account of past conflicts, but also in their legal analyses of rights violations, and in their recommendations for, among other things, institutional reforms which might address socioeconomic inequalities.[68] Some have advocated that truth commissions and other transitional justice measures should be explicitly linked to asset recovery processes, not least to provide reparations for victims.[69]

At the same time, such an approach could mean that the recommendations of truth commissions begin to diverge from the current liberal peacebuilding processes to which they are increasingly tied. While international financial institutions and others engaged in peacebuilding typically emphasize macroeconomic stabilization and growth, relying upon rule of law reform but nothing broader, more radical approaches might entail greater state intervention to address fundamental inequalities. Such an approach would require greater redistributive policies, which may be decidedly at odds with neoliberal economic policies.[70] That said, transitional justice processes can address other types of economic harms, arising from expropriation and corruption, without necessarily being at odds with such economic policies, and could in principle reinforce the perceived reliability of property rights in ways which make a country a more attractive investment prospect.

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65 Carranza, "Plunder and Pain," 321.

66 Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond," in this volume.

67 Lisa J. Laplante, "Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework," *International Journal of Transitional Justice* 2 (2008): 331–355; Laplante, "On the Indivisibility of Rights," 143–144.

68 *See also* the discussion of the Sierra Leone commission's report in this volume by Dustin Sharp, "Economic Violence in the Practice of African Truth Commissions".

69 Carranza, "Plunder and Pain," 324–326.

70 Laplante, "Transitional Justice and Peace Building," 337–338.

Reparations and Their Limitations

Reparations are often part of contemporary transitional justice processes. Might they prove a useful means to redress past violations of economic rights? Reparations are in fact the one area where transitional justice measures might be expected to directly deal with economic matters. However, as Naomi Roht-Arriaza observes elsewhere in this volume, they are primarily designed in most instances to respond to specific victims who suffered violations of civil and political rights, or to the needs of affected communities, rather than to address violations of specific economic rights or widespread inequality.[71] Truth commissions in Peru and South Africa, among other countries, recommended significant reparations, the Peruvian one having recognized the effects of structural inequalities in its report. Reparations in Peru did draw upon illegal assets of the Fujimori regime, which were also used to fund anti-corruption programs.[72] But in neither country were the reparations designed to address systematic economic discrimination or harm, but rather to address specific harms arising out individual of violations of civil and political rights.[73] As Miller puts it, "[r]eparations and compensation allow the state to redistribute wealth only in a strikingly narrow manner, frequently compensating only those named by the transitional justice measure."[74] The effect, as Laplante argues, is to leave some of the structural causes of violence unaddressed, or at most to be the subject of development policy.[75]

This is perhaps of course as it should be. After all, reparations have been designed to address specific harms, while redistribution and/or development more generally, are the responsibility of governments, often with the assistance of international actors. Laplante herself points to the criticism of the Peruvian government's approach to reparations, which appears to confuse development with reparations measures.[76] Conflating reparations with development or humanitarian assistance may delegitimize the very real claims of victims to be heard, and any sense of vindication which they may feel in receiving reparations. In my recent research in Sierra Leone, I found that many victims and non-victims alike were not able to identify funds disbursed by the reparations program as reparations per se, viewing them not surprisingly in a country awash with international donors as another humanitarian or development assistance program.[77] In addition, one-off

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71 Naomi Roht-Arriaza, "Reparations and Economic, Social, and Cultural Rights," in this volume.

72 Schmid, "Liberia's Truth Commission Report," 15.

73 Miller, "The Effects of Invisibility," 279–280.

74 Miller, "The Effects of Invisibility," 283–284.

75 LaPlante, "Transitional Justice and Peace Building," 334.

76 Laplante, "On the Indivisibility of Rights."

77 Chandra Lekha Sriram, "Victim-Centred Justice and DDR in Sierra Leone," *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram, Jemima Garcia-Godos, Johanna Herman, and Olga Martin-Ortega (London: Routledge, 2012), 159–177.

individual reparations may, as Roht-Arriaza observes in this volume, have perverse effects in promoting clientelism or corruption. Alternatively, she and other scholars have drawn attention to the risk that, given scarce resources, governments will opt for collective reparations, which appear even more like development funds, and that demands for individual reparations may result in a zero-sum competition, pitting "the poor against the victims."[78]

Transitional Justice and Development

There are of course those who advocate greater linkages between transitional justice and development, or at least that the existing linkages be better recognized and transitional justice be more "development-sensitive," such as Roger Duthie.[79] In response to the perceived absence of recognition of these connections, an issue of the *International Journal of Transitional Justice* was devoted to the topic in 2008, in a volume which included many of the pieces cited in this chapter, such as those by Miller, Mani, Duthie, and Laplante. As Duthie argues, a holistic approach to transitional justice is not limited to truth-telling, prosecutions, and reparations, but operates in a larger peacebuilding context and should thus include institutional reforms as well. As such, it will intersect with the work of development actors seeking to improve the living conditions of the poor, particularly where development programming deals with rule of law. He argues that the two processes share long-term goals of transforming societies, and that given that transitional justice processes operate in situations of limited resources, thinking about their relationship to development is all the more important.[80] Further, in resource-poor post-conflict settings, there is often an apparent, if not real, competition for resources between transitional justice processes and development assistance, and the former may be criticized for being too expensive and draining resources from longer-term related activities, such as justice sector reform. This was an allegation frequently made, for example, with regard to the Special Court for Sierra Leone, although my interviews with donors in the country did not bear this out.[81]

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[78] Laplante, "On the Indivisibility of Rights," 164; and Roht-Arriaza, in this volume.

[79] Roger Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," *International Journal of Transitional Justice* 2 (2008): 292–309; Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

[80] Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," 295.

[81] This was because the funds were allocated differently, so a reduction of resources to one would not have resulted in an increase to the other. Chandra Lekha Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (London: Routledge, 2005), 108–109; *see also* Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," 298.

Transitional justice processes are inevitably tied to peacebuilding and subsequent development activities of rule of law reform and security sector reform, so Duthie, Naomi Roht-Arriaza, and Katharine Orlovsky argue it would be useful to identify synergies.[82]

Finally, Duthie argues, it might be possible for the two processes to directly address one another—for transitional justice processes, the most obvious way in which this might be done is to address "development-related" issues, such as economic crimes and violations of economic rights, along the lines of processes outlined above (through truth commissions and reparations), as well as through the prosecution of economic crimes.[83] Conversely, development factors, already engaged in support to justice reform, might be ever more involved in directly addressing past crimes. Through technical assistance, they can support transitional justice measures directly.[84] Of course, such a tightened connection between development and transitional justice is not without its risks. Transitional justice processes are inherently political and politicized, and development factors who require long-term access to a country, and who often seek to present their work as technical and apolitical, will be concerned about engagements which may put that access at risk. Further, as Duthie observes, the pursuit of transitional justice goals through development, and vice versa, may undermine each, or may simply be ineffective.[85]

Some Skepticism

Even for those who desire a closer connection between transitional justice and economic and social rights concerns, some skepticism maybe warranted. Pablo de Greiff, for example, notes that adding economic crimes to the mandates of truth commissions or to the charges in criminal trials may overburden the transitional justice processes, and further that trying economic crimes involves different evidentiary and procedural demands.[86] There is also, as noted above, a risk of

[82] Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," 299; Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development," *Transitional Justice and Development* ed. de Greiff and Duthie, 170–213. *See also* Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, "Evaluating and comparing strategies of peacebuilding and transitional justice," *JaD-PbP Working Paper Series* (2009), http://www.lu.se/upload/LUPDF/Samhallsvetenskap/Just_and_Durable_Peace/Workingpaper1.pdf.

[83] Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," 301–302.

[84] Roger Duthie, "Introduction," in de Greiff and Duthie, eds., *Transitional Justice and Development,* 21.

[85] Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," 307–308.

[86] Pablo de Greiff, "Articulating the Links Between Transitional Justice and Development: Justice and Social Integration," in de Greiff and Duthie, eds., *Transitional Justice and Development,* 40.

conflating development processes and transitional justice processes, particularly in the context of reparations.[87] Lars Waldorf has offered the most sustained challenge to expanding the remit of transitional justice to address socioeconomic wrongs.[88] He challenges the instrumental or conflict-prevention argument for addressing such wrongs, pointing out that there continues to be significant academic dispute about the role economic, social, and cultural rights violations actually play in causing violent conflict.[89] Further, transitional justice instruments may not be well-placed to directly address economic rights or harms—while they have a proven capacity to detail the historical role of economic violations in conflicts, they may lack the expertise to develop targeted recommendations in this area.[90]

I would argue that there is good reason for skepticism. Transitional justice processes have had increasingly broad expectations placed upon them. They are expected to respond to specific violations of civil and political rights and to promote reconciliation, democracy, human rights, and the rule of law, all while remaining sensitive to the many concerns of victims. At the same time, they are also increasingly tied to broader processes, including the disarmament, demobilization, and reintegration of ex-combatants.[91] Yet there remains significant skepticism within the field concerning the effects of transitional justice measures, raising serious questions about their ability to serve all of the many goals with which they are associated.[92] As I have argued elsewhere, claims for the effects of transitional justice measures are not only potentially overstated, but have the potential to undermine the perception of those measures when they fall short of overstated claims.[93]

Even those transitional justice measures which appear best suited to addressing socioeconomic issues may have important drawbacks. Reparations, which may address past socioeconomic harms, suffer at least two limitations: first, they address harms to a specific set of victims rather than addressing wider economic violations or redistributive needs, and second, governments often do not follow

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[87] Marcus Lenzen, "Roads Less Traveled? Conceptual Pathways (And Stumbling Blocks) for Development and Transitional Justice," *Transitional Justice and Development,* ed. de Greiff and Duthie, 80.

[88] Waldorf, "Anticipating the Past."

[89] Ibid., 175.

[90] Ibid., 176.

[91] For analyses of the impact which also outline this trend, *see* Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*; Sikkink, *The Justice Cascade*; Olsen, Payne and Reiter, *Transitional Justice in Balance;* Sriram, García-Godos, Herman, and Martin-Ortega, eds., *Transitional Justice and Peacebuilding on the Ground.*

[92] Thoms, Ron, and Paris, "State-Level Effects of Transitional Justice," and related articles in the special issue of the *International Journal of Transitional Justice* edited by Colleen Duggan in 2010 entitled "Transitional Justice on Trial: Evaluating its Impact."

[93] Sriram, "Wrong-Sizing Transitional Justice".

through, preferring to pursue economic development goals.[94] Thus, as Roht-Arriaza argues in this volume, reparations processes would need to be designed carefully to address socioeconomic rights violations. Finally, placing further demands on already overstretched, poorly resourced, and politically vulnerable transitional justice processes may simply be extremely difficult. Governments which cannot afford such measures might turn to donors for support, but while in some instances, international support to reparations has been provided (as in Sierra Leone), in many instances, donors will prioritize other goals.[95] Further, as noted above, broader redistributive measures which address systematic discrimination may run counter to priorities of international peacebuilders bent on marketization and promoting an environment conducive to foreign investment.

Implications

Transitional justice processes have expanded in scope and complexity in the past two decades, and are under pressure to encompass an ever-greater number of issues, from reintegration of ex-combatants to gender justice. This trend toward expansion signals the increasing reliance on the transitional justice "toolkit" by international policymakers, and perhaps its acceptance and legitimacy in many quarters. However, this does not automatically mean that transitional justice processes can, or necessarily should, take on a greater role in redressing past specific violations of socioeconomic rights, broader questions of redistribution, or economic development.

This is not to say that these are not important goals in and of themselves, but to question whether transitional justice processes are the correct site for them. In the introduction to this volume, Sharp suggests that the question of overload is a genuine one, but that regardless, transitional justice measures should not be determined by the divide between civil and political rights and economic, social, and cultural rights. Certainly, there is no reason why transitional justice measures should necessarily exclude measures to respond to socioeconomic harms. And indeed, there is some nominal progress toward including them as part of the normative and practical development of transitional justice. However, to the degree that transitional justice processes are embedded in, or at least linked to, liberal peacebuilding processes, expanding their remit, while gaining a normative foothold, may be challenging in practice. As I have noted above, the focus of liberal peacebuilding programmers on macroeconomic policies which promote growth does not generally bring with it an emphasis on redistribution, and may be diametrically opposed to it or inadvertently promote existing patterns of patronage and corruption. Further,

[94] Waldorf, "Anticipating the Past," 177–179.

[95] Ibid., 179.

transitional justice processes may be ill-suited to addressing socioeconomic issues, or simply overburdened by the expansion of their mandates, given that they have increasingly broad ones on which it is not clear that they are able to deliver. That said, I have outlined several areas in which transitional justice processes have begun, in limited ways, to address socioeconomic questions. It remains possible that, alongside challenges to liberal peacebuilding, challenges to the liberal model of transitional justice, on the grounds that it is top-down and does not address core issues of great concern to those most affected within conflict-ridden societies, will result in expansion of transitional justice processes in the future.[96]

[96] Dustin Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth-Generation Transitional Justice," *Harvard Human Rights Journal* 26 (2013): 149–178.

The Trilemma of Promoting Economic Justice at War's End

Topher L. McDougal

The Prototype

By the end of September 1791, the French Revolution had seemingly succeeded, and the transitional work of the National Assembly drew to a close. The process had swept away many of the presumed causes for discontent with the *ancien régime*, including an opaque and corrupt legal system, seigniorial rights, the heavy influence of the church in the state, and an undemocratic political apparatus that had been the very paragon of absolutism. The *Declaration of the Rights of Man and the Citizen* and a new constitution based on liberal values promised equality before the law and drastically reformed the court system. Legislative elections were held.[1] And yet the Revolution did not end there; in fact, it lurched in a much more violent direction, as figures such as Danton executed thousands of "traitors" (August 1792) and Robespierre's Committee of Public Safety began a Reign of Terror (September 1793–July 1794) that would see Louis XVI, Marie Antoinette, Danton himself, and tens of thousands of others guillotined or otherwise executed. Why such violence after an ostensibly successful political transition?

[1] Only tax-paying citizens were allowed to participate.

I am grateful for the comments and suggestions of Dustin Sharp. All errors remain my own.

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The answer is not easy, but three principal explanations are typically forwarded.[2] First, the revolutionary reforms had focused on political equality, but had failed to address economic equality. In fact, by embracing the Lockean ideal of property rights (in which unequal property accumulation is justified on the basis of individual preferences regarding various forms of work and leisure time) without first redistributing land and wealth, the Revolution had in many ways put the liberal stamp of approval on the old economic order.[3] The radical Jacobins, however, found their strongest supporters among the *sans-culottes*, urban laborers who had not seen economic gains from the Revolution. Moreover, the early reforms and uprisings of the Revolution may themselves have displaced many rural people, producing an influx of urban malcontents, most notably in Paris.

A second line of reasoning points to the counter-revolutionary Catholic movement that gained momentum in the Vendée, in the West of France. Its adherents viewed the radical egalitarian restructuring of social and political life as a mere prelude to chaos.[4] To combat these counter-revolutionaries, it is asserted, the Revolution radicalized.

A third, economic explanation for the Terror relates intimately to both the preceding ones.[5] The National Assembly was unable to repudiate the heavy external debt burden it inherited from the *ancien régime* for fear of alienating foreign (and domestic) banks. At the same time, it was unwilling to incur the wrath of the people by re-imposing unpopular taxes. So, requiring funds to support massive public works projects and a revolutionary army to put down the counter-Revolution, the

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[2] *See,* e.g., Paul Hanson, *Contesting the French Revolution* (Oxford: Wiley-Blackwell, 2009), 158 *et seq.*

[3] Locke himself argued that the universal right to pursue one's happiness would naturally lead to unequal property accumulations, as each individual would weigh his relative preferences for leisure time and labor—the latter being the element that was, in the Lockean conception, "mixed" with land to create property. *See* Chap. 5 in John Locke, *Two Treatises of Government* [Indianapolis: Hackett Publishing Company, 1690 (1980)]. Even Abbé Sieyès himself during his time on the Estates General elaborated a distinction between active and passive (male) citizens based on their status as property owners. A modern alternative linking property directly to violent conflict is offered by economist Thorstein Veblen, who posited a private property system initially constituted through violent collective seizure of resources and intra-group strife resulting in the private apportionments of the those resources. *See* Thorstein Veblen, *Essays on Our Changing Order* (New York: Viking Press, 1934). *See also* Carol Rose, "Possession as the Origin of Property," *University of Chicago Law Review* 5, no. 1 (1985).

[4] Echoing this sentiment from across the English Channel, the conservative commentator Edmund Burke used the term "terrorist" to describe French revolutionaries, whom he believed to have shattered the necessarily hierarchical structure of society. Burke believed these revolutionary leaders to have erected a uniquely democratic tyranny controlled by an "ignoble oligarchy" that would cause fiscal havoc speculating on confiscated estates of the clergy and nobility. *See* Edmund Burke, *Reflection on the Revolution in France* (London: Penguin Books, 1982 (1790)).

[5] For a more detailed account of the revolutionary monetary crisis, *see* H.A. Scott Trask, "Inflation and the French Revolution: The Story of a Monetary Catastophe," *Mises Daily Index* (2004).

Assembly moved to confiscate the estates of the nobility and clergy in November of 1789 and, against the advice of economists, issued paper bills called *assignats*. With so many assets and so much currency dumped on the market, inflation took hold, only to be aggravated by subsequent reissues of *assignats* in 1790, 1791, and 1792. The Assembly, previously a force for market liberalization,[6] began to re-embrace the mercantilism that had been the hallmark of the *ancien régime* since Jean-Baptiste Colbert, the previous Minister of Finance (1665–1683) under Louis XIV. And finally, when the *assignats* were rejected as worthless by foreign lenders and French businesses alike, the Terror took over. In June 1793, the National Convention passed draconian laws forcing businesses to accept *assignats*. As the Terror proceeded, more *assignats* were printed to buoy purchasing power, and more "traitors" who would not accept them were executed. By the winter of 1795, the exchange rate between the paper franc and the gold franc had fallen to 600 to 1, and when a new paper currency, the *mandat*, was introduced in 1796, it took just six months for it to devalue by 97 %.[7] In effect, this third narrative explanation posits the direct violence of the Terror as an attempt to maintain sovereign control of the country in the context of economic and political liberalization. The expropriations of church and nobility might be readily justified as a dismantling of the socioeconomic apparatus of structural violence. But their sale, together with inflationary spending, untethered the political machinery from the tax base of the population, allowing for, and supported by, violent excesses committed en masse against the citizenry.

Such an intercalation of political and economic violence as described above (the latter often specifically manifesting as inflationary spending) has characterized a number of modern episodes of coercive repression.[8] The French Revolution is far removed in time from the messy, intrastate wars that have become the hallmark of violent conflict in the globalized, post-Cold War era, and which created such a strong demand for what we now term "transitional justice."[9] But there are interesting parallels between the questions raised by that first, pioneering transition to liberal democracy, and those that the field of transitional justice is wrestling with today. The first two explanations for a relapse into civil conflict proffered in

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[6] Trask notes that the National Assembly abolished the guilds, the *corvée* system, tithes and internal custom barriers.

[7] Ibid.

[8] Much like France's National Commission, Zimbabwe's Robert Mugabe dismissed economists' warnings against inflationary spending as "bookish economics" in 2007, replacing price signals with soldiers stationed at markets to force retailers to take losses on their merchandise as the estimated real rate of inflation soared to 20,000 %. Chris McGreal, "Mugabe's Price Cuts Bring Cheap Tvs Today, New Crisis Tomorrow," *The Guardian*, July 15, 2007. Likewise, Argentina under right-wing General Jorge Videla veered into a "Dirty War" characterized by disappearances as financial liberalization grew the country's debt to unprecedented levels and ultimately led to inflation rates of over 900 % by 1983. Keith Griffin, *Alternative Strategies for Economic Development* (New York: St. Martin's Press, 1989), 59.

[9] The initial expansion of interest in Transitional Justice in the 1980s and 1990s involved reckoning with abuses that took place in the Cold War context as states struggled to democratize.

the French Revolution case parallel two of the most contentious (and related) issues in transitional justice. The first is the role of economic reform in supporting social justice—and, as indicated in the introductory chapter, a measure of positive peace—in times of political transition. As other chapters in this volume explain, transitional justice has employed both retributive and restorative justice mechanisms, but only rarely (re)distributive ones. Later in this chapter, we will wrestle with the question of when inequalities constitute a risk factor for future conflict relapse in post-conflict countries—and when they do not.

The second issue concerns the controversial role of the state in rebuilding a fractured economy: Should it advance a positive, "top-down" economic agenda, step back to the point of providing only the basic public goods and services (e.g., security, transportation, infrastructure) needed for markets to recover in "bottom-up" fashion, or attempt to create synergies between the "top" and "bottom"? It is a question that is especially thorny in a post-conflict setting. Needs are huge and multifarious (including the restoration of devastated human and physical capital, as well as the reconstruction and reform of splintered political, economic, and social institutions). Resources may be embezzled, squandered, or otherwise lacking. The pressure brought to bear by external actors, including ex- and neo-colonial powers, as well as the International Financial Institutions (IFIs), is potentially immense. The very representational identity of the state remains contested, and the governments claim to legitimacy weak.[10]

Taken together then: Should transitional justice mechanisms be informed by agendas of economic justice and, if so, what should the state's role be in forwarding those agendas? These questions cannot be answered with simple formulas, but I hope to provide some intellectual scaffolding to help frame their consideration.

The remainder of this chapter is divided into four sections. The next section describes the outlines of my basic contention, arguing that post-conflict and transitional countries face a policy trilemma that threatens their sovereignty—sovereignty that is ultimately important to ensuring a measure of economic justice in the post-conflict context. The following section raises three potential caveats when considering the integration of economic agendas into the transitional justice framework. I then briefly review a selection of key findings from the conflict economics literature that yield relevant suggestions for economic and development agendas in transitional societies. I conclude with an imperfect view of the road ahead, arguing that transitional justice must be better integrated into the formulation and implementation of post-conflict development policy. I will contend that transitional justice mechanisms offer a lens by which development policy might be examined and based more solidly on a people-centered or rights-based platform. Moreover, at their best, transitional justice mechanisms involve forms of democratic engagement that could procedurally improve national sovereignty, internal cohesion, and stability in a country.

[10] Katrin de Boer and Werner Distler, "Is It Possible to 'Hand Over' Authority? On the Misperception of Authority Generation and Transfer in Post-Conflict Societies," paper presented at the *International Studies Association 53rd Annual Convention,* San Diego, CA, April 2, 2012.

The Argument

Since the late 1990s, there has emerged a growing consensus within the international community that the larger peacebuilding project, as well as the sub-project of transitional justice, are not sustainable enterprises in the absence of strong national institutions.[11] From this consensus has grown an interest in "statebuilding," without which such broad sets of policy goals encapsulated in terms like economic liberalization and democratization might have perverse effects, perhaps even prolonging or aggravating the conflict dynamics.[12] But among the many contradictions inherent in the statebuilding process is the possibility that the state you have helped to build could exercise its growing sovereignty by enacting policies that do not seem supportive of political or economic liberalization—the very policy goals that convinced the international community to support the time-consuming and laborious process of statebuilding in the first place. Yet paradoxically, statebuilding, for all the blood and treasure it requires, seems anodyne and garners support at the international level, while sovereignty—especially economic sovereignty—is less palatable insofar as it may imply deviations from the liberal democratic ideal of what a transition should look like. Unsurprisingly, transitional governments today are expected, and often heavily pressured, to embrace democracy and market liberalization, while sovereignty—a shorthand I am using for the ability of the government to design, adopt, and enact those robust forms of public law and service delivery that they believe to be most promising for long-run development—typically falls by wayside, or is even actively undermined.[13]

Throughout the remainder of the article, I will refer to the idea that sovereignty, economic liberalization, and democratization jointly constitute a trilemma for the post-conflict state: The state may reasonably promote any two of those goals—democracy and sovereignty, say, or sovereignty and market liberalization—but not all three at once without risking conflict relapse. But why are these goals seen as possibly competing policy goals in the first place? One of the reasons, according to trade economist Dani Rodrik, is that market liberalization in a globalized age implies both winners and losers. Whether the losers are traditional dryland farmers in Mozambique whose land is increasingly under pressure from biofuels

[11] Roland Paris and Timothy Sisk, "Introduction: Understanding the Contradiction of Postwar Statebuilding," in *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations*, eds. Roland Paris and Timothy Sisk (New York: Routledge, 2009).

[12] Roland Paris, *At War's End: Building Peace after Civil Conflict* (New York: Cambridge University Press, 2004).

[13] This is what has been called the "liberal model" of peacebuilding and has given rise to criticism that peacebuilding, in this guise, is merely hegemonic Western liberalism in another form. *See,* e.g., Jonathan Goodhand, "The Limits of International Peacebuilding? International Engagement in the Sri Lankan Peace Process," *Journal of Intervention and Statebuilding* 3, no. 3 (2009).

corporations[14] or indigenous tribes in India's forest belt whose livelihoods are threatened by a combination of iron-mining operations and tea and coffee plantations,[15] they have been discarded by the global capitalist system.

Market liberalization in low-capacity settings heightens popular discontent, putting pressure on government to act. The terms of trade paradox implies that, because most employee earnings in a post-conflict economy derive from raw materials production, government promotion of, and dependence on, raw materials production does not help, and may even harm, the livelihoods of the majority. That majority is then likely to grow discontent as they see wages and the wider economy stagnate. Market liberalization may also require shifts in the labor market for which locals will require retraining and further education in order to cope. It should come as a shock to no one that more "open" economies typically require more state welfare interventions to protect citizens from the vagaries of international market fluctuations, retrain outmoded workforces, regulate the labor practices of transnational firms, etc.[16] Liberalization's "victims" will press the government to moderate the social trauma associated with rampant liberalization. Such moderation may take the form of diminished market openness, increased government, or a combination of both.

Now for the trilemma: If the government remains committed to democracy, that discontent will likely manifest itself in the election of officials supportive of economic policy that promotes greater purchasing power and service delivery—quite possibly implying the curtailment of market liberalization. We will then have democracy and sovereignty, but less economic liberalization. If the government tries to respond to popular concerns by curtailing market liberalization, but is prevented from doing so by the international community, we may wind up with democracy and economic liberalization, but no sovereignty. If the government opts to ignore or even repress the discontented masses, we will have preserved sovereignty and market liberalization at the expense of democratic government.

Why might the international community impinge on sovereignty? One possible reason is that raw materials would be more expensive on the international market if countries rich in them also produced some of the goods that influence terms of trade most. Another reason is that, stated bluntly, economic protectionism hurts firms from the developed world. But that puts post-conflict countries in a bind.

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[14] Klaus Deininger et al., *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* (Washington, D.C.: World Bank, 2011); Oxfam International, *Biofueling Poverty: Why the EU Renewable Fuel Target May Be Disastrous for Poor People* (Boston: 2007); Topher McDougal and Raul Caruso, "Wartime Violence and Post-Conflict Political Mobilization in Mozambique," *Peace Economics, Peace Science, and Public Policy* 18, no. 3 (2012).

[15] Topher McDougal, "Insurgent Violence and the Rural–Urban Divide: The Case of Maoist India," *Contributions to Conflict Management, Peace Economics, and Development* 17 (2011); Devyani Srivastava, "On Maoist Killings," Institute for Peace and Conflict Studies, Naxalite Violence Articles #3141, May 31, 2010, http://www.ipcs.org/article/naxalite-violence/on-maoist-killings-3140.html.

[16] *See* Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, D.C.: Institute for International Economics, 1997), 53.

Sovereignty in the terms by which I have defined it is predicated upon (among other things) the government's ability to raise revenues—which in the short run after a violent conflict is usually most expedient by way of import tariffs, royalties from natural resource extraction, and borrowing. The first means is not seen as being "market-friendly" enough by IFIs, though, and even royalties are often kept to a bare minimum. Government-led plans for the development of specific industries are often frowned upon, since government should not be in the business of "picking winners." Outside of a narrow mandate to provide certain basic public services (health, education, security) and public goods (electricity, water and sanitation, transportation infrastructure), public industrial plans may prove difficult to finance through borrowing. Sovereignty suffers as a result. This omission is critical for the future of distributive justice, as only a sovereign state is capable of effecting significant wealth and land redistribution, promoting embryonic domestic industrialization, and ultimately guaranteeing the economic rights of its citizens. As the late Alice Amsden wrote:

> Peace requires rethinking "policy rights," or how much freedom countries should enjoy over their policy choices for economic development. The greater their policy rights—outside a shared core of global values—the stronger the developmental state and the greater the chance for peace.[17]

I contend that, if one of the three policy goals mentioned above—sovereignty, democratization, and economic liberalization—must be sacrificed for the sake of the others, it ought to be that of economic liberalization. Moreover, I will argue that safeguarding sovereignty, or what Amsden termed "policy rights," is crucial to the success of post-conflict democratic transitions, and that refocusing transitional justice to valorize national sovereignty will require radically new mechanisms and ways of thinking.

The structure of the trilemma described above is heavily informed by Rodrik's argument regarding the limits of globalization.[18] For Rodrik, too, there is a trilemma at work, characterized by same the horns: Democracy, market liberalization, and sovereignty. However, Rodrik believes this trilemma to apply somewhat universally to all countries facing the expanding reach of global markets. By contrast, I argue that the trilemma is only likely to obtain under certain conditions, all of which are aggravated by the fact of a recent conflict. I contend that it is theoretically possible for a country to (more or less) successfully embrace all three policy goals. This possibility is probably greatest in industrialized or industrializing countries experiencing decent rates of growth. The problem comes when the economy is structured to militate against such a happy outcome, and an economic structure in which such trade-offs are necessary is particularly likely to emerge in a transitional or post-conflict country.

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[17] Alice Amsden, *A Farewell to Theory: How Developing Countries Learn from Each Other*, Cambridge, MA.

[18] *See* Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W.W. Norton & Co., 2011).

The basic reason for this distinction comes when we consider the two above-mentioned ways a government can moderate the trauma caused by market liberalization. On the one hand, it may choose to limit market liberalization, perhaps through the use of import tariffs, environmental protection measures, or the application of laws regulating the forms foreign direct investment may take. On the other hand, it may seek to redress the associated social ills through various forms of government spending, perhaps including retraining programs and other educational investments geared toward the up-skilling of the workforce, and urban development projects to house dislocated rural workers in cities. But while the first set of policy options is clearly protectionist, the second need not be. Any country in which the economic gains from market liberalization outweigh the losses should theoretically be able to redistribute the winnings to compensate the losers. While we might then expect the trilemma to obtain only in those countries that are net losers from globalization, in fact the problem is far broader. Indeed, the gains from liberalization must exceed the losses by quite a bit in order to avoid the trilemma. If they do not, there turns out to be a mathematical reason that conflict can be expected to emerge.

In an attempt to explain why this would be so, I will take a brief detour into the foothills of cooperative game theory. This is a body of theory that attempts to model when cooperative frameworks will persist, and when no bargain can be struck that will assure a stable peace.[19] The simplest model, developed as a formal model elsewhere,[20] is one in which there are three parties and two fundamentally different ways to organize an economy. That scenario describes the basic outlines of many developing economies: There are landowners, industrialists, and workers who might work for either. The economy may be organized toward industrialization or toward raw materials export. In such a case, a peaceful economy may represent the optimal scenario for society, producing the most national revenue—and yet, because growth is not fast enough, may prove fundamentally unstable. In fact, it turns out that in some instances, there exists *no stable coalition*. In the vernacular of political economists, the economy cannot provide "self-reinforcing contracts." And, while the government of a developed country may, through rule of law institutions, provide the external contract enforcement that the economy requires to remain stable, a post-conflict government with weak institutions and limited resources may be incapacitated in that regard.

The ramifications of this finding are momentous for those seeking to promote peace in a transitional country, because it maps perfectly onto the trilemma. Typically, industrialists stand to gain by national sovereignty through the application of trade tariffs and industrial promotion policies. Conversely, large

[19] Aivazian and Callen point out the major implication: when three or more agents interact in the presence of two or more externalities, the Coase Theorem may fail and no bargain can be struck. *See* Varouj Aivazian and Jeffrey Callen, "The Coase Theorem and the Empty Core," *Journal of Law and Economics* 24, no. 1 (1981).

[20] *See* Topher McDougal and Neil Ferguson, "Land Inequality and Conflict Onset: Cooperative Game Theoretic Implications for Economic Policy," *Post-2015 Global Thematic Consultation on Inequalities*, October 2012, http://www.worldwewant2015.org/node/283321.

landowners typically stand to gain by market liberalization, since post-conflict countries often have a "comparative advantage" in cash crops or other raw materials.[21] If the payout for an all-inclusive national economy is low but economic growth is positive and experiencing decreasing returns to scale (as is often the case in countries recovering from conflict, reactivating many of their withered sectors), then a stable equilibrium may be ensured only if one of the stakeholder groups is relegated to relative insignificance.[22] This might be done, as in Park's South Korea, via severe political repression, effectively prioritizing sovereignty and an increasingly liberal market over true democracy.[23] (In the Korean case, rapid economic growth arguably then changed the "payout structure," allowing for the re-emergence of democracy after a long period of turmoil.) But if democratic principles are adhered to and the trilemma is still in effect, the choice becomes one between supporting industrialists or landowners. With the weight of the World Trade Organization (WTO) and the international community for market liberalization, and perhaps just a nascent industrial class yet to gain the political heft to bolster national sovereignty, the scales are tipped. Thus, in post-conflict circumstances, when countries are least likely to be able to sustain a commitment to all three policy goals, the choice of which one to reject is stripped from them.

Potential Problems with Integrating Economic Agendas into Transitional Justice

A recent United States Institute for Peace Conference on the "Economic Dimensions of Peace Negotiation" kicked off with the observation that while around 40 % of violent conflicts in the past 35 years could, to some extent, be classified as "resource conflicts," only 25 % of the peace agreements in that time

[21] These generalizations do not, of course, always hold. In the case of Haiti, for instance, the market liberalization forced on the country in the mid-1990s after the reinstatement of President Aristide had the effect of wiping out local rice production, as Haitian producers suddenly found themselves competing with subsidized and highly mechanized American rice farmers. And yet it was the country's tiny industrial and business class, spearheaded by an assembly plant owner name Andy Apaid, that mobilized in opposition to the formation of a strong national government, ultimately supporting the rebel group that succeeded in ousting Aristide in 2004. A partial explanation is that Aristide's administration was uniquely focused on supporting the rural poor and dismantling those power structures associated with the Duvalier era—including the industrial class.

[22] For a more formal exposition of these ideas, *see* McDougal and Ferguson, "Land Inequality and Conflict Onset: Cooperative Game Theoretic Implications for Economic Policy."

[23] Diane Davis makes the intriguing argument that a strong landowner class politically "disciplined" the Korean Government in its application of import substitution industrialization by forcing it to show results of such industrial-serving policies, thereby spurring it into an export-led industrialization model. *See* Diane Davis, *Discipline and Development: Middle Classes and Prosperity in East Asia and Latin America* (New York: Cambridge University Press, 2004).

have explicitly addressed economic issues.[24] The implication was clear: A gap exists between the need for economic agendas to be included in peace negotiations, and the number of successful attempts to do so to date. Very good arguments can be, and have been, made for economic considerations to inform transitional justice more broadly.[25] And while peace agreements are not strictly considered one of the tools in the transitional justice toolbox (as they are primarily the focus of the engagement and negotiations phases, rather than the transition phase), they may to a large extent dictate what types of transitional justice mechanisms will be acceptable to the parties later on.

This section will seek to problematize the straightforward view that economic agendas should figure more prominently in transitional justice mechanisms. This is not because I believe that economic aims should not inform transitional justice—quite the contrary. Rather, I hope to discuss three principal caveats to an unqualified "more economics in transitional justice" approach, in the hopes of generating a more nuanced, and perhaps a more realistic, discussion on the topic. More importantly, I seek to cast doubt on the assumption that outside experts are knowledgeable, politically neutral actors who are more capable than nascent, trial-by-error governments at promoting progressive economic agendas in the design and implementation of transitional justice mechanisms.

The first caveat concerns the ability of economists and political scientists to understand, and effectively plan to subvert, violence in conflicted societies. That is, can they identify the causal determinants of violent conflict reliably enough to craft transitional justice mechanisms that will be effective in heading off relapse? Moreover, do the "root causes" experts identify remain constant over time, or do they evolve over the course of a conflict? The second caveat has to do with vested interests in knowledge generation, and the influence of political dogma in problem solving. The third caveat concerns experts' ability to understand the public will and interest—and goes to the heart of the old tug-of-war between democratic self-determination and expert knowledge.[26]

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[24] Raymond Gilpin, "Introductory Remarks," speech given at United States Institute for Peace conference *The Economic Dimensions of Peace Negotiation*, February 4, 2011, http://www.usip.org/events/economic-dimensions-peace-negotiation.

[25] *See*, *inter alia*, Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2 (2008); Ismael Muvingi, "Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies," *International Journal of Transitional Justice* 3 (2009); Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?," *The International Journal of Transitional Justice* 2 (2008); Louise Arbour, "Economic and Social Justice for Societies in Transition," *International Law and Politics* 40, no. 1 (2007); Roger Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," *The International Journal of Transitional Justice* 2 (2008); Yvette Selim and Tim Murithi, "Transitional Justice and Development: Partners for Sustainable Peace in Africa?," *Journal of Peacebuilding and Development* 6, no. 2 (2011).

[26] These problems have corollaries found in Alan Altshuler, "The Goals of Comprehensive Planning," *The Journal of the American Institute of Planners* 31, no. 3 (1965).

I develop these arguments drawing from "new institutional" economics and critical legal theory. The former is a school of economic thought that views legal systems as economic institutions, or "incentive systems that structure human interaction."[27] They are intended to reduce transactions costs (like negotiations and information sharing),[28] increase predictability,[29] and channel conflict toward nonviolent outcomes.[30] While legal institutions may serve to facilitate conflict transformation, their form, content, adoption, and implementation are rarely technocratic, neutral, or objectively desirable (e.g., based on empirically measurable social utility maximization).[31] Critical legal theory has argued that legal institutions are the objects of, and scaffolding for, intense political and ideological contestation. This characterization may potentially apply to a greater degree in post-conflict contexts, in which the rules of the game are themselves still being formulated,[32] though it is by no means restricted to them. To that extent, the "backgrounding" of economic violence and reform in transitional societies does not merely echo the broader favor that Civil and Political Rights (CPR) have enjoyed over Economic, Social, and Cultural Rights (ESCR) in the Human Rights field.[33] It also perpetuates a kind of willful ignorance of power dynamics[34] and precludes an honest discussion of the trade-offs that may at

[27] Douglas North, *The Role of Institutions in Economic Development* (Geneva, Switzerland: United Nations Economic Commission for Europe, 2003), 2.

[28] In fact, the Coase Theorem in economics postulates that conflict itself—generated by the imposition of an economic activity's costs on someone who is concomitantly excluded from its benefits—can only exist in the presence of transactions costs. *See* Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3, no. 1 (1960). This generalization has been convincingly challenged by cooperative game theorists, however. *See* Aivazian and Callen, "The Coase Theorem and the Empty Core."

[29] *See* Stephan Haggard, Andrew MacIntyre and Lydia Tiede, "The Rule of Law and Economic Development," *The Annual Review of Political Science* 11 (2008). *See also*, Oliver E. Williamson, "The New Institutional Economics: Taking Stock, Looking Ahead," *Journal of Economic Literature* 38 (2000).

[30] *See* Georg Elwert, "Sozialanthropologisch Erklärte Gewalt," in *Internationales Handbuch Der Gewaltforschung*, eds. Wilhelm Heitmeyer and John Hagan (Weisbaden: Westdeutscher Verlag, 2002). These views may differ from those of some transitional justice advocates, for instance, who may view legal mechanisms as simple and straightforward tools to redress past rights abuses or otherwise punish the abusers.

[31] Paradoxically, liberal utilitarianism in the tradition of John Stuart Mill provided the very mathematical calculability needed by social engineers like Auguste Comte and Saint-Simon to introduce technocratic social planning as a "third way" between capricious autocratic rule and radical democracy.

[32] *See* Balakrishnan Rajagopal, "Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination," *William and Mary Law Review* 49, no. 4 (2008).

[33] *See* Muvingi, "Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies."

[34] Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice."

times exist between various policy aims, including democratic rule, CPR, ESCR, political stability,[35] economic development, human security, etc.[36]

It also bears mentioning at the outset of this section that throughout the social sciences, peace studies, and human rights literatures, a recurring tension exists between minimal standards and maximum attainable well-being. Examples include CPR versus ESCR in the Human Rights arena; keeping negative peace (i.e., preventing direct violence) versus building positive peace in peace studies[37]; safeguarding negative freedoms versus expanding positive freedoms, in political science[38]; and free versus planned markets in economics.

The first component of each pair derives from the liberal tradition and accordingly takes the individual as the fundamental building block of society and origin of all social change. The latter derives from utopian social thought and focuses to a greater degree on societal organizations—at scales from the family to the nation—that may impact human well-being. The first is generally more universally palatable in the contemporary era, the second more contentious.

As the introductory chapter to this volume suggests, there are certain *imperfect* correspondences between the dyadic pair of CPR abuses and ESCR abuses, on the one hand, and that of direct and structural violence on the other hand. In each case, the first component is thought to offer a more easily identifiable causal pathway between perpetrator and victim. While the introductory chapter refers to the difficulty in identifying victims of economic violence using the prevailing liberal diagnostic tools, the problem is perhaps even greater when attempting to identify perpetrators. Supposing someone's family is at risk of starvation unless he commits a robbery—Jean Valjean, say—it might not be unreasonable to assert that Valjean's (and his family's) economic rights

[35] A classic example of the trade-off between CPR and political stability is the so-called peace versus justice debate over amnesties. *See* Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Portland, OR: Hart Publishing, 2008).

[36] Bronwyn Anne Leebaw, "The Irreconciliable Goals of Transitional Justice," *Human Rights Quarterly* 30 (2008).

[37] This tension manifested itself originally as a transatlantic debate: In America, the *Journal of Conflict Resolution* was founded in 1957 with a focus on resolving existing violent conflicts. In Norway, the *Journal of Peace Research* was founded under the leadership of Johan Galtung, who viewed Conflict Resolution adherents as focused on symptoms rather than cures; he stressed the paramount importance of dismantling the systems of oppression that cause violent conflicts in the first place and coined the term "structural violence." *See* Johan Galtung, "Violence, Peace and Peace Research," *The Journal of Peace Research* 6 (1969).

[38] Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1984 (1969)), 19 *et seq.*

have been abused or violated. However, it is much more difficult to say how and by whom—especially when government is absent, contested, weak, or impoverished.[39]

Of course, violations of ESCR are not always structural in nature. Economic crimes such as resource plundering and large-scale corruption would seem to lend themselves better to the traditional forms of transitional justice than structural violence.[40] The distinction between direct economic violence and violence precipitated, or in some way "caused," by structural economic conditions is useful to bear in mind, even if most cases fall somewhere between the two extremes and may at times differ in degree more than in kind. Theoretically, where direct violence is more easily attributable to a perpetrator via a mechanistic cause, structural violence is mired in the stochasticity of complex systems. Economic policies may change the probability of depriving citizens of economic rights. But that probability can run the gamut from the predictably disastrous currency reform enacted in North Korea in 2010 and resulting in probable widespread famine,[41] to the privatization of parastatal companies such as Zambia Consolidated Copper Mines, or that of water provision as in Cochabamba, Bolivia, both performed with the approbation and support of "expert" economists and the international community.

Caveat No. 1: Known and Unknown Unknowns

For all economists and political scientists believe they know about the determinants of the onset, intensity, and duration of violence, we are humbled by the objects of our study. Even the most convincing statistical studies will contain a multitude of proxies—many of dubious value in representing the intended variable—and only explain a small fraction of the variation in the outcome variable. For instance, the flagship regression model of Collier and Hoeffler's seminal contribution to the "greed versus grievance" debate contained up to 15 regressors (predictor variables) and, at best, explained only 26 % of the variation observed in civil war occurrence.[42] That means that three-quarters of the full

[39] The debate over the narrow (military) versus broad definitions of the "Responsibility to Protect" doctrine bear on this question, and again manifest the same dyadic tension mentioned above, but are described in full elsewhere. *See,* e.g., Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washinton, D.C.: Brookings Institution Press, 2008). No interpretations of "R2P" seek to go beyond addressing symptoms of a government's inability to provide for its citizens to redress fundamental economic inequalities between governments.

[40] *See,* e.g., Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?"; James Cockayne, "Crime, Corruption and Violent Economies," in *Ending Wars, Consolidating Peace: Economic Perspectives*, ed. James Cockayne (London: Routledge, 2010), 412–413.

[41] *See* Barbara Demick, "Letter from Yanji: Nothing Left: Is North Korea Finally Facing Collapse?," *The New Yorker*, July 12, 2010.

[42] *See* Tables 3–5 in Paul Collier and Anke Hoeffler, *Greed and Grievance in Civil War* (Washington, DC: World Bank, 2000), 29–31.

explanation is missing—we simply do not understand why most violence occurs. Social scientists who point to major underlying structural causes of violence—e.g., youth population bulges,[43] shrinking or stagnant economies, being "landlocked with bad neighbors,"[44] political exclusion[45]—are like seismologists: They can tell you where the risks of upheaval are greatest and maybe even what kind or degree of violence are most likely, but they cannot accurately predict when, how, or why.

Moreover, it is useful to bear in mind that violence itself may change the nature and prominence of structural drivers of conflict. If, for instance, violence has created a sizeable displaced population, the most pressing post-conflict economic agendas may have more to do with land usurpation, restitution, and community reintegration than with the initial aggravators of that violence.

Furthermore, many of the field's findings are hotly debated in academic circles. Still in play are such basic issues as the definition of "civil war," and the pros and cons of lumping together distinct phenomena—ideological revolutions, economically motivated rebellions, secessionist insurgencies,[46] and urban "slum wars"[47]—not to mention all the rich heterogeneity within types. Such limitations probably restrict transitional justice's retributive domain to reasonably clear cases of corruption, plunder, and other direct economic crimes, as Ruben Carranza[48] and others advocate. After all, if the so-called experts are unable to convincingly define typologies of large-scale violence and diagnose their purported economic causes with certainty, how can we hold politicians, community leaders, and business owners accountable for the indirect effects of their choices? In addition, cross-country studies (which form a large part of the policy-relevant empirical economics literature on conflict) maximize "external validity"—i.e., generalizability—at the expense of applicability to any one particular case. That is, quite aside from the

[43] Henrik Urdal and Kristian Hoelscher, *Urban Youth Bulges and Social Disorder: An Empirical Study of Asian and Sub-Saharan African Cities* (Washington, D.C.: World Bank, 2009); Henrik Urdal, "A Clash of Generations? Youth Bulges and Political Violence," *International Studies Quarterly* 50, no. 3 (2006).

[44] Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Falling Behind and What Can Be Done About It* (New York: Oxford University Press, 2007).

[45] Gudrun Østby, *Horizontal Inequalities, Political Environment, and Civil Conflict: Evidence from 55 Developing Countries, 1986–2003* (Washington, D.C.: World Bank, 2007).

[46] Oliver Ramsbotham, Tom Woodhouse, and Tom Miall, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (Malden, MA: Polity Press, 2005).

[47] Dennis Rodgers, *Slum Wars of the 21st Century: The New Geography of Conflict in Central America (*London: London School of Economics, 2007).

[48] Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?"

myriad other problems associated with such studies,[49] to base economic policy on them in a particular, idiosyncratic situation with all of its attendant dynamic complexities is to commit the "ecological fallacy" of assuming that members of a class will all exhibit the characteristics of the class as a whole.

Finally, the debate over *whether* the economy is structured in such a way as to incentivize violence is distinct from that over *why* it might be. If the economy is naturally structured in such a way—for instance, by virtue of self-reinforcing capital concentrations[50]—then perhaps redistributive, but not necessarily retributive, justice is called for.[51] By contrast, if maldistributions of wealth occur through political patronage networks and the forcible exclusion of others,[52] then retributive recourses may multiply. Of course, such discussions potentially open a Pandora's box, as the operatives of IFIs themselves might be blamed and perhaps even prosecuted for inflicting economic harm through market liberalization schemes, structural adjustment programs, and other forms of conditionality.[53]

Caveat No. 2: Distinguishing Knowledge from Dogma

In some ways, direct and structural violence nicely complement each other, echoing the dialectic between greed and grievance that conflict scholars have recently

[49] These include a questionable unit of analysis based on the social science bias toward the Westphalian political order, problems of causal inference making it difficult to determine whether *changes* in predictor will lead to *changes* in outcome, or whether the relational pattern is more static. *See* Ross Levine and David Renelt, *Cross-Country Studies of Growth and Policy: Methodological, Conceptual, and Statistical Problems* (Washington, D.C.: World Bank, 1991).

[50] *See,* e.g., Paul Krugman, "Increasing Returns and Economic Geography," *Journal of Political Economy* 99, no. 3 (1991); Paul Krugman, "Space: The Final Frontier," *The Journal of Economic Perspectives* 12, no. 2 (1998).

[51] Even in cases in which some form of economic redistribution is legally enacted, the implementation process may be fraught with its own challenges and depend for its success upon the ability of civil society groups to provide robust enforcement mechanisms for local governments. *See* Topher McDougal, "Law of the Landless: The Dalit Bid for Land Redistribution in Gujarat, India," *Journal of Law and Development* 4, no. 1 (2011).

[52] *See,* e.g., William Reno, "Political Networks in a Failing State: The Roots and Future of Violent Conflict in Sierra Leone," *Internationale Politik und Gesellschaft* 2 (2003); William Reno, "African Weak States and Commercial Alliances," *African Affairs* 96 (1997).

[53] A number of respectable economists believe the IFIs have impeded the development goals of poorer countries. Some believe it to be willful. *See,* e.g., Alice Amsden, *Escape from Empire: The Developing World's Journey through Heaven and Hell* (Cambridge: MIT Press, 2007). Others are more equivocal. *See* Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002); William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Harm and So Little Good* (New York: Penguin Press, 2006).

seemed to transcend.[54] Structural causes of violence could be interpreted by an economist to mean something close to Collier's "greed"—that is, the economy is structured in a way to incentivize violent, predatory behavior.[55] But given the uncertainty that we must accept in trying to understand complex socioeconomic systems, one might argue that it is disempowering to focus broadly on "structural violence" in transitional justice, when we could gain more political traction (at least for starters) with a narrow focus on economic crimes like large-scale corruption and natural resource plunder.

The intractability of the direct versus structural violence dilemma is partly due to the fact that any discussion of the value of structural economic reform is a hostage of polarized politics. The Left and Right have exactly opposite opinions of the economic costs and benefits of participating in violence (the elasticities of marginal revenue and cost curves, to economists). Let us say you are right wing. You may believe that as your level of participation in violence increases, the punishment you get skyrockets. You may also think that the economy naturally incents violence: There are no limits to the wealth that can be gained from looting. In that case, trying to coax hooligans back into law-abiding society—for instance, by providing job skills training, or supporting local employers with a lending program—will not greatly affect the quantity of looting that goes on. However, if you move the *cost* of participating in violence—for instance, with military action or robust Rule of Law programs—you will get massive results.

But if you are a left-winger, you probably believe that the incentives are exactly reversed. Predatory behavior is punished in a heavy-handed way for even petty offenses,[56] and therefore cannot rise dramatically. The payoffs for hooligans erode

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[54] *See* Karen Ballentine and Heiko Nitzschke, *Beyond Greed and Grievance: Policy Lessons from Studies in the Political Economy of Armed Conflict* (New York: International Peace Academy, 2003).

[55] It is interesting to note that Collier, an economist, chose to use the morally charged language of "greed" (one of the Seven Deadly Sins, no less) as a synonym for "economic rationalism," while he uses the term "grievance," connoting a justified moral outrage, as a synonym for decision making on the (economically irrational) basis of sunk costs. This counter-intuitive framing puts rebels in a very unflattering light and paradoxically replicates the "background" status of structural determinants of violence.

[56] Such a phenomenon could be due to a number of factors. Policies like California's "three strikes" law and the zero-tolerance ("mano dura") approach that former New York Mayor Rudolph Giuliani advocated in various Latin American contexts could contribute. *See* Diane Davis, "El Factor Giuliani: Delincuencia, La 'Cero Tolerancia' En El Trabajo Policiaco Y La Transformación De La Esfera Pública En El Centro De La Ciudad De México," *Estudios Sociológicos* 25, no. 75 (2007). It could also be an outgrowth of police or judicial corruption, since the worst offenders are the best able to pay the necessary bribes for reduced sentences, and governments may highlight their crime-fighting efforts by making examples of what petty offenders they do apprehend. In cases of insurgency, government forces may become frustrated by the lack of clear targets, and intensify retributive justice measures against the civilians presumed to support the militants. *See,* e.g., the case of the anti-Soviet Lithuanian resistance movement described in Roger Petersen, *Resistance and Rebellion: Lessons from Eastern Europe* (New York: Cambridge University Press, 2001).

greatly the more they participate in violence—perhaps because the more time they spend looting, the less unsecured wealth there will be to loot, perhaps because they do themselves a disservice by not spending that time in school or at a job. In these circumstances, cracking down on violence does not have much of an impact. By contrast, increasing the opportunity costs of violence participation by improving the overall economy does.

If scarce resource "investments" in transitional justice must be allocated in some proportion between distributive development aims and retributive rule of law, better to base the decision on what empirical evidence we have of the relative effects, rather than on ideological tenets of what Keynes called "some defunct economist." It bears mention, however, that the right-wing story is *a priori* more likely to hold true in a stable, developed democracy than in a transitional, post-conflict country. This is because a relative lack of corruption in law enforcement and judicial processes in developed countries means that greater participation in violence will likely incur greater costs. At the same time, a low unemployment rate in developed countries will imply that the greater participation in violence is likely to yield indefinite financial rewards, because there is so much wealth to steal. By contrast, the left-wing interpretation is probably more likely to hold in a transitional country because rule of law institutions are weak, while there is a finite amount of value left in the economy. More to the point, to the extent that jobs creation is made a priority of the transitional government, the opportunity cost of violence will rise. Unsurprisingly, then, a focus on economic justice might be reasoned to be a better way of assuring a peaceful transition than focusing on retributive measures. To this extent, the call for the inclusion of economic and development agendas in transitional justice is theoretically justified.

Caveat No. 3: The Lives of Others

The third caveat I raise speaks more generally to the formulation of post-conflict economic agendas to provide a greater potential for economic justice, namely the possibility of imposing policies against local democratic will. This caveat speaks directly to the trilemma and the degradation of national sovereignty in transitional countries. The tendency for the international community to employ cookie-cutter solutions to address a diverse array of problems and situations is as well appreciated in Legal Studies as in Development Studies. I once heard an anecdote told by a human rights lawyer working in post-conflict Cambodia about a legal consultant hired to help draft the new constitution. The human rights lawyer remarked to the consultant that he imagined the job would involve months if not years of local consultations. The consultant replied that actually he had nearly finished the job on his plane ride to Phnom Penh by cutting-and-pasting articles from other "model" constitutions. Admittedly, the processes of transitional justice may not involve "outsiders" to the same degree as post-conflict development more generally (or the constitution-drafting example above, more specifically). But to the extent that I am advocating for transitional justice practitioners to think of ways in which justice

mechanisms may play active roles in the statebuilding and development processes, grappling with this classic development conundrum will be necessary.

Superficially, of course, the overriding democratic agenda of external actors in transitional countries is geared toward identifying, and enhancing the legitimacy of, the local public will. In practice, however, interventions aiming at "democracy enhancement," often funded by the US Government and involving contracted entities like the National Endowment for Democracy, the International Republican Institute, and the Center for International Private Enterprise, have been instrumental in actually *undermining* democratic but "undesirable" regimes (as in the case of Haiti's Aristide administration in 2004) by supporting wealthy elites who are depicted as the torchbearers of the public will and a healthy business climate.[57] Such selective support has the obvious effect of equating the capitalist class with legitimate democratic voice.

The international community still has an important role to play in promoting economic justice in transitional countries. But that role might usefully be reconceived from that of mentor to that of facilitator. In such cases, the WTO might consider being more tolerant of protectionist economic policies. Likewise, the IFIs and bilateral lenders might consider being more accepting of targeted import substitution industrialization initiatives (provided they are linked to benchmarks for eventual export promotion), and less ready to impose various forms of conditionality. They might consider debt forgiveness more often in transitional countries, for despite associated problems of moral hazard,[58] we have seen how debt burdens may generally aggravate the democracy–sovereignty–liberalization trilemma via inflationary spending—as in our prototypical case, the French Revolution. Indeed, the international community might generally try to be more tolerant of trial-by-error processes, because they are rooted in local experience. After all, human rights may be universal, but achieving them is contextual. In fact, transitional justice mechanisms continue to build on an admirable tradition of democratic engagement that might mitigate against this general concern if they were employed in the design and implementation of development policy.

A Selection of Relevant Economic Drivers of Conflict

With those three major caveats out of the way, the following section offers an incomplete selection of economic drivers of conflict that that I believe have either been underappreciated or misunderstood in post-conflict development policy, and

[57] Democracy Now!, "U.S. Gvt. Channels Millions through National Endowment for Democracy to Fund Anti-Lavalas Groups in Haiti," January 23, 2006, http://www.democracynow.org/2006/1/23/u_s_gvt_channels_millions_through.

[58] Recent scholarship has pointed to war-making, and the attendant possibility for debt repudiation, as a cause of conflict relapse. *See* Branislav Slantchev, "Borrowed Power: Debt Finance and the Resort to Arms," *American Political Science Review* 106, no. 4 (2012). This evidence might be used as justification for debt forgiveness in specific cases, as well as a policy of non-forgiveness across the board.

which could inform approaches to economic justice in transitional settings.[59] They are encapsulated in three main areas: Natural resource management, dealing with non-state armed actors, and managing the rural–urban divide.[60] All three of these issues involve deep questions related to the overarching theme of national (economic) sovereignty and state legitimacy that I have attempted to develop in this chapter. I will attempt to draw out the possible implications of each for transitional justice mechanisms in particular.

Natural Resource Management

The past dozen or so years have seen a significant shift in the conflict economics literature from a focus on natural resources, geography, and other external determinants of conflict, to an emphasis on internal organizational and institutional modes of governance. Since the 1990s, economists steered the conflict literature into the areas of the "resource curse"[61] and, beginning in the early 2000s, the related "greed versus grievance" debate.[62] These areas represented a break from the previously dominant view of violent conflict—and particularly civil war—as a collective psychosocial anger response to oppression and structural violence against traditional livelihoods.[63] Rather, war-making was now viewed as an economically rational, utility-maximizing behavior.

Political scientists and economic geographers turned their attention to "conflict resources"—defined by one economic geographer as "natural resources whose control, exploitation, trade, taxation, or protection contribute to, or benefit from the context of, armed conflict."[64] Much of this literature sought to make correlative, but not causally mechanistic, links between various resources and conflict outcomes. Some scholars discussed the differential effects on conflict onset and duration of oil versus timber versus diamonds versus drugs, etc.,[65] arguing that

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[59] For an older but more general overview of the economic causes of violence, *see* Macartan Humphreys, *Economics and Violent Conflict* (Cambridge, MA: Harvard Program on Humanitarian Policy and Conflict Research, 2003).

[60] Other areas that might easily have been included are, e.g., post-conflict industrial policy, jobs creation, and housing and land tenure.

[61] *See,* e.g., Michael Klare, *Resource Wars: The New Landscape of Global Conflict* (New York: Henry Holt and Company, 2002).

[62] Collier and Hoeffler, *Greed and Grievance in Civil War.*

[63] This view is presented, for instance, in James Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (New Haven: Yale University Press, 1976).

[64] Philippe Le Billon, "The Political Ecology of War: Natural Resources and Armed Conflicts," *Political Geography* 20 (2001).

[65] Michael Ross, "How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases," International Organization 58 (2004); Michael Ross, "What Do We Know About Natural Resources and Civil War?," *Journal of Peace Research* 41, no. 3 (2004).

non-lootable resources like oil made separatist conflict onset more likely, but "lootable" resources like gemstones, while not responsible for conflict onset, tended to prolong and intensify conflict. Others claimed that "scarce" or "high-value" resources, like diamonds, were associated with wars of "greed," while "abundant" or "livelihood" resources, like water and land, were associated with wars of "grievance."[66] As an economist, I would argue that abundance never boosts demand or fuels conflict. Rather, the *spatial scale* of scarcity is a more apt concept: Global scarcity and local abundance create a disparity that encourages wars fueled by global market demand, while local scarcity may potentially be associated with local wars of redistribution. In any case, left largely unexamined was the context in which resources were becoming curses when they had not been before—a context characterized by the withdrawal of Cold War financial support for loyal regimes, expanding liberalization of trade, and the retrenchment or curtailment of many government programs and institutions in the developing world occurring in response to Washington Consensus policies.[67]

More recently, the conflict research agenda has begun to shift toward understanding the organizational incentives or disincentives for violence within governance institutions—be they official government, informal, or those of non-state armed groups. The narrow focus on conflict resources has then been broadened to include how they are managed and inform the behavior of institutions trying to control them. One of the first nudges in this direction came from Snyder,[68] who argued that different modes of institutional extraction led to very different outcomes. He took the case of Sierra Leone, in which small-scale artisanal mining operations dominated by Lebanese middlemen eroded the state's monopoly on the use of force. President Momoh then attempted to shift the mode of extraction to large-scale industry, making a deal for a regulated private monopoly with the Israeli firm LIAT—a deal that fell through when LIAT itself collapsed, paving the way for RUF military successes.[69]

There are appreciable lessons for economic justice in the transitional context. First, try to avoid dependency upon natural resource exports. Second, to the extent that the economy must be jumpstarted quickly (which often requires dependency on natural resource exports) in order to give political processes a better chance of working, industrial-scale operations for mineral extraction may least erode

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[66] *See,* e.g., Stormy-Annika Mildner, Gitta Lauster, and Wiebke Wodni, "Scarcity and Abundance Revisited: A Literature Review on Natural Resources and Conflict," *International Journal of Conflict and Violence* 5, no. 1 (2011).

[67] Michael Pugh, Neil Cooper and Mandy Turner, "Conclusion: The Political Economy of Peacebuilding—Whose Peace? Where Next?," in *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding*, eds. Michael Pugh, Neil Cooper and Mandy Turner (New York: Palgrave Macmillan, 2008).

[68] Richard Snyder, *Does Lootable Wealth Breed Disorder? A Political Economy of Extraction Framework* (Notre Dame: Hellen Kellogg Institute for International Studies, 2004).

[69] Richard Snyder and Ravi Bhavnani, "Diamonds, Blood, and Taxes: A Revenue-Centered Framework for Explaining Political Order," *The Journal of Conflict Resolution* 49, no. 4 (2005).

governmental monopoly on the use of force because large corporations are few in number and easier to keep track of. This suggestion, however, has its own negative by-products in that corporations may not be accountable to local populations, thereby fueling discontent. Moreover, best practices in corporate social responsibility such as local consultations on resource extraction practices, even when adopted and implemented well, may actually give rise to violent manifestations when local parties perceive themselves as being relatively powerless at the bargaining table.[70]

Third, it may therefore be beneficial to consider joint community–corporation management of natural resources. In this model, local stewardship councils are incentivized via royalties to cooperate with industrial partners. The latter are in turn constrained to operate within the limits of local wishes concerning the pace, scope, scale, and method of extraction, as well as social and environmental remediation measures to be employed. This model has worked well, for example, in the case of timber companies operating in Maoist-affected forests in West Bengal.[71] Nevertheless, careful oversight would be required to make sure that local communities are truly being represented by the stewardship councils. In the case of agricultural resources, the most pro-poor post-conflict policy may leverage industrial production operations that draw on small-scale producers, also referred to as the outgrower production model.[72]

All of these ideas fall outside of the traditional ambit of transitional justice mechanisms, but need not necessarily. For local populations who have suffered the devastation of a diamond-fueled war in Sierra Leone, timber-fueled war in Liberia, or a metals-fueled war in eastern Democratic Republic of Congo, an institutional mechanism that allows them to regain control over the very resources that made possible such violence might be restorative in more than one sense. The insights from restorative justice programs such as truth and reconciliation commissions might inform the structure and function of cooperative natural resource management programs, re-knitting community bonds even as revenues are directed toward "building back better." Furthermore, joint natural resource management is a concrete way that weakened national governments may build institutional connections to local community institutions, to the extent that the latter derive their mandate through, and report to, higher levels of government. It has been suggested that these sorts of "vertical" ties between levels of government are particularly liable to be damaged in the course of war,[73] and so represent a way to strengthen government legitimacy and responsiveness.

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[70] Isabelle Anguelovski, *Understanding the Dynamics of Community Engagement of Corporations in Communities: The Iterative Relationship between Dialogue and Local Protest at the Tintaya Copper Mine in Peru* (Cambridge, MA: MIT, 2007).

[71] Anuradha Joshi, "Roots of Change: Front Line Workers and Forest Policy Reform in West Bengal" (PhD diss., MIT, 2000), http://dspace.mit.edu/handle/1721.1/9292.

[72] Channing Arndt et al., "Biofuels, Poverty and Growth: A Computable General Equilibrium Analysis of Mozambique," *Environment and Development Economics* 15 (2009).

[73] McDougal and Caruso, "Wartime Violence and Post-Conflict Political Mobilization in Mozambique."

Recognizing Non-state Armed Actors

Recently, political scientists have made empirical studies of non-state armed groups, forming conclusions with important implications for transitional justice in particular. Weinstein, for instance, makes a double distinction between rebel organizations that are (a) relatively wealthy in social, versus financial, capital, and (b) locally versus externally funded.[74] Organizations that are well endowed with financial capital suffer from two problems: First, their leaders are not incentivized to create disciplinary structures that would restrain the use of violence against locals. Second, the leadership (even if originally ideologically motivated itself) is unable to verify the motives of new recruits: Are they joining for the cause or the loot? On the other hand, Weinstein's argument suggests that rebellions that rely on social endowments may be more "legitimate" in the sense that they require some degree of local democratic consensus and participation. It may also be that organizations with "bottom-up" financing—in which underlings are expected to pass along collected money to the higher-ups—are inherently less capable of enforcing disciplinary code.[75] This might explain why Somali pirates are more restrained in their use of violence than were, say, Liberians United for Reconciliation and Democracy (LURD) in the early 2000s—despite the fact that both groups are classified as "externally funded" and "financially endowed."

The literature on non-state armed actors imparts one major lesson to those interested in post-conflict economic agendas with a greater potential for economic justice. Paralleling the famous "peace versus justice" debate,[76] it may be necessary to work *with* non-state organizations to promote local development projects—especially when those organizations are well disciplined. For instance, Somali pirates are increasingly well organized, and annually rake in around $70 million in ransom money, while the international community annually spends around $300 million to stop them.[77] Moral hazard worries aside, this seems an instance where a bargain could be struck with leadership, transforming pirates into a (better-paid) coast guard, capable of patrolling the Somali coast to prevent the illegal trawling that caused local fishermen to turn to piracy in the first place. Such cooperation may also be beneficial to economic development outcomes when armed groups are heavily

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[74] Jeremy Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (New York: Cambridge University Press, 2007); Jeremy Weinstein, *The Structure of Rebel Organizations: Implications for Post-Conflict Reconstruction* (Washington, D.C.: World Bank, 2002).

[75] Nicholai Lidow, "Lootable Natural Resources and Rebel Organization" (unpublished manuscript, 2008).

[76] Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*; I. William Zartman and Viktor Aleksandrovich Kremeniuk, *Peace Versus Justice: Negotiating Forward- and Backward-Looking Outcomes* (Oxford: Rowman and Littlefield, 2005).

[77] Anja Shortland, "The Puntland Pirate Economy," paper presented at the Jan Tinbergen European Peace Science Conference, Amsterdam, Netherlands, June 27, 2011.

involved in governing territory. For instance, some INGOs in Port-au-Prince, Haiti, have reported better development outcomes when working in slums controlled by armed gangs than in those without[78]—possibly because, when thoughtfully engaged, gangs enable collective action more effectively than the weak state and fractured community groups. For external actors, pointing out the potential advantages of selectively working with non-state actors might imply a reconsideration of laws such as the portion of the US Patriot Act that outlaws the provision of "material aid" to any group on the State Department's list of terrorist organizations.

There are also broader implications for the role of transitional justice in providing a scaffolding for the (re)construction of national sovereignty, together with the notion of "transition" itself. Following the collapse of its central government in the early 1990s, Somalia has arguably been experiencing a long and painful process of autochthonous statebuilding, involving not a single monolithic "transition," but a series of geospatially variegated, and at times competing, governance experiments involving different modes of organizational structure, revenue generation, and constituent engagement. Despite a definitive end of the previous regime, post-war Libya currently resembles a patchwork quilt of self-governing city–states whose military influence extends into surrounding hinterlands, sometimes overlapping. Haiti's democratic transition might be seen as persisting since 1986, when Baby Doc first fled into exile, punctuated both by promising democratic developments and disastrous external interventions. In none of these cases, does government enjoy the famous Weberian monopoly on the use of coercive force, and therefore does not exhibit national sovereignty in the full sense.

In these types of cases, the transitional justice strategy may have to be fundamentally rethought along different lines. It may not be a time-bound, "post-conflict" exercise, but an open-ended, "peri-conflict" one. It may not be geared toward reconciling individuals under a settled, unitary government, but a bottom-up process of creating the very institutions that will govern the participants. It may not depend on, or presume, sovereignty, or legitimacy "inherited" from a past government, but generate its own through the reconciliation process. In short, transitional justice may be asked to wade into the murky waters of peacebuilding and perhaps even nation-building.

Managing the Rural–Urban Divide

As the developing world continues to urbanize rapidly, the rural–urban divide has come to characterize many violent internal conflicts—with important implications for securing peace and the state. In some cases of rural–urban conflict, the combat frontier is messy and erratic, as insurgents target cities as their economic prey. In

[78] Ami Knorr and Timothy Donais, "Peacebuilidng from Below versus The Liberal Peace: The Case of Haiti," paper presented at the 53rd Annual International Studies Association Annual Convention, San Diego, CA, April 2, 2012.

other cases, the combat frontier is tidy and stable, seemingly representing an equilibrium in which cities are effectively buffered from violent non-state actors. What accounts for these divergent outcomes? I have argued elsewhere[79] that there are two principal factors at work here: The infrastructure that connects urban areas to towns and hinterlands, and the social structure of the trade networks that activate these physical linkages. In the first instance, infrastructure that connects primary, secondary, and tertiary cities in radial fashion (think hub-and-spokes) is more likely to yield monopolistic or monopsonistic relationships between urban and rural areas. In other words, cities exploit the hinterlands, and any measure of economic justice will need to advance a structural remedy, not just vilify the rural malcontent. In the second instance, ethnically hierarchical trade networks—in which higher groups operate longer routes, and lower groups operate short, local ones—tend to facilitate the sort of elite–elite bargaining structure across the combat frontier that contributes to territorial stability. This is because they represent a kind of "soft infrastructure" that allows for redundantly networked towns. Conversely, trade networks without such ethnic hierarchy are more egalitarian, but tend to discourage elite–elite bargaining and producing more contested combat frontiers. This is because they tend to socially reinforce radial trade patterns, even if the physical transportation infrastructure is better reticulated.

For settings in which the rural–urban divide has strongly informed the nature of the conflict, there are three implications for economic justice in the transitional context. First, to the extent that regional development projects figure into the agenda, this should not just mean that rural areas become connected to urban areas. In fact, that policy may very well backfire, putting rural enterprises out of business and increasing monopoly and monopsony power of urban-based traders. Second, and related, trade networks should diffuse, with many redundant connections among rural destinations.[80] Third, in ethno-spatially cleaved societies, it may be important to re-knit cross-cutting ethnic ties (particularly among traders and business people) among peripheral towns. For transitional justice practitioners, these implications suggest that truth and reconciliation commissions pay special attention to the business and trading communities, perhaps even coordinating their hearings and processes with rural development programs. It is essential for transitional justice practitioners not to lose sight of rural development more generally in transitional countries. Just as in Paris of 1791, cities may be swelled or overwhelmed by unprecedented levels of rural migrants seeking security and ex-combatants unable

[79] McDougal, "Insurgent Violence and the Rural–Urban Divide: The Case of Maoist India The Case of Maoist India"; Topher L. McDougal, "The Political Economy of Rural–Urban Conflict: Lessons from West Africa and India" (PhD diss., MIT, 2011), http://dspace.mit.edu/handle/1721.1/67560; Topher McDougal, "Production and Predation in a Core-Periphery Model: A Note," *Peace Economics, Peace Science and Public Policy* 17, no. 1 (2011).

[80] This advice resonates with the "sparse networks" mechanism for economically fueled civil wars, as described in Macartan Humphreys, "Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms," *Journal of Conflict Resolution* 49, no. 4 (2005).

to return home. Such in-migration may transform urban spaces into crucibles for the organization of violence[81] and focus the attention of policymakers seeking to "stabilize" the country on the pacification of, and service provision to, urban slums. Consequently, programs that might reduce the intensity of "push factors" in rural areas, slowing the rate of urban in-migration, boosting food production, and reducing the strain on urban social services, may go relatively neglected.[82]

Transitional Justice and the Trilemma

As set forth earlier in this chapter, there is a trilemma at work in the post-conflict context, the horns of which are democracy, market liberalization, and sovereignty. The traditional purview of transitional justice is that of a transition to democratic government—not just a transition out of conflict—and so we might constructively assume at least a nominal commitment to democracy.[83] We are therefore left to choose between embracing strong national sovereignty (including economic sovereignty) and market liberalization. And while I have argued that we still have much to learn about promoting economic justice in democratic transitions, I have also suggested that what we do know leads us unequivocally to choose national sovereignty over market liberalization when and if the two are at odds with one another. Nevertheless, this is rarely the choice made in real democratic transitions—indeed, the felt need to attract foreign direct investment is often of prime concern.[84]

Even in the case of relatively strong states undergoing progressive transitions, such priorities may come to predominate years after the upheaval. In post-apartheid South Africa, for instance, the African National Congress ran on a platform of a universal right to housing, yielding a constitutional right to adequate housing. The latter eventually led to progressive Constitutional Court cases, such as the feted 2000 Grootboom decision, which declared the government in breach of its duties, as well as the 2001 Alexandra decision.[85] Nevertheless, sweeping change for South Africa's homeless has not been forthcoming. More recent legal decisions

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[81] Danny Hoffman, "The City as Barracks: Freetown, Monrovia, and the Organization of Violence in Postcolonial African Cities," *Cultural Anthropology* 22, no. 3 (2007).

[82] Yasmine Shamsie, "Pro-Poor Economic Development Aid to Haiti: Unintended Effects Arising from the Conflict-Development Nexus," *Journal of Peacebuilding and Development* 6, no. 3 (2012).

[83] Pádraig McCauliffe, "Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition," *Journal of Conflictology* 2, no. 2 (2012).

[84] Paul Collier, "Paul Collier's New Rules for Rebuilding a Broken Nation," TED Talk, filmed June 2009, http://www.ted.com/talks/paul_collier_s_new_rules_for_rebuilding_a_broken_nation.html, 14; Paul Collier, *Post-Conflict Recovery: How Should Policies Be Distinctive?* (Oxford: Centre for the Study of African Economies, 2007).

[85] Elisabeth Wickeri, *Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa?* (New York: Center for Human Rights and Global Justice, 2004).

such as in 2004 Bredell have not shied away from unconditional eviction of illegal land occupants to quiet investor fears of Zimbabwe-style redistribution of large private holdings—despite widespread recognition that such land redistribution would be defensible on the grounds of economic, distributive, and restorative justice.[86] The proverbial iron has cooled and liberal market forces have reasserted themselves.

One question therefore is whether transitional justice, in a greater embrace of issues of economic justice, has a role to play in helping post-conflict states to manage the trilemma. I argue that it does and that the traditional remit of transitional justice mechanisms should be expanded to include forums that permit democratic input into the generation of post-conflict development strategy. The vitality of a democracy is not solely the product of elections, but of deep and broad engagement between local communities and various levels of government with a view toward solving real problems.[87] Moreover, sovereignty in a democratic country depends critically upon the legitimacy cultivated by such engagement. Transitional justice and post-conflict development might be rendered more intentionally mutually reinforcing processes. On the one hand, as argued above, transitional justice mechanisms are predicated upon a level of democratic engagement and a rights-based focus that is often missing in the formulation of development policy. On the other hand, the re-knitting of social bonds that restorative justice in particular attempts to achieve is rendered easier when people are working toward common goals or solving common problems,[88] not just coming to grips with past events.

Ultimately, getting more serious about issues of economic justice and economic violence in post-conflict and transitional countries implies sweeping policy changes that will cut across institutions and disciplines. This work is too big and too broad to fall on the shoulders of transitional justice institutions alone, yet it will require broadening the scope of existing transitional justice mechanisms to embrace a more active role in helping to formulate post-conflict development policy and economic agendas. It will demand re-conceptualizing the very aims of transitional justice in far broader terms; and this broadening applies equally to the

[86] Marie Huchzermeyer, "Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell," *Urban Forum* 14.1 (2003).

[87] This now-commonplace observation is often expressed in terms of "thin" versus "thick" democracy. *See*, e.g., Luis Armando Gandin and Michele Apple, "Thin Versus Thick Democracy in Education: Porto Alegre and the Creation of Alternatives to Neo-Liberalism," *International Studies in Sociology of Education* 12, no. 2 (2002).

[88] This idea that cross-group contact yields positive benefits when working toward a common goal (a condition that economists might term a positive-sum game) goes back to Gordon W. Allport, *The Nature of Prejudice* (Cambridge, MA: Perseus Books, 1954). A number of more recent studies have seemed to confirm this hypothesis. *See,* e.g., Saumitra Jha, "Trade, Institutions and Religious Tolerance: Evidence from India," Stanford University Graduate School of Business Research Paper No. 200 (2008).

range of actors and institutions who will necessarily be involved in justice work, even if they do not understand it as such. It will demand that those designing and implementing transitional justice frameworks conceive of them in more holistic terms, linking them to the complex ecosystem of development processes that will ultimately support or undermine the economic sovereignty and stability of the country.

Economic Violence in the Practice of African Truth Commissions and Beyond

Dustin N. Sharp

Over the last three decades, truth commissions in their various forms, together with other transitional justice mechanisms, have become an increasingly popular means of attempting to address legacies of violence. While mandates vary, the core mission of most truth commissions includes an attempt to diagnosis "what went wrong" in the lead up to the conflict or period of abuses, to document and understand the human rights abuses that were perpetrated, particularly from the perspective of those defined as "victims," and to offer prescriptions for the future with a view to preventing recurrence of conflict. Given the tangled political, economic, and social roots of many conflicts, this is no easy task.

Conflicts do not begin in a vacuum, isolated from deeper socioeconomic and historical forces, and their ripple effects rarely cease when the guns fall silent. While there is a tendency to associate conflict with the most extreme forms of physical violence, murder, rape, and torture for example, the violence of conflict is often carried out at multiple levels. "Economic violence" in various forms, including widespread corruption, theft and looting from civilians, plunder of natural resources to fuel wartime economies and fill warlords' pockets, and other violations of economic and social rights, is also deeply woven into the narrative of many modern conflicts, as both driver and sustainer. In addition to violations of bodily integrity, many individuals lose life savings, homes, and the ability to sustain themselves in the future. For many victims, it is the combination of both

A few portions of this chapter, particularly the case study on Sierra Leone, are drawn from an article first published in the Harvard Human Rights Journal. *See* Dustin Sharp, "Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice," *Harvard Human Rights Journal* 26 (2013). 149–178.

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physical violence and economic violence that makes conflict utterly devastating. As a result, the poverty and lack of access to basic social services that may have pre-dated the conflict are all the more crippling in the conflict's aftermath.

But while forms of economic violence are part and parcel of many modern conflicts, the great majority of truth commissions created in the wake of violent conflict have chosen to place almost exclusive emphasis on documenting and analyzing acts of physical violence and other civil and political rights violations. Issues of equally devastating economic and social justice have received comparatively little attention. In the 1980s and 1990s, for example, Latin American truth commissions in Argentina, Uruguay, and Chile largely prioritized violations of civil and political rights, passing over the role of economic crimes in the violence that was perpetrated.[1] The much-lauded South African truth commission focused on murder, torture, and other egregious acts of bodily harm, but not on the economic and structural violence of the apartheid system itself. Where some of these truth commissions have grappled with economic violence in limited ways, it has often been treated as context, useful in helping to understand why physical violence took place, but little more.[2] Whatever merits the truth narrative woven by a commission following such an approach might have, it will inevitably be a truth distorted by the notion that there is a tidy and clean division between economics and politics, between some of the key drivers and sustainers of conflict, and its most egregious effects. Ultimately, the marginalization of the economic within the transitional justice agenda can also serve to distort the policies thought to be necessary in the wake of conflict.[3]

In contrast to these historical patterns, an increasing number of truth commissions in the last decade, many of them African, have taken steps to shift economic violence into the foreground of their work. A few have even identified forms of economic violence as a "root cause" of the conflict in question and included among their recommendations measures intended to address the underpinnings of economic violence. This chapter will explore the pioneering work of five African truth commissions—Chad, Ghana, Sierra Leone, Liberia, and Kenya—using the case studies as a prism to explore some of the practical, legal, and policy dilemmas raised by the greater inclusion of economic violence in the transitional justice agenda. I argue that while these efforts have varied in terms of quality, rigor, and the amount of attention paid to economic violence, they nevertheless represent an important step in moving economic violence into the foreground of the transitional justice agenda and in linking analysis and understanding of some of

[1] James Cavallaro and Sebastián Albuja, "The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond," in *Transitional Justice from Below, Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford and Portland, Oregon: Hart Publishing, 2008), 122.

[2] *See* Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 275–276.

[3] Ibid., 266–268.

the drivers and sustainers of conflict with necessary peacebuilding initiatives in the wake of conflict. At the same time, while African truth commissions have made great strides in moving economic violence into the foreground, they have rarely chosen to frame the issues in question as human rights issues, even where claims of violations of economic and social rights would be strong. This represents a lost opportunity for addressing poverty and other issues of economic violence in the post-conflict context. Going forward, I argue that truth commissions choosing to address economic violence will need to find ways to retain focus despite broadening mandates. Focusing on an "economic violence-human rights nexus" would be one way to achieve such focus.

This chapter will proceed in three parts. In part one, I discuss the role of truth commissions in transitional justice generally, describing their functions, ascribed purposes, and a few broad streams of critique that have been raised relating to their work. I analyze the historic focus of many truth commissions—what Cavallero and Albuja have called the "dominant script"—and the relative invisibility of economic issues therein. I also discuss the spectrum of approaches a truth commission might choose to take in addressing economic violence if it wished to counter these historic patterns. In the second part, I look at economic violence in the practice of five African truth commissions and beyond, using the case studies to outline the promises and pitfalls of attempting to move economic violence into the foreground of transitional justice work. The third and final part concludes the chapter with recommendations for improving the quality and rigor of work on economic violence.

A note about terminology is in order before continuing. In this chapter, I use the terms "physical violence" and "economic violence" as shorthand to refer to a range of phenomena. "Physical violence" refers to murder, rape, torture, disappearances, and other classic violations of civil and political rights. In contrast, "economic violence" refers to violations of economic and social rights, plunder of natural resources, and various forms of economic crime carried out by authorities in violation of generally applicable criminal law, including large-scale embezzlement, fraud, tax crimes, and other forms of corruption. While most of the "physical violence" discussed in this article constitutes a violation of civil and political rights under international law, the concept of "economic violence" includes but is also broader than violations of economic and social rights under international law.[4] Though they discuss the phenomena I have grouped under the category of "economic violence," the truth commissions I discuss in this chapter do not use the term as such. Many of them do not even refer to economic and social rights

[4] Beyond the International Covenant on Economic, Social, and Cultural Rights, economic, social, and cultural rights have the status of binding law in a number of international human rights treaties. Examples include the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of Persons with Disabilities; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights; the European Social Charter; and the African Charter on Human and Peoples Rights.

explicitly, preferring instead to talk about "economic crimes" under national law. I am therefore using the phrase "economic violence" in a relatively broad sense that encompasses the varied economic crimes and economic and social rights violations at issue in the work of the truth commissions used as case studies in this chapter.

Truth Commissions and Transitional Justice

Though many of the mechanisms associated with transitional justice have origins and parallels going back centuries if not millennia, as a domain of policy, practice, and academic study, the modern field of transitional justice emerged in the 1980s and 1990s with the surge of political transitions in both Eastern Europe and Latin America that followed in the wake of the end of the Cold War.[5] The field encompasses the diverse ways in which societies attempt to grapple with a legacy of widespread human rights abuses as part of a transition to a more democratic and peaceful future. In recent years, transitional justice has come to be associated not just with narrow political transitions to democracy, but with post-conflict reconstruction and peacebuilding more generally.[6] As endorsed by the United Nations in a landmark 2004 report, transitional justice is said to comprise

> 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]

Despite the increasingly open-ended nature of transitional justice, the paradigmatic "third wave" transitions at the origins of the field, transitions from authoritarianism and communism to Western liberal democracy were "crucial to structuring the initial conceptual boundaries of the field" and remain relevant today to understanding the field's constructed boundaries and limitations.[8]

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[5] *See generally*, Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I. General Considerations* (Washington: United States Institute of Peace, 1995).

[6] *See* Chandra Sriram, Olga Martin-Ortega, Johanna Herman, "Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice," JAD-PbP Working Paper Series No 1. (May 2009), 13 (discussing increasing linkages between transitional justice and a broader set of peacebuilding activities).

[7] United Nations Secretary General, "The Rule of Law and Transitional Justice in Post-conflict Societies," UN Doc. S/2004/616 (August 23, 2004), para. 8.

[8] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 326.

Transitional justice is often said to be at once backward looking, insofar as it is preoccupied with abuses committed by various factions prior to the transition or conflict, and forward looking, insofar as it attempts to prevent recurrence and lay the groundwork for long-term peace by promoting accountability, reconciliation, and institutional reform. While the transitional justice "toolbox" has broadened to include a range of mechanisms and practices designed to encourage reconciliation and various forms of accountability, the most iconic and perhaps most dominant mechanisms associated with transitional justice are prosecutions and truth commissions.

The Rise of the Truth Commission

When in 1984 Argentina's Sábato Commission (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP) charged with investigating disappearances in the course of Argentina's dirty war published its final report, *Nunca Más* (or "Never Again"), it could hardly know that it was in the vanguard of a worldwide trend.[9] In the nearly three decades that have followed, the concept of the truth commission has been exported throughout the world, with an average of over one new truth commission being created per year since the early 1980s.[10] Priscilla Hayner, perhaps the world authority on the subject, has documented the existence of some 40 modern-day truth commissions.[11] While truth commissions have spanned the globe, ranging from South Africa and South Korea, to Morocco, Germany, and Greensboro, North Carolina, at least 65 % of them have been split almost equally between Latin America and sub-Saharan Africa. With the recent creation of truth commissions in Brazil and Côte d'Ivoire, the worldwide list will likely only continue to grow in the coming years. Truth commissions, together with other transitional justice mechanisms, appear to have become a routine part of the "post-conflict checklist" that includes security sector reform, judicial reform, and national elections. Increasingly, both rhetoric and actual policy choices suggest that the question is no longer *whether* something will be done in the wake of large-scale human rights abuses, but *what* should be done. Truth commissions in their various forms have been and will likely continue to be a consistent part of the response to that question in the years to come.

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[9] *Nunca Más, Report of the Argentine National Commission on the Disappeared* (New York: Farar, Strauss & Giroux, 1986).

[10] While Uganda and others can arguably lay the claim to having held the first truth commission, Argentina's commission is of unquestionably higher influence in the spread of truth commissions around the world and was the first to publish a report that became a best seller.

[11] Prisilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2011), 11–12.

At the most general level, truth commissions across the world have a remarkable similarity. As defined by Hayner, a truth commission:

> (1) is focused on the past, rather than ongoing events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; (5) is officially authorized or empowered by the state under review.[12]

The purposes and goals ascribed to such bodies are far ranging, though some claims appear to be anchored more in articles of faith than rooted in robust empirical evidence. It is often assumed, for example, that establishment of "the truth" is a necessary precursor to reconciliation and national and individual healing, though the historical record and individual experience certainly provide examples that might lead one to question such claims. Others argue with more modesty that while they may be an imperfect mechanism for justice, truth commissions can at least help to create a bulwark against later denial of the abuses that took place and of forgetting.[13] Beyond establishing a historical record of events, truth commissions can also provide a national forum in which victims' experience of conflict can be heard and publically acknowledged, often for the first time. Truth commissions have also been instrumental in articulating policy platforms for necessary change in the wake of conflict, occasionally leading to the implementation of reparations programs and a number of significant prosecutions.[14]

Yet despite their popularity and the powers ascribed to them, truth commissions have not been without their disappointments, failures, and critics. Some truth commissions, including that of one of the case studies used in this chapter, Chad, have been seen as too partisan to do credible work and establish an unvarnished historical record of events. Others, including commissions in Bolivia, Zimbabwe, and the Philippines, have failed to even publish a report. Still others, such as the Liberian commission, have produced lengthy reports that are groundbreaking in certain respects, but nevertheless considered to lack the requisite rigor that the subject matter requires.[15] Even when their work has been of relatively high caliber, the bulk of recommendations issued by truth commissions are in many cases simply ignored by governments. Finally, advocates from the mainstream human rights community have often argued against the use of truth commissions in the absence of prosecutions, calling them a "soft option" for avoiding hard justice, a choice all too readily welcomed by warlords intent on avoiding "real" forms of accountability.[16]

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[12] Ibid.

[13] *See*, for example, Alexander Boraine, "Truth and Reconciliation in South Africa," in *Truth v. Justice,* eds. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 141–157.

[14] Hayner, *Unspeakable Truths*, 5.

[15] For a critical take on the work of the Liberian truth commission, *see,* e.g., Jonny Steinberg, "Liberia's Experiment with Transitional Justice," *African Affairs* 109 (2009): 136.

[16] Reed Brody, "Justice: The First Casualty of Truth?," *The Nation*, April 30, 2001, 25.

As should come as no surprise, truth commissions have also faced withering criticism from academics. When it comes to the question of conflict prevention, political scientist David Mendeloff has argued that many of the core claims and assumptions underlying the creation of truth commissions—including the notion that personal healing promotes national healing, that truth-telling promotes reconciliation, and that forgetting the past necessarily leads to war—are flawed and that "truth-telling advocates claim far more about the power of truth-telling than logic or evidence dictates."[17] In view of some of the questionable claims made, Mendeloff argues, one should not be so quick to proclaim the necessity of truth commission in the aftermath of violent conflict. Other critics like anthropologist Rosalind Shaw have argued that the particular model of truth commission that has been exported throughout the world, rooted as it is in Western traditions of public confession, sin, and forgiveness, may at times conflict with and even serve to displace local traditions of memory, healing, and social forgetting and that more context-specific approaches may be required.[18] Yet despite these trenchant critiques from activists and academics, the truth commission as a worldwide phenomenon continues to flourish.

The Practice of Truth Commissions; Following a Dominant Script

Truth commissions are, of course, not a monolith, and there is no single model that has been used throughout the world. With many different iterations across the globe, truth commissions have demonstrated variability and adaptability across a number of dimensions. They have varied as to the enacting authority establishing them, the scope of abuses addressed, the time and budget allocated to their work, whether they could pardon violators in exchange for a confession, whether to name names and use photographs of those responsible in their final report, whether to provide compensation to victims, the scope of investigative powers, and the legally binding nature of any recommendations that they might issue. As variations in form, composition, and powers demonstrate, the truth commission is an open-ended institution, combining some of the features of a court, an investigative legislative committee, and community therapy body, its ultimate form and power determined only by the institutional imagination of its creators, together with the political and financial realities they face.

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[17] David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?," *International Studies Review* 6 (2004): 356.

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

Yet despite their variability and adaptability across the world, when it comes to the scope of abuses that they address, most truth commissions have generally worked within fairly established parameters that emphasize physical violence and civil and political rights violations, with dimensions of economic violence, including violations of economic and social rights, corruption, and other economic crimes pushed to the margins, if they are addressed at all. For example, one of the world's first truth commissions, the Sábato Commission in Argentina, focused exclusively on forced disappearances, despite the range of civil and political rights abuses in which the military had engaged, to say nothing of economic crimes and corruption. Truth commissions created shortly thereafter in Uruguay (1985) and Chile (1990–1991) focused exclusively on disappearances. Though their mandates were somewhat broader, truth commissions in El Salvador (1992–1993) and Guatemala (1997–1999) focused on a relatively narrow band of the human rights spectrum. In South Africa (1995–2002), only those who had suffered "gross violations of human rights, including killing, abduction, torture, or ill-treatment" qualified as "victims."[19] The apartheid system itself, in some ways perhaps the embodiment of structural and economic violence, was largely treated as context to instances of egregious bodily harm that became the commission's principal focus. As Cavallaro and Albuja have argued, the near invisibility of economic violence in the work of these truth commissions cannot be attributed to an absence of corruption and economic crimes in the countries and political regimes at issue.[20]

That this pattern should be so marked notwithstanding geographic distance and great variability in the underlying conflicts at issue is in a sense remarkable. In tracking this pattern across the truth commissions of Latin America, Cavallero and Albuja have posited that the narrow focus of these early truth commissions developed not because it was particularly well suited to context-specific needs, but due to a process of "acculturation" whereby a dominant script is replicated again and again as a result of "repeated information exchange and consultations with prior commission members and a cadre of international scholars and practitioners in the area."[21] Paige Arthur has similarly documented the vital importance of conferences and information exchanges to the early development of transitional justice norms, practices, and institutional parameters.[22] Once a dominant paradigm for truth commissions as "denouncing only a limited set of human rights violations developed legitimacy in world society," Cavallero and Albuja argue, "modifying the script to include economic crimes and corruption—and thus undoing the process of socialization of the model—became extremely difficult."[23]

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[19] Pablo De Greiff and Roger Duthie, "Repairing the Past: Reparations for Victims of Human Rights Violations," in *The Handbook on Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 8.

[20] Cavallaro and Albuja, "The Lost Agenda," 128.

[21] Ibid., 125.

[22] *See generally*, Arthur, "How 'Transitions' Reshaped Human Rights."

[23] Cavallaro and Albuja, "The Lost Agenda," 125.

The script developed in Latin America subsequently became the model for export throughout the world. Perhaps most importantly in terms of truth commission genealogy, the narrow Latin American model was largely the one adopted in South Africa. As explained by Alexander Boraine, former vice chairperson for the South African commission: "In the work leading up to the appointment of the TRC, we were greatly influenced and assisted in studying many of these commissions, particularly those in Chile and Argentina."[24] The South African commission remains today perhaps the most famous truth commission in the world and certainly the most influential in sub-Saharan Africa. In my dealings with human rights activists across sub-Saharan Africa over the last 10 years, I have found that many are not even aware that the South African commission was preceded by other truth commissions, having come to see it as a uniquely "African" approach to addressing transitional justice issues.

The narrow script of these early Latin American truth commissions is of course not unique to the field of transitional justice, but reflects a deeper ambivalence regarding the proper status of economic and social rights within the international human rights community.[25] Though formally universal and "indivisible"[26] from civil and political rights, economic and social rights have long lingered at the periphery of the focus and action of the key players in the international human rights movement, including the largest and most influential NGOs, Amnesty International and Human Rights Watch.[27] This was particularly true in the 1980s and 1990s when the Latin American script for truth commissions was being developed.

The Costs of Undue Narrowness

Whatever the precise historic reasons for the exclusion of economic violence from the ambit of truth commissions, the invisibility of the economic in their work is not without its costs. As one of the means of defining the historical record and

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[24] Boraine, "Truth and Reconciliation in South Africa," 142–143.

[25] Louise Arbour, "Economic and Social Justice for Societies in Transition," *International Law and Politics* 40 (2007), 5.

[26] World Conference on Human Rights, June 14–25, 1993, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (July 12, 1993); United Nations Millennium Declaration, G.A. Res. 55/2, UN Doc A/RES/55/2 (Sept. 13, 2000).

[27] Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* (2004): 63; Curt Goering, "Amnesty International and Economic, Social, and Cultural Rights," in *Ethics in Action; The Ethical Challenges of International Human Rights Nongovernmental Organizations*, eds. Daniel Bell Jean-Marc Coicaud (Cambridge: Cambridge University Press, 2006), 204 (tracing the history of Human Rights Watch and Amnesty International's early ambivalence toward economic and social rights).

creating the officially sanctioned narrative of conflict, exclusion of the economic has the potential to distort our understanding of the governance regimes that helped in part to precipitate the conflict and impoverish our understanding of the conflict dynamics themselves. For example, the impression shared by some that corruption was limited during some Latin American dictatorships may be due in part to the fact that truth commissions created to document abuses committed by these regimes paid little attention to issues of corruption, in spite of the economic mismanagement and abuses by elites that served as among the driving forces of the underlying conflicts.[28] Looking back, regimes that perpetrated both economic violence and physical violence may come to be remembered as firm, perhaps occasionally abusive, but strict, orderly, and fiscally clean. There could be a danger of romanticizing such figures in the messy and often crime-ridden world of some modern Latin American democracies.

As the number of truth commissions across the world has grown, many of them have come to play an increasingly important agenda-setting role for post-conflict governments, issuing detailed policy recommendations to a variety of actors on matters touching the rule of law, human rights, and broader governance more generally. In some cases, these recommendations are even binding as a matter of law, with Liberia and Sierra Leone being two examples. Where economic violence has played a key role in driving abuses both during and in the lead up to the conflict, excluding these issues as a matter of course risks producing a set of recommendations that are not well tailored to the crisis at issue, and which do not lay the proper groundwork to prevent recurrence of the dynamics that led to the conflict.

The risk of such distortions will likely vary from country to country and conflict to conflict. For example, whatever the relevance to certain Latin American countries of a more narrow approach to transitional justice that largely excludes economic violence, one might particularly question its applicability to other regions of the world with completely different legacies of conflict and governance. It has been argued, for example, that for many countries in sub-Saharan Africa, with their history of neopatrimonial governance regimes based on systems of patronage and clientelism, dimensions of economic violence such as corruption might logically arise "as one of the central justice issues of such transitions."[29] In such cases, the seemingly self-replicating nature of the dominant script carries with it the risk of excluding issues that are potentially fundamental to post-conflict peacebuilding. In countries such as Liberia, Sierra Leone, and the Democratic Republic of the Congo where plunder of natural resources, corruption, and looting from civilians have featured so prominently, any truth commission that would choose to ignore such major features of the conflict would produce a seriously distorted narrative and set of policy recommendations.

In sum, exclusion of economic violence from the ambit of truth commissions carries the risk of distorting the historical record, hindering understanding of the

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[28] Cavallaro and Albuja, "The Lost Agenda," 129.

[29] Arthur, "How 'Transitions' Reshaped Human Rights," 359.

drivers of conflict, and biasing the reforms and initiatives thought necessary in the wake of conflict. Whether dealing with conflicts in Africa, Latin America, or elsewhere, there is simply no compelling a priori reason that economic violence should be excluded from the ambit of transitional justice mechanisms. Rather, the scope of inquiry and work should be based on a highly contextualized understanding of the roots of the conflict in question and the needs of the transition.[30] In many instances, I argue, such an analysis would lead to what has been alternately called a "deeper, richer, and broader vision of justice" and a "thicker" or more holistic version of transitional justice in which economic violence and physical violence are placed in the foreground.[31]

Writing a New Script

To say that a truth commission should not exclude economic violence from the ambit of its work as a matter of course does not answer the question of how and to what extent economic violence should be addressed. As reflected in the case studies discussed later in this chapter, a truth commission might choose to take a relatively broad or narrow approach to issues of economic violence in transition. At the broadest end of the spectrum, a truth commission with a wide temporal and subject matter mandate might look deep into history, examining the socio-economic underpinnings and structural violence that often predate conflicts by decades if not centuries. Such an approach might involve looking at instances of corruption and other economic crimes not only during a particular conflict period, including sale of natural resources and other national assets to fuel violent conflict, but in the years leading up to the violent conflict as well. At its most direct, such an approach would involve framing many such issues not simply as useful background to understand why fighting broke out, but as independent violations of international and national law, including violations of economic and social rights. If such a commission were to take a similarly broad and deep approach to its recommendations for legal, policy, and institutional reforms, one could imagine measures that would include, among others, affirmative action, land tenure reform, redistributive taxation, the creation of anti-corruption commissions endowed with serious power, and special development assistance to regions most economically affected by the conflict. At the most extreme end, such measures might be hard to distinguish from the work of the field of economic development.

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[30] Miriam Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal* 15 (2002): 91–97 (calling for a goal- and culture-specific response to mass atrocities).

[31] Alexander Boraine, "Transitional Justice: A Holistic Interpretation," *Journal of International Affairs* 60 (2006), 18; Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34 (2007): 417.

Of course, to say that in addressing economic violence a truth commission might choose such an approach does not mean that it would necessarily be wise to do so. At its most extreme, an especially broad approach to economic violence might risk political backlash from entrenched elites, dooming even more modest recommendations made by the commission to irrelevancy. Such a broad approach would also bring costs in terms of the extra time, expertise, and finances needed to address the range of both physical violence and economic violence that took place.

At the narrow end of the spectrum, a truth commission might include economic violence within its ambit, but do so in a relatively restricted way, looking perhaps only to egregious violations of economic and social rights that rise to the level of war crimes committed during a relatively restricted period.[32] One could also imagine an approach where a commission would choose to document violations of economic and social rights only to the extent they were concomitant with civil and political rights violations (seizure of assets from political prisoners, for example). Relatively narrow approaches to addressing economic violence in transition would be less likely to risk political backlash and would be less of a strain on a commission pushing up against resource constraints, both temporal and financial.

Economic Violence in the Practice of African Truth Commissions and Beyond

While the dominant script described above has shaped the narrative of the majority of the world's truth commissions, an increasing number of truth commissions, many of them African, have taken steps to shift economic violence into the foreground of their work. A few of them, Liberia and Sierra Leone, have even gone so far as identify forms of economic violence as among the "root causes" of the conflict in question and included in their recommendations measures intended to address the underpinnings of economic violence. In this section, I will present case studies examining the background and work of five African truth commissions, Chad, Ghana, Sierra Leone, Liberia, and Kenya. I will also briefly look at the work of two truth commissions outside of Africa, East Timor and the Solomon Islands. While they may not be the only examples of truth commissions that have focused on economic violence to more than a small degree, they represent many of the most prominent examples in the world today and serve as a prism to explore some of the practical, legal, and policy dilemmas raised by the greater inclusion of economic violence in the transitional justice agenda.

[32] *See* Evelyne Schmid, "War Crimes Related to Violations of Economic, Social and Cultural Rights," *Heidelberg Journal of International Law* 71, no. 3 (2011): 3, 5, 9–17.

Chad: The Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-president Habré, His Accomplices and/or Accessories (1990–1992)[33]

Chad's post-independence history has been tumultuous, punctuated at seemingly regular intervals by internal conflict and *coups d'état*. Though the relatively recent discovery of oil and the construction of a pipeline to facilitate its export have filled national coffers to unprecedented levels, landlocked and isolated, Chad remains one of the Africa's poorest, worst-governed, and most conflict-ridden countries.[34] Chad's most notorious military leader, Hissein Habré, served as president from 1982 until 1990, receiving significant support during his reign from both France and the United States who saw in Habré a bulwark against Libyan expansion in the region. Habré's reign "was marked by paranoia, clanism, severe political repression, and torture."[35] The chief arm of terror in the police state created by Habré was the Directorate of Documentation and Security (DDS), the security force chiefly responsible for torture and other acts of political repression. Brought to the pinnacle of power in a bloody coup, Habré's fall from power came when one of his former lieutenants, Idriss Déby (still serving as Chad's president over two decades later), mounted a successful insurgency.

Almost immediately after Habré's fall from power, President Déby authorized the creation of a "Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories." As suggested by the name given, the commission's mandate included both classic violations of physical integrity, including "illegal imprisonments, detentions, assassinations, disappearances, torture, and acts of barbarity," and crimes of an economic nature, including embezzlement and theft of public and private goods.[36] From the start, however, the ambitious goals assigned to the commission were not matched by the resources or time allocated to it. With a total of 8 months to do its work (after an extension was granted), a miniscule budget, the loss of two of its four vehicles for a period of time due to ongoing combat in parts of the country,

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[33] Commission d'Enquête du Ministère Chadien de la Justice sur Les Crimes et Détournements de l'ex-Président Habré et de ses Complices.

[34] Chad currently ranks 175 of 182 on the United Nations Human Development Index, 173 of 180 on Transparency International's Corruption Perception Index, and 46 of 48 on the Mo Ibrahim Index of African Governance. Life expectancy is 47.7 years, and 80 % of the population lives on less than one US dollar a day. For a discussion of the Chad–Cameroon oil pipeline, *see* Dustin Sharp, "Requiem for a Pipedream; Oil, the World Bank, and the Need for Human Rights Assessments," *Emory International Law Review* 25 (2011): 379.

[35] Sharp, "Requiem for a Pipedream," 387.

[36] Decree Creating the Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, His Accomplices and/or Accessories, Decree No. 014/P.CE/CJ/90 (December 29, 1990), Article 2.

and threats from members of the security forces they were investigating, the commission's efforts were greatly hampered and delayed.[37] Complicating matters further, due to a shortage of space, the commission was assigned to work in the former headquarters of Habré's secret police, the DDS, an institution described by the commission as "the principal organ or repression and terror" of the Habré regime, perhaps the worst possible place to locate a truth commission in all of Chad.[38] The negative effects of this location on the willingness of former political prisoners to testify cannot have been eased when the commission began to use prisoners from the jails to perform mass exhumations at the sites of Habré's largest atrocities.[39] The commission's report was published in the early 1992.

To some, the work of the commission was little more than a political hatchet job designed to make Habré look worse than the man who replaced him, a type of victor's justice.[40] Indeed, the loose language of the report's opening pages does little to dispel this impression, with passages likening Habré to a "camel thief" with innate criminal penchants.[41] The failure to fully account for the round figures offered in the report regarding the number of victims—Habré is said to be responsible for 40,000 victims, 80,000 orphans, and 30,000 widows—might also lead one to question the report's rigor.[42] But despite its many shortcomings, the Chadian commission's report is groundbreaking in a number of respects: It was the first truth commission report to name names, publishing the actual photographs of key torturers, many of whom were still serving in government at the time.[43] The commission called for the prosecution of Habré, as well as torturers serving in government.[44] Finally, the report also took an open look at the role of foreign powers (France, the United States, and others) in supporting the Habré regime, including the budgetary support and training provided to the DDS itself.

Beyond these notable achievements, a perhaps underappreciated innovation in the commission's work is the degree to which the report addressed a range of economic issues, going so far as to divide its report, and indeed its staff, into

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[37] *Les Crimes et Détournements de l'ex-Président Habré et de ses Complices* (Chadian TRC Report) (Paris: L'Harmattan, 1993), 9.

[38] Ibid., 21.

[39] Ibid., 150.

[40] Priscilla Hayner, "Fifteen Truth Commissions—1974 to 1994: A Comparative Study," Human Rights Quarterly 16 (1994): 625.

[41] *Chadian TRC Report,* 18.

[42] Ibid., 97.

[43] Hayner, "Fifteen Truth Commissions," 625.

[44] While the government of Chad has done little to follow these recommendations, a coalition of Habré's victims and human rights NGOs have been attempting to prosecute Habré for violations of the Convention Against Torture since 1999. For a look at the genesis of these efforts, *see* Dustin Sharp, "Prosecutions, Development, and Justice; The Trial of Hissein Habré," *Harvard Human Rights Journal* 16 (2003). For a review of more recent developments in the Habré case, *see* Laura Bingham, "Trying for a Just Result? The Hissène Habré Affair and Judicial Independence in Senegal," *Temple International and Comparative Law Journal* 23 (2009): 77.

two sections, one looking at violations of physical integrity and the other at the embezzlement of public goods. As published in the commission's final report, the efforts of the economic crimes section are a little disappointing. For the most part, it appears that the commission could not make sufficient sense of the maze of presidential accounts, national and international, to tease out the full workings of Habré's financial system. The most concrete evidence of personal pillage appears to be the scramble for money on the eve of Habré's fall from power when millions of dollars were stolen from the state's coffers. The commission makes no attempt to link any of these large-scale financial crimes to economic and social rights and the general poverty that has plagued Chad during the Habré regime and after. Given the complexity of the work, short staffing, and the limited amount of time allotted, the quality of the economic section's work is perhaps not surprising.

Despite the apparent inability of the financial crimes unit to do the type of forensic accounting that would crack the code of Habré's alleged personal embezzlements, the Commission's report nevertheless breaks ground in illustrating the links between political repression and violence, on the one hand, with economic violence on the other. In documenting the widespread torture and disappearances that characterized Habré's brutal reign, the report documents in some detail the DDS practice of routinely seizing the family wealth of Habré's thousands of political prisoners, including bank accounts, houses, cars, and other physical goods. The proceeds were used not only to line the pockets of the members of the DDS and provide houses to Habré regime loyalists, but also to bridge DDS budgetary gaps.[45] In a very real sense then, political terror in Habré's Chad was directly fueled by economic violence. The combination of political violence and economic violence had huge implications for the extended families of political prisoners. To illustrate this, the commission attempted to estimate the number of indirect victims of Habré's political violence by looking at the number of orphans and widows who lost all economic support as a result of the disappearance of a father or mother, together with the seizure of all of the family's goods and eviction from their home. In doing so, the Chadian truth commission broke new ground in helping to illustrate the socioeconomic ripple effects of political violence.[46]

Ghana: The National Reconciliation Commission (2003–2004)

Though Ghana is often known today for relative prosperity and stability in a troubled region, its post-independence history has at times been overshadowed by authoritarian and military rule, including four military *coups d'état* since 1966. Human rights abuses occurred under all periods of military rule, but intensified under Jerry John Rawlings' two socialist-inspired military regimes spanning a total

45 *Chadian TRC Report*, 27–28.

46 Ibid., 97.

period of 11 years from the late 1970s until the early 1990s. These periods were characterized by killings, abductions, disappearances, torture, and confiscation of property.[47] While periods of civilian rule were generally associated with increased, if imperfect, respect for rights, such administrations were generally too short-lived to counter the impunity that had taken root. Ghana's experience with military rule came to a formal close in 1993 after a new constitution came into effect and democratic elections were held returning Rawlings to power in a civilian capacity. The new constitution included an amnesty provision for past abuses.

The second democratic elections of 2000, which replaced Rawlings with John Kufor, brought a definitive close to Ghana's experience with military rule. In the lead up to the elections, John Kufor promised an active policy of national reconciliation intended to address Ghana's troubled past.[48] In the early 2003, a National Reconciliation Commission (NRC) began its work in the same building where Kwame Nkrumah declared Ghana's independence 46 years earlier. The NRC would be the first national initiative to provide Ghanaians opportunities to publically relate their experiences of abuse and to seek redress.

The creation of the NRC proved controversial in several respects. Some questioned the need for a commission some 9 years into Ghana's democratic transition. There was also a lively debate surrounding the time period and types of violations that would constitute the commission's mandate, particularly whether the commission would focus only on periods of military rule or, as ultimately decided, abuses under both military rule and civilian rule. With respect to the commission's subject matter mandate, "Many raised the issue of whether the violations examined by the commission should be confined to violations of bodily integrity or extend to socio-economic violations and the reproduction of structural injustice."[49] In the end, the commission was instructed to investigate violations and abuses of human rights relating to seven categories—"killings, abductions, disappearances, detentions, torture, ill-treatment, and seizure of properties"[50]—but it was also given the flexibility in investigate "any others matters" it deemed necessary to promote reconciliation.[51]

To outsiders looking at the seven enumerated categories of abuses within the commission's mandate, the addition of "seizure of properties" might appear anomalous, coming as it does after some of the most egregious violations of civil and political rights abuses imaginable. Seen through the lens of Ghanaian history, however, particularly periods of military rule under Rawlings' two socialist-inspired regimes where contested economic narratives were central to the story of

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[47] Robert Ameh, "Doing Justice after Conflict: The Case for Ghana's National Reconciliation Commission," *Canadian Journal of Law and Society 21 (2006):* 96.

[48] Nahla Valji, "Ghana's National Reconciliation Commission: A Comparative Assessment," International Center for Transitional Justice, Occasional Paper Series (September 2006).

[49] Ibid., forward.

[50] The commission understood seizure of property to include "confiscation of factories, houses, vehicles, goods, cash crops and food crops, and various sums of money." *National Reconciliation Commission Report (Ghana NRC Report)* (2004), Vol. I, 92.

[51] Ibid., 10–14.

military repression, it would have been strange to exclude dimensions of economic violence from the work of any such commission. Under Rawlings' military regimes, much of the political violence targeted economic actors accused of "kalabule," or corruption and profiteering. Those thought to be rich and politically conservative, including the market women who controlled private trading businesses, were particularly targeted. Abuses against such figures included severe physical violence as well as property seizure. Such targeted violence may have reached its peak in 1979 with the execution without trial of two former heads of state and six senior military officers accused of corruption.[52]

In documenting the economic violence perpetrated by soldiers during Ghana's military regimes, the commission's report helps to illustrate the complicated interplay between economic violence and political violence. Indeed, as presented in the report, forms of economic violence and political violence are almost inextricably intertwined during certain periods of Ghana's history. In tailoring its recommendations to the abuses documented, the commission ultimately urged a range of policies relating to the economic violence that was meted out, ranging from restitution, to a special memorial for traders, one of the groups heavily brutalized by a combination of physical violence and economic violence.[53] Beyond property seizures, the commission also looked at labor violations as forms of economic violence. Unlike some dimensions of economic violence such as property seizure and the infamous burning of the central market in Tamale, which the commission does not generally conceptualize as violations of economic and social rights per se, it describes summary dismissals of public servants by various military regimes as "one form of human rights abuse."[54]

Despite its many achievements, the Ghanaian commission was criticized for being narrowly legalistic in its approach to truth and reconciliation, something reflected in the final report's narrative style.[55] The commission's report does not, for example, contain a particularly deep analysis of the broader social conditions of wealth and poverty that may have in part inspired the abusive practices of "revolutionary" governments. Rather, it largely seeks to detail an atomized catalog of abuses perpetrated by soldiers, from killing and abductions to property seizure. Unlike the work of the Chadian truth commission, there is little effort devoted to detailing the ripple effects of both economic violence and political violence on the lives of families and their ability to support themselves. Thus, although the report breaks important ground in documenting aspects of economic violence, in some ways it continues to represent a more decontextualized and conventional human rights approach to reporting on violations. The story told in the commission's report becomes primarily a narrative of unchecked indiscipline by young rogue soldiers who mete out revolutionary zeal. The remedy to the

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52 Ibid., 96.

53 *Ghana NRC Report*, Vol. II, 42.

54 *Ghana NRC Report*, Vol. I, 76.

55 Valji, "A Comparative Assessment," 10.

problems evoked by such a narrative in turn tends to focus on the need to reign in unchecked security forces rather than to address broader social and economic conditions. This stands in contrast to the work of truth commissions analyzed later in this chapter such as Liberia and Sierra Leone that have explicitly identified large meta-drivers of the conflicts and abuses in question such as poverty, disenfranchised youth, and the scrum for natural resources, and tailored recommendations to address these "root causes."

Sierra Leone: Truth and Reconciliation Commission (2002–2004)

In March 1991, a rag-tag group of disaffected students and would-be revolutionaries, led by Foday Sankoh and supported by Charles Taylor in neighboring Liberia, launched their first attacks in Eastern Sierra Leone under the banner of the Revolutionary United Front (RUF). Though the RUF was in its earliest days loosely united against the endemic corruption and inept governance of President Momoh's government, their efforts quickly degenerated into what appeared to be a war against the civilian population as drug-addled child soldiers raped, pillaged, maimed, and killed with impunity. In the 11 years that followed, the civil war enveloped the entire country, killing as many as 50,000 people.[56] Though notorious for its extreme brutality and mass amputations, it was also a conflict that gave the world a new vocabulary for thinking about the linkages between natural resources and violent conflict as factions vied for control of Sierra Leone's lucrative alluvial diamond fields, the so-called blood diamonds that helped in part to sustain the conflict. The war only came to an end in 2002 with the intervention of the United Nations, Guinea, and the British army. The Lomé Peace Accord that brought a formal end to the conflict called for the creation of a Truth and Reconciliation Commission. Subsequently, the government also asked the United Nations for help in setting up a Special Court for Sierra Leone in order to try those who "bear the greatest responsibility."[57]

Tasked with making sense of a war that seemed to many to be without purpose, the Sierra Leone Truth and Reconciliation Commission took a historically deep and thematically broad view of the roots and drivers of the conflict. In interpreting its mandate, the commission adopted a broad view of the concept of human rights, comprising civil and political, economic, and social, "as well as other categories such as the right to development and the right to peace."[58] It emphasized in its analysis

[56] John Bellows and Miguel Edward, "War and Institutions: New Evidence from Sierra Leone," *The American Economic Review* 96 (2006): 394.

[57] Statute of the Special Court for Sierra Leone, Art. 1.

[58] *Witness to Truth*, *Report of the Sierra Leone Truth and Reconciliation Commission* (2004), Vol. I, 37–38.

dimensions of both physical violence and economic violence, going so far as to place corruption, poverty, and structural violence as the core building blocks for the conflict: "the central cause of the war was endemic greed, corruption, and nepotism that deprived the nation of its dignity that reduced most people to a state of poverty."[59] Rather than treating facets of economic violence and structural violence as mere context, the commission traces the intertwined nature of economic violence, physical violence, and political violence both before and during the conflict itself. Thus, for example, in documenting violence that took place in the course of the conflict, the commission lists destruction of property, looting of goods, and extortion, along with serious violations of bodily integrity such as killing, assault, and rape as among the most common "violations" that took place with no attempt to create hierarchies of suffering.[60] It also examined the secondary economic and social rights impacts of the conflict, such as the impact on the health and education of women and children.[61]

The inseparable nature of economic violence and physical violence in the course of the Sierra Leonean conflict is perhaps expressed most clearly in the way that natural resources played into conflict dynamics, both before and during the conflict itself. While to many outsiders, the conflict in Sierra Leone was often seen as little more than a brutal scrum for the nation's diamond resources, in fact, it might more plausibly be argued that diamonds played into both greed and grievance dynamics. Thus, for example, in the decades before the eruption of conflict, the commission examines the role of elites in siphoning off the country's diamond wealth to the detriment of development and poverty alleviation, creating some of the conditions, including widespread frustration with corruption, which made the conflict possible. Once the conflict erupted, control of diamond production became a key strategy for several factions, influencing the targeting of certain areas with attendant human rights consequences. The commission found it important to emphasize, however, that this did not feature highly in the early years of the conflict, ultimately concluding that while diamonds helped to fuel and sustain the conflict, plunder was not the driving factor that precipitated the RUF's initial brutal campaign.[62]

The report's recommendations, which are in principle binding upon the government of Sierra Leone,[63] are ambitious and wide ranging. While the bulk of the recommendations appear to target stronger rule of law and greater respect for civil and political rights, there are also recommendations tailored to dimensions of economic violence as expressed before and during the conflict, including a repeal of laws preventing women from owning land, the need for a stronger anti-corruption commission, better basic service delivery, and better and more transparent use of diamond revenues. Taken together, the recommendations of the Sierra Leonean

[59] *Witness to Truth*, Vol. II, 27.

[60] Ibid., 35.

[61] Ibid., 99–105.

[62] *Witness to Truth*, Vol. I, 12.

[63] Republic of Sierra Leone, The Truth and Reconciliation Act (2000), Section 17.

commission were perhaps the most comprehensive and most holistic set of recommendations issued by any truth commission up to that time.

In issuing its recommendations, the commission attempted to calibrate what was realistically achievable in the short, medium, and long term. In this respect, it is worth noting that recommendations targeting improvement in economic and social rights are more likely to be qualified by the commission as something the government must "work toward" rather than something that is "imperative." While this is in part understandable given Sierra Leone's resource limitations, it may also serve to reinforce the notion that these are "backburner" issues compared to more pressing issues relating to civil and political rights. In this regard, it is unfortunate that the commission did not more explicitly couch the economic violence that it documented in explicitly human rights terms. As things stand, though there have been notable exceptions, including the passage of Sierra Leone's three gender bills,[64] many of the commission's recommendations have not been implemented. Understanding that misuse of diamond revenues and other instances of corruption can lead to violations of the rights to health and education, for example, might have given activists and citizens groups a tool to campaign and press for the implementation of certain recommendations.[65]

Liberia: Truth and Reconciliation Commission (2006–2009)

On Christmas Eve 1989, former government minister Charles Taylor and a small group of Libyan-trained rebels launched an insurgency from neighboring Côte d'Ivoire in an attempt to topple the abusive regime of Samuel Doe, who ruled Liberia from 1980 to his death in 1990. The civil war that would consume Liberia for the next 14 years, punctuated only by a brief relative peace from 1996 to 1999, would result in the loss of as many as 250,000 lives and the displacement of one million individuals. While staggering in themselves for a country whose pre-war population numbered just over two million, such numbers only begin to capture the brutality of a conflict now famous for its use of child soldiers, widespread sexual violence, and rapacious looting as Charles Taylor and other rebel faction leaders encouraged their troops to "pay themselves."[66] Charles Taylor sustained his war effort in large part though plunder of Liberia's natural resources, including timber and diamonds, many of which were trafficked from neighboring Sierra

[64] Specifically, the Domestic Violence Act, the Registration of Customary Marriage and Divorce Act, and the Devolution of Estates Act.

[65] Lisa Laplante, "Transitional Justice and peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework," *International Journal of Transitional Justice* 2 (2008): 337–350.

[66] *Truth and Reconciliation Commission, Consolidated Final Report (2009) (Liberia TRC Report),* Vol. I, 44.

Leone. The war only came to a definitive end in 2003 with the combined interventions of neighboring (Guinea), regional (Nigeria), and international powers (the United Nations and the United States). In early 2006, a transitional government was replaced by Ellen Johnson Sirleaf, Africa's first and only elected female head of the state, and her new administration.

The comprehensive peace accords of 2003 provided for the creation of a Truth and Reconciliation Commission that was to "deal with the root causes of the crises in Liberia, including human rights violations."[67] The commission, which was not actually launched until the early 2006, was tasked with investigating "gross human rights violations and violations of international humanitarian law," including massacres, rape, murder, and extrajudicial killings. It was also mandated to investigate "economic crimes, such as the exploitation of natural or public resources to perpetuate the armed conflict."[68] In terms of temporal scope, the commission's mandate actually stretched back to 1979, some 10 years before the formal beginning of the civil war, the final year of Americo-Liberian rule. It was further permitted to look at "any other period preceding 1979." This was a significant concession to many of Liberia's so-called natives, who continue to view the tiny but still influential elite who ruled the country since its founding as a colony in 1822 with some suspicion and who associate the structural violence and disenfranchisement woven throughout Liberia's history as fundamental to understanding the eruption of war in 1989.

From the outset, the Liberian commission's trajectory was a shaky one. The commission was cash-strapped, and its commissioners generally perceived as lacking the requisite stature and expertise. Disputes within the commission even led to a fistfight between two female commissioners. Of the former warlords who testified, some chose to grandstand and even express open contempt for the commission. At times, the conduct of commissioners appeared deeply unprofessional, including episodes of "giggl[ing] when victims narrated unusual forms of atrocities, including particularly creative forms of rape."[69] The commission's final report has been criticized for lacking rigor, even described by one critic as "unsightly and horribly flawed."[70] Perhaps unsurprisingly, two of the nine commissioners refused to sign the final report.

Despite these serious shortcomings, the commission's final report was a bombshell. It recommended 98 people for prosecution and that 50 people be barred from public office for 30 years due to support they gave to Liberia's warring factions. The list of those subject to censure included President Ellen Johnson Sirleaf herself, an icon of the international women's movement and widely respected as an exemplar of good governance. While some welcomed the recommendations for

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67 *Republic of Liberia, An Act to Establish the Truth and Reconciliation Commission for Liberia* (Liberian TRC Act), May 12, 2005, preamble.

68 Ibid., Article IV, Section 4(a).

69 Lansana Gberie, "Truth and Justice on Trial in Liberia," *African Affairs* 107 (2008): 428.

70 Steinberg, "Liberia's Experiment," 136.

prosecution and censure, they have arguably made enemies of even some of the report's natural allies.[71]

Given the drama surrounding the commission and the controversy arising out of its recommendations for prosecution and censure, it is perhaps unsurprising that some of the more progressive aspects of its work have been underappreciated. The commission was, for example, the first to take statements from citizens living abroad, particularly the large diaspora community living in the United States. It was also innovative in terms of its attempts to detail violations against women and children.[72] Finally, the commission broke ground in its relatively extensive exploration economic violence. Indeed, the report squarely identifies as among the "root causes of the conflict" factors such as poverty, an "entrenched political and social system founded on privilege, patronage… and endemic corruption which created limited access to education, and justice, economic and social opportunities," and "historical disputes over land acquisition, distribution and accessibility."[73]

In reading the commission's account of the civil war, this more holistic approach makes clear that physical and economic violence are almost impossible to separate in attempting to understand the unfolding of Liberia's civil war. For example, the commission details instances of Charles Taylor's soldiers helping to guard the very logging companies who were paying Taylor for the privilege of operating in his territory, which in turn allowed Taylor to buy arms and take more territory, extorting even more companies and further diverting the proceeds of plunder and pillage into his war machine. Other aspects of the war economy, including widespread looting, are also documented. Though the report does not do so explicitly, one can trace in its narrative of the war economy an exaggerated form of the plunder and patronage system that in many ways started with Liberia's colonization by repatriated slaves some 150 years earlier.

Beyond the war economy, other dimensions of economic violence, such as issues of land tenure, are treated rather breezily and without the necessary rigor that complex issues require. Similarly, while many of the recommendations relating to economic violence seem sensible enough, including further investigations into those individuals accused of economic crimes, repatriation of unlawfully acquired monies, and the building of a new culture of integrity in politics, in general, the report's recommendations section is unmoored from the rigorous documentation and empirical data one would expect to find in the body of a report. Thus, although the likelihood that many of its recommendations will be adopted has already been deeply undermined by the controversy surrounding its recommendations for censure, the overall shoddy workmanship of the report, including the general lack of congruence and consistency between the various sections of the report, and between the report and its recommendations, does not help matters.

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[71] Ibid.

[72] Paul James-Allen, Aaron Weah, and Lizzie Goodfriend, "Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia," International Center for Transitional Justice (May 2010), 3.

[73] *Liberia TRC Report*, Vol. II, 16–17.

If its groundbreaking though incomplete treatment of economic violence is to be welcomed, one can lament the lost opportunity to make tighter connections between the economic crimes discussed in the report and violations of economic and social rights under international law. Indeed, economic and social rights receive scant mention in the report as an explicit matter, though there are a few vague mentions of "economic rights." In the end, the war economy detailed in the report comes to be seen as a product of unchecked greed and criminality by certain individuals, but there is little attention to the actual suffering it imposed on the people, an effect compounded by the near complete absence of victim voices throughout the report. In addition, the failure to cast economic violence as rights issue robs would be activists and reformers of an important lobbying tool using a universal vocabulary that would serve to link wartime violations of economic and social rights with violations before and after the conflict took place. The Liberian commission's approach to economic violence is therefore both ambitious and progressive, but also serves as a cautionary tale. Documenting economic violence is a complicated exercise that requires time, finances, and expertise. A commission without these resources should think carefully about how best to pursue a broad mandate.

Kenya: Truth, Justice, and Reconciliation Commission (2009–Ongoing)

Compared to some of its more troubled neighbors, Kenya has, to outsiders at least, appeared to be a relatively stable and peaceful nation. Yet Kenya's post-independence history has a darker side and has been "marked by authoritarianism, political repression, gross violations of human rights, and widespread corruption."[74] Ethnic cleansing, detention without trial and of political prisoners, torture, and extrajudicial killings have all featured in the nearly 40 years of rule under presidents Kenyatta and Moi and the Kenya African National Union party (KANU).[75] Shortly after historic elections brought an end to KANU rule, a new coalition government under President Kibaki created a task force to study the question of holding a public inquiry into past injustices. Based on broad-based consultations, the 2003 task force recommended the creation of a "Truth, Justice, and Reconciliation Commission" (TJRC), but its recommendations were ignored. It would take the post-election chaos of 2007, where politically orchestrated violence left more than 1,100 people dead, to provide the impetus for further action. In the wake of that violence, a national dialogue and reconciliation process mediated by former UN

[74] Godfrey Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *International Journal of Transitional Justice* 3 (2009): 447.

[75] *See generally*, Makau Mutua, chairperson, "Republic of Kenya, Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission," *Buffalo Human Rights Law Review* 10 (2004): 15.

Secretary General Kofi Annan helped to create consensus that "historical injustices," issues at the core of the post-electoral violence, finally needed to be addressed. In 2008, the Kenyan parliament adopted an act providing for the establishment of the TJRC.[76]

As established, the mandate of the Kenyan TJRC is spectacularly broad, not only in terms of temporal scope, going back to 1963, but in terms of the range of "historical injustices," it was authorized to investigate during its two-year operational period.[77] Those issues range from egregious acts of physical violence, such as "abductions, disappearances, detentions, torture, sexual violations, murder, and extrajudicial killings" to rather ill-defined "economic rights" and "economic crimes," including irregular and illegal acquisition of public land, grand corruption, exploitation of natural or public resources, and "perceived economic marginalization of communities."[78] While the commission's mandate is exceptional when viewed against the "dominant script" followed by most truth commissions throughout the world, the transitional justice narrative in Kenya has long seen forms of economic violence as central to the historical injustices that need to be addressed.[79] Indeed, in tracing the history of transitional justice initiatives in Kenya, Godfrey Musila has argued that economic issues actually have a longer pedigree and are more central to most accounts of victimization in Kenya than civil and political rights, which "were late entrants to the Kenyan debate."[80]

The sheer breadth of the commission's mandate, however, led some to worry that its ambitious goals may not be manageable in terms of time and cost. Before the TJRC even began its work, Human Rights Watch, for example, argued that the commission should either be given a longer life or the scope of its mandate reduced.[81] In examining the possibility of overreach, the task force established to study the possibility of a truth commission in 2003 noted that, particularly in Kenya, "economic crimes are so intertwined with human rights violations that it is impossible to establish watertight compartments between the two types of violations."[82] Nevertheless, as a means of ensuring that an examination into historical injustices remains focused and manageable, it argued that that "a truth commission should investigate a selected set of economic crimes that directly lead to the violations of economic, social, and cultural rights."[83] In other words, by focusing spe-

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[76] *Republic of Kenya, The Truth, Justice and Reconciliation Act, 2008* (Kenyan TRC Act).

[77] The commission began its work in August 2009, yet as a result of repeated delays and extensions, its final report had yet to be issued as of this writing in January 2013.

[78] The Truth, Justice and Reconciliation Act, 2008.

[79] Godfrey Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *International Journal of Transitional Justice* 3 (2009): 446.

[80] Musila, "Options for Transitional Justice in Kenya," 460.

[81] Human Rights Watch, "Kenya: Proposed Truth Commission Bill Seriously Flawed," Press Release (March 13, 2008).

[82] Mutua, "Report of the Task Force," 41.

[83] Ibid., 42.

cifically on an economic crimes–human rights violations nexus, a truth commission might frame and focus its inquiry into historical injustices in ways that are holistic, yet limited enough to be manageable. As adopted, however, the TJRC Act mentions "economic crimes" and "economic rights," but the terms go largely undefined and their overlap with violations of internationally recognized economic and social rights is unclear. The apparent distinction made in the Act between "human rights," on the one hand, with "economic rights," on the other hand, does little to clarify the muddied waters.

As of this writing, release of the TJRC's final report has been greatly delayed, and it remains to be seen whether it will produce a report without rigor, similar to the Liberian report discussed above, "mired in the enormous details of history that… obfuscate[s] and preclude[s] possibilities for legal accountability."[84] Thus, only time will tell whether the commission's final product will be as rigorous and groundbreaking as its mandate is holistic and broad.

Economic Violence in the Work of Truth Commissions Outside of Sub-Saharan Africa

Though this chapter has primarily focused on the role of economic violence in the work of African commissions, truth commissions outside of Africa have also begun to move beyond the dominant and relatively narrow script that has traditionally circumscribed the work of truth-seeking bodies around the world. In East Timor, the report of the Commission for Reception, Truth, and Reconciliation (2002–2005), often known by its Portuguese Acronym, CAVR, took an extended look at economic violence under the Indonesian occupation.[85] The commission's final report, *Chega! (*or "enough"), has a chapter explicitly dedicated to exploring violations of economic and social rights, including the rights to an adequate standard of living, health, and education. In general, the commission's analysis is comparatively sophisticated, linking up a range of Indonesian policies with violations of economic and social rights in creative and unexpected ways, including the use of education as a propaganda tool as a violation of the right to education, forced resettlement of villagers into areas with poor soils and malarial conditions as a violation of the right to health, and the manipulation of coffee prices to fund military operations as a violation of the right to an adequate livelihood.[86] The tight linkage between the commission's work on economic violence and specific violations of economic and social rights under international law continues into the recommendations section, with specific recommendations grouped under headings

[84] Musila, "Options for Transitional Justice in Kenya," 453.

[85] Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, CAVR.

[86] *Chega!, The Report of the Commission for Reception, Truth and Reconciliation in Timor Leste (CAVR), Final Report* (2005), part 7.9, 3.

such as "right to education and self-determination" and "right to health and a sustainable environment."[87] Overall, the commission's elaborate treatment of economic and social rights violations under Indonesian occupation stands in contrast to many of the African case studies discussed above, which have examined various forms of economic violence, but rarely done so in explicit terms of economic and social rights. Nevertheless, despite offering perhaps the most extensive and explicit treatment of economic and social rights of any truth commission to date, for purposes of reparations, the East Timorese commission's definition was limited to victims of violations of civil and political rights.[88] While the necessity of such distinctions as a matter of resource constraints might be argued, such practices have the effect of promoting hierarchies of rights and granting de facto impunity to the architects of economic violence.

Beyond East Timor, in 2009, the Solomon Islands Truth and Reconciliation Commission was created in order to examine the ethnic violence arising out of disputes over land ownership and economic displacement that wracked the region between 1997 and 2003 in a period known as "the Tensions."[89] The scope of the commission's work includes investigating and reporting on a relatively broad range of physical violence and civil and political rights, including killings, abductions, enforced disappearances, torture, rape, sexual abuse, forced displacements, deprivation of liberty, and serious ill-treatment.[90] In contrast, the range of economic rights to be so investigated are comparatively limited, including only "the right to own property and the right to settle and make a living," but the commission is also tasked with assessing the impact of the conflict on key sectors such health and education. The act establishing the commission makes clear that any such assessment is to be done "without diluting emphasis on individual victims."[91] It therefore appears that parliament was intent on precluding a loose and overly broad inquiry unmoored from concrete violations of human rights.[92] When the five-volume final report is made public, it will be clear whether economic violence has indeed been of significant if circumscribed importance to the commission's work.[93]

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87 Ibid., part 11, 10–12.

88 Ibid., part 11, 40–41.

89 For background on "the Tensions," *see generally* James Cockayne, "Operation Helpem Fren: Solomon Islands, Transitional Justice and the Silence of Contemporary Legal Pathologies on Questions of Distributive Justice," NYU School of Law Center for Human Rights and Global Justice, Working Paper Series, No. 3 (2004).

90 *The Solomon Islands, Truth and Reconciliation Act, 2008* (Solomon Islands TRC Act), section 5.

91 Ibid.

92 Ibid.

93 While the commission's final report was given to the Prime Minister in the early 2012, as of this writing, it is unclear when it will be made widely publically available.

Broadening the Script, Yet Retaining Focus

With few exceptions, the transitional justice institutions of the 1980s and 1990s worked to build a justice narrative that was relatively narrow, focusing largely on egregious acts of physical abuse, while issues of economic violence were pushed to the sidelines. Seen against the backdrop of this "dominant script," the work of the truth commissions outlined in this chapter is pioneering, even while the work of some individual commissions has been deeply flawed. Taken together, the work of these commissions suggests that the dominant script is slowly giving way to a much more holistic conception of justice in transition in which economic violence is increasingly placed in the foreground.

One might well ask *why* a number of African commissions appear to have broken from the dominant script to varying degrees. While the answer presented here is somewhat speculative, there are at least three plausible explanations. First, in the case of Chad, it appears to have worked in such splendid isolation that it was not heavily influenced by the dominant script to begin with.[94] At the same time, Chad's cash-strapped government appeared to be desperate to reclaim some of the funds embezzled by Habré on the eve of his fall from power, making a focus on corruption important if only out of self-interest. Second, speaking more broadly, unlike the early Latin American commissions, most of the commissions outlined in this chapter were operating at a time when work on economic and social rights had become much more prevalent in the UN and NGO world more generally, with activists vigorously pressing the need to give both civil and political and economic and social rights equal pride of place. If the early Latin American commissions of the 1980s and 1990s in some ways expressed the human rights zeitgeist of the era, they also represented the least common denominator of what could be agreed to at the time. Yet by the end of the millennium, the parameters of the possible in the world of human rights and transitional justice had expanded, as reflected in the work of the commissions discussed in this chapter. Finally, for at least some of the conflicts presented in this chapter, economic violence was so deeply written into the logic of the conflict that to focus exclusively on violations of physical integrity would have seemed wholly inadequate. It is simply not possible to understand conflicts in Sierra Leone and Liberia, for example, without reference to facets of economic violence.

Whatever the precise reasons for this evolving work, the empirical evidence of a change in the dominant script that these commissions represent has been accompanied by signs of a normative shift in international policymaking. For example, a recent report of from the UN Secretary General observes "a growing recognition that truth commissions should also address the economic, social, and cultural rights dimensions of conflict to enhance long-term peace and security."[95] Given

[94] Cavallaro and Albuja, "The Lost Agenda," 138.

[95] United Nations Secretary General, "The Rule of Law and Transitional Justice in Post-Conflict Societies," UN Doc. S/2011/634 (October 12, 2011), para. 7.

these emerging normative and empirical trends, now is the time to take stock of the work that has been done with an eye to improving future practice.

One of the challenges illustrated in this chapter is that while the work of some truth commissions is starting to broaden, it is not clear that the budgets and time allocated to do this work have increased commensurately. Addressing legacies of economic violence in the context of a truth commission is challenging work, at times requiring new methods of research and documentation that call on particular sets of expertise. In many instances, such work does not lend itself to the relatively straightforward victim hearings that have been the mainstay of many truth commissions in the past. To some extent, the case studies discussed in this chapter reflect the dangers of broadening mandates without at the same time broadening the resources needed to accomplish the work. In Chad, for example, the attempt to unravel Hissein Habré's alleged financial schemes did not appear to benefit from the time, financial wherewithal, or expertise in forensic accounting that would have been required to thoroughly and convincingly expose the economic misdeeds of the former regime. In attempting to document aspects of economic violence in Liberia and East Timor, the truth commissions in question appeared to be especially reliant on secondary sources, a fact that may detract from credibility when so many other aspects of a commission's work are based on primary fact-finding and first-hand testimony.[96] Finally, analytically, the work and mandates of several of the truth commissions discussed in this chapter bear a confused and inexact relationship with economic and social rights recognized under international law, which at times gives the final reports a rather loose and freewheeling feel.

Given the unlikelihood in the near term that the resources allocated to truth commissions will increase dramatically over historical levels, commissions addressing aspects of economic violence will need to find better ways to manage broadening mandates. To some extent, increased work on economic violence might give transitional justice more relevance to new constellations of actors and institutions, including development and financial organizations. Some issues of resources and expertise might therefore be addressed through new partnerships. In the end, however, the work of the Liberian truth commission illustrates that partnerships alone cannot ensure quality work, and many truth commissions will still need to find some kind of filtering device to tighten the focus on economic violence to manageable levels.

One potential filter that might increase the rigor of work on economic violence would be to focus specifically on an "economic violence-human rights nexus," looking primarily at those aspects of economic violence that most directly and egregiously impact economic and social rights recognized under international law. While this approach might at times exclude certain kinds of conduct from a commission's purview—not every act of corruption might been seen to undermine the right to health or education, for example[97]—it could also provide some benefits in terms of requiring truth commissions to focus on the rights bearers themselves, the victims of economic

[96] In its final report, the East Timorese commission acknowledged its heavy reliance on secondary sources as one of the limitations of its analysis. *Chega!*, part 7.9, 5.

[97] *See* Chris Albin-Lackey, "Corruption, Human Rights, and Activism: Useful Connections and their Limits," in this volume.

violence, without getting lost in numbers and open-ended historical analysis. A sharper focus on the intersection of economic violence and internationally recognized economic and social rights would also likely give civil society and citizen groups a powerful mobilization tool once a truth commission issues its report. Given the extent to which the recommendations of many truth commissions are simply ignored by governments, this should not be overlooked. Of course, in focusing on a rights nexus, truth commissions should be wary not to become overly lawyerly and atomistic, losing the broader thread and historical context in which rights violations are produced. As with so many other questions of transitional justice, striking the right balance will be key.

Beyond looking to an economic violence–human rights nexus, there may be other ways of circumscribing mandates to manageable levels. Each truth commission will have to find a context-appropriate solution to addressing economic violence. But despite the risks of taking a more holistic approach to questions of justice in transition, there is simply no a priori reason to exclude economic violence from the mandate and work of a truth commission as a general mater. This is particularly true when economic violence has been written into the logic of the conflict itself, as illustrated in various ways by the work of the truth commissions described in this chapter. The script is slowly changing, and those changes bring new challenges. Just as the human rights movement has found that greater embrace of economic and social rights has required hard thinking about new advocacy strategies and research methods, so too the field of transitional justice needs to focus greater energies on devising more holistic yet rigorous and disciplined approaches to questions of economic violence and justice in transition.[98] Examining the pioneering work of African truth commissions on economic violence helps to give some important clues as to where this work must begin.

[98] *See generally* Roth, *"Defending Economic, Social and Cultural Rights"* (explaining the particular methodological challenges associated with trying to apply a "naming and shaming" documentation strategy to violations of economic and social rights); Goering, *"Amnesty International and Economic, Social, and Cultural Rights"* (tracing the history of Amnesty International's ambivalence toward economic and social rights).

Reparations and Economic, Social, and Cultural Rights

Naomi Roht-Arriaza

In its first decade or two, the transitional justice agenda focused largely on violations of basic physical integrity rights. Early reparations programs also responded to this narrow band of violations: Reparations were paid for the dead, but only more reluctantly for the living, in places like Chile or Argentina. Reparations, both through courts and through government administrative programs, were generally limited, where provided at all, to monetary compensation for wrongful death, disappearance, torture or arbitrary detention or exile, and to health and education services for the survivors and families of victims of those violations.

In 2012, more and more voices are calling on policymakers to pay attention to a much broader band of rights violations under the banner of transitional justice.[1] In part, this is due to the continuing fragility of post-conflict/post-dictatorship countries where economic and social marginalization drives continuing violence and dampens enthusiasm for democratic reform. The early hopes that trials and truth commissions focused on core crimes and civil and political rights violations would usher in robust, inclusive democracies have, not surprisingly, proven more complicated. Critics, including many from countries that have implemented one or more transitional justice measures, began to note that despite a wealth of transitional justice measures, the everyday lives of

[1] There were some early advocates for a broader view of transitional justice to include economic, social, and cultural (ESC) rights. A seminal work on the need for distributive alongside reparatory justice was Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002). Another early effort to link impunity and reparation for ESC rights, albeit not explicitly in a transitional justice context, was United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural rights)*, UN. Doc. E/CN.4/Sub.2/1997/8, 1997.

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the majority had changed little or even gotten worse. The critique of transitional justice as too "top-down," too elite-driven, and too responsive to donor rather than local priorities merged with a sense that the emphasis on civil and political rights in transitional justice reflects the privilege those rights receive in Western rights discourse.

There is now recognition that justice is broader than just criminal justice and a look at root causes of conflict is a key component of truth-seeking. The prevailing view insists that socioeconomic rights must have their due in considering both the violations and their remedy. Broadening the transitional justice agenda to consider economic violence has special challenges for the theory and practice of reparations.

The states where reparations are needed are generally poor, with many competing challenges and few resources. They face a lack of adequate infrastructure or employment opportunities, intermittent or non-existing provision of basic services, and political systems characterized by clientelism/patronage, ethnic tensions, and/or shaky post-conflict compromises. The number of victims/survivors runs to the tens or even hundreds of thousands, with acute and varied needs. Many of these states receive significant amounts of foreign aid, but that aid tends to be short term and fickle. The underlying causes of armed conflict tend to be structural and resource related as often as ideological.

While there is considerable support for the idea that transitional justice generally needs to grapple more centrally with economic, social, and cultural (ESC) rights, it is not clear how reparations fit into that picture. On the one hand, if ESC rights are to be the subject of the investigations, reports, and recommendations of truth commissions[2] and prosecutors are to bring criminal charges for at least those ESC rights violations that also violate humanitarian law,[3] then following through with some kind of reparations would seem necessary to give concrete expression to truth-telling and acknowledgment of wrongs, especially those judged severe enough to be punished. Moving beyond seeing ESC rights as simply background conditions, to grappling with what "guarantees of non-repetition"[4] for such violations might entail will require detailed attention to redress and reparation. Violations of ESC rights can have a devastating effect, often extending over several generations, as victims are denied educational and medical services, social protection, and opportunities for work. In situations of armed conflict, deprivations of land, food, water, and medical care can kill large numbers of people, and even

[2] *See* chapter by Dustin Sharp in this volume for a discussion of how recent truth commissions, including those of Liberia, Sierra Leone, East Timor, and elsewhere, have dealt with ESC rights violations.

[3] Evelyne Schmid, "War Crimes Related to Violations of Economic, Social and Cultural Rights," *Heidelberg Journal of International Law* 71, no. 3 (2011): 540.

[4] United Nations General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," UN Doc. A/RES60/147, December 16, 2005.

those who survive can suffer long-term damage that affects the quality and length of their lives. Expanding the focus of ESC rights violations to include economic crimes like corruption and spoliation could also provide funds for reparations programs.[5]

On the other hand, some cautions are in order. Reparations for violations of law are necessarily limited, targeted, and incomplete. As several scholars have pointed out: "In cases where economic exploitation has been systemic and institutionalized, individual reparations are inadequate. In fact, reparations, by individuating compensation, may impede systemic change by surrogating redistribution."[6] Thus, if the goal is ESC rights for all, reparations are at best a palliative and at worst a distraction. They can also set up new conflicts between resources aimed at the poor and those reserved for a subset of the poor known as "victims"—many of whom may not be those most in need.[7] Moreover, using a reparations program to try to get at deeper structural inequalities is fraught with difficulties, from the astronomical sums needed to the inability to adequately determine the beneficiary class.[8] And conversely, attempting to provide reparations for too broad a category of violations will not only be prohibitively expensive, but also risks turning reparations into a "theory of everything" expected to create broad social change—a load that no reparations effort can bear.

This chapter proceeds as follows: A brief set of definitions and description of types of reparations and their potential contributions to protecting and ensuring ESC rights, followed by a look at how existing administrative reparations programs have dealt with rights like education, health, and housing in the context of "integral reparations" for other kinds of violations. The chapter then turns to efforts to deal directly with violations of ESC rights, especially arising from forced displacement and dispossession of land and property. Finally, it considers how reparations programs could be more effectively used to deal with violations of socioeconomic rights, especially where these stem from systematic discrimination and exclusion.

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[5] *See generally* Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" *International Journal of Transitional Justice* 2, no. 3 (2008): 310–330.

[6] Ismael Muvingi, "Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies," *International Journal of Transitional Justice* 3, no. 2 (2009): 180.

[7] This is the argument President Mbeki of South Africa made against reparations to victims of apartheid-era rights violations. *See also* Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 285 (Stating "only certain victims became fully part of the narrative of reconciliation. The suffering of many living victims is denied recognition or relegated to a lesser level of significance because their suffering is seen as politically problematic or ambiguous").

[8] For an account of the evolution of Peru's reparations program in light of these concerns, *see* Jemima Garcia-Godos, "Victims Participation in the Peruvian Truth Commission and the Challenge of Historical Interpretation," *International Journal of Transitional Justice* 2, no. 1 (2008): 63–82.

History and Definitions

Economic, Social, and Cultural Rights

ESC rights have a long pedigree in social justice theories and have clearly been defined as "human rights" since 1948. The Universal Declaration of Human Rights enumerates the right to an adequate standard of living, including food and shelter, the right to education, to physical and mental health, to social security, to decent conditions of work, protection of children and of maternity, to the benefits of culture, and to property. The subsequent Covenant on ESC Rights expounded on many of these rights, although due to its Cold War provenance it excluded a right to property. Regional human rights conventions, including the European, Inter-American, and African, do include a property right, although they vary in the extent to which ESC rights are justiciable.[9] A series of subsequent "soft law" instruments[10] and national court cases[11] have further delineated the contours of these rights. In particular, under the Covenant on ESC Rights, ESC rights are progressive, such that states agree to "undertake to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights…."[12] However, even though the obligations are progressive, they are real, and states must be planning, programming, and moving to increase observance of these rights over time while avoiding backsliding. The non-discrimination obligations of the Covenant are also immediate.[13]

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[9] The European Convention on Human Rights and Fundamental Freedoms and American Convention on Human Rights do not explicitly include ESC rights per se, although they often deal with such rights in terms of property rights, provisions against discrimination or on due process. A separate European Social Charter in Europe and Protocol on ESC Rights (Protocol of San Salvador) in the Americas do contain such rights, but only some of those rights are justiciable through the regional human rights courts. The African Charter on Human and Peoples' Rights does include some ESC rights. In addition, the International Committee on ESC Rights, the expert committee that monitors implementation of the International Covenant on ESC Rights will be able to hear individual communications once the Optional Protocol allowing such communications comes into force.

[10] Examples of such "soft law" sources include the various "general comments" published by the United Nations Committee on Economic, Social, and Cultural Rights; "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," a set of principles regarding the nature and scope of violations of ESC rights developed by a group of civil society and human rights experts, adopted on January 22–26, 1997; and "The Right to Food Guidelines" developed by the Food and Agricultural Organization of the United Nations in 2006.

[11] See the South African Constitutional Court's cases on right to housing (*Government of the RSA v Grootboom* 2000 (1) SA 46 (CC)) and health (*Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC)); *see also* the Colombian Constitutional Court's cases on the rights of the internally displaced, discussed below.

[12] International Covenant on Economic, Social and Cultural Rights, *entered into force* January 3, 1976, 993 U.N.T.S. 3, art. 2.1.

[13] Ibid., art. 2.2.

A lack of ESC rights, or their extremely unequal distribution, is at the heart of many armed conflicts. Additionally, it is often a desire to quell demands for more equitable distribution of opportunities and resources that triggers and underlies the maintenance of dictatorships. During armed conflicts or dictatorships, provision of ESC rights generally worsens. Educational and medical facilities are damaged or destroyed, their personnel threatened or dispersed. Widespread dislocation and forced dispossession of land, houses, livestock, and crops affect basic rights to food and shelter. Water wells, crops, and other sources of sustenance are often deliberately destroyed and access to food impeded. It is difficult, if not impossible, for many people to earn a living or to attend classes in situations of constant insecurity and dislocation. Water sources may become contaminated or too dangerous to access; schooling becomes a distant memory. War exacerbates denials of all basic ESC rights.

After the conflict, the population that bore the brunt of the fighting will often look to an improvement in ESC rights as a marker of positive change that distinguishes the new dispensation from the old. Those who have been victims of the conflict will not necessarily look to be returned to the situation they were in before their losses occurred; rather, they will look for a transformation of prior inequitable social relations as the most appropriate redress for their losses. Often, changes in access to opportunities and resources will be what makes the conflict, and the sacrifices, "worth it" for survivors. This presents a tall order for transitional governments often burdened simultaneously with enormous expectations, little capacity, few resources, and a host of economic and security challenges.

A new government will also be measured externally by how well it responds to demands for basic ESC rights. The UN Development Programme's Human Development Index has, since the 1990s, ranked countries in terms of measures like infant morbidity and mortality, educational level, women's rights, as well as GDP growth. The Millennium Development Goals set standards on clean water, sanitation, health, education, and social security toward which governments are expected to strive. Models for economic development have evolved considerably toward one that is, in the best of circumstances, "sustainable," participatory, sensitive to gender and minority needs, environmentally sound, and equitable. It is this vision of a rights-respecting regime, especially as it concerns the life conditions and chances of excluded or marginalized sectors, where the clearest overlap with reparations occurs.

Reparations

Reparations before 1945 were largely a state-to-state affair. Subsequent efforts focused on trying, to the extent possible, to undo the effects of the harm to individual victims, with the emphasis on remedies for violations of physical integrity rights. International law has evolved to acknowledge a victim's rights to reparation

for serious harms they have suffered.[14] According to the 2005 United Nations "Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," a victim of said violations has the right under international law to (a) equal and effective access to justice; (b) adequate, effective, and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[15] Such reparation "should be proportional to the gravity of the violations and the harm suffered,"[16] but may take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[17] The right to a remedy or to reparations is also articulated in the basic human rights instruments, specialized conventions, non-binding instruments, and the Rome Statute of the International Criminal Court.[18]

Reparations are distinguishable from reconstruction and from victim assistance first, by their roots as a legal entitlement based on an obligation to repair harm, and second, by an element of recognition of wrongdoing, atonement, or "making good." Reparations are therefore a limited category of responses to harm. Although reparations can be provided by either courts or administrative processes, this discussion focuses mainly on the latter.

Reparations are classified along three different axes: the Basic Principles and Guidelines' categories of restitution, rehabilitation, compensation, and guarantees of non-repetition; The distinction between material and symbolic reparations; and the distinction between individual and collective reparations. Given the aims of this chapter, I will focus on the individual and collective axis, adding in the other dimensions of each.

For the most part, reparations have been granted for violations of core rights to physical integrity: Killings, forced disappearances, torture, and imprisonment. A few administrative reparations programs include exile or forced displacement as harms, but few provide individualized redress for displacement alone.

Individual reparations can take the form of monetary compensation, either a single lump-sum payment or a periodic pension. They can also take the form of restitution—of land, other property, jobs, pensions, civil rights, or good name—and rehabilitation, which can be physical, mental, and socio-legal. Publicly reversing an unjust criminal conviction, for example, might constitute

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[14] United Nations General Assembly, "Basic Principles and Guidelines on the Right to a Remedy." For a thorough examination of the UN Basic Principles, and other sources of the right to reparation in international law, *see* Dinah Shelton, "The United Nations Principles and Guidelines on Reparations: Context and Contents," in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, eds. Koen De Feyter et al., Stephan (Holmes Beach, FL: Intersentia, 2006), 11–33.

[15] United Nations General Assembly, "Basic Principles and Guidelines on the Right to a Remedy," art. 11.

[16] Ibid., art. 15.

[17] Ibid., arts. 19–23.

[18] Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas," *Hastings International and Comparative Law Review* 27 (2004): 160–165.

socio-legal rehabilitation. Individual reparations may be symbolic as well as material: For example, the Chilean government's delivery of a personalized copy of the Truth and Reconciliation Commission's report with a letter indicating where the name of each individual victim could be found had a profound reparative value to the individuals involved. Other individual reparations may include the exhumation and reburial of those killed, apologies to individual survivors or next-of-kin, or the publication of the facts of an individual case. Individual reparations can also take the form of government service packages: Enrollment in government health plans, or preferential access to medical services, scholarships, and the like.

The concept of collective reparations on the other hand is more complex and is used to mean different things in different contexts. As with individual reparations, these may include material as well as symbolic measures, restitution, rehabilitation, and satisfaction as well as compensation. "Collective" may refer to the beneficiaries of the reparation, as when religious, ethnic, or geographically defined communities have suffered harm to their institutions, property, or social fabric and social cohesion as groups and therefore need to be repaired as such. The easiest example of this meaning is the restitution or compensation for places of worship damaged during the period in question, but it could also involve restitution of communal land, or measures to end discrimination on the basis of language. The meaning of collective reparations has also referred to the type of reparation rather than the beneficiary. Thus, public goods provided to a specific community, but open to all, would constitute this type of collective reparation. While individual or family access to scholarships or hospital privileges would constitute individual reparation, the building of schools or health clinics in affected communities, open to all residents, would be collective reparation. This of course raises the difficulty of dealing with assigning victims to groups or communities for reparations purposes, a problem magnified by demographic and social shifts during the course of an armed conflict. Some of the difficulties specific to collective reparations are explored below.

Material Reparations and the Right to an Adequate Standard of Living

Reparations intersect with ESC rights, first, because the material reparations offered—compensation, restitution, rehabilitation—are both forward and backward looking, aimed at both redressing past harms and transforming lives for the future. For the most part, these are not reparations for ESC violations, although there is recognition that ESC rights were violated concomitantly with the basic civil rights that are being compensated. Thus, the family members of those killed or forcibly disappeared suffer, in addition to the incommensurate harm of losing a loved one and the mental anguish involved, the loss of a breadwinner, the need to flee, the loss of schooling opportunities, and the like. The jurisprudence of the

Inter-American Court of Human Rights, for instance, compensates survivors for these lost opportunities through the concept of changes in their "life's project" (*proyecto de vida*).[19] However, these harms are rarely pulled apart and compensated separately in administrative reparations programs.

The bedrock of early transitional justice-related administrative reparations programs was monetary grants to individual survivors or to the families of those killed or disappeared. These took two forms: Lump-sum, one-time payments and periodic pensions. One-time payments have been far more common. In a few places, payments were specifically for forced displacement or exile, with the attendant change in life prospects, but usually all the harms were lumped together.

The one-off payment has the advantage of relative speed and simplicity—it requires only a temporary budget allocation, and a temporary bureaucracy to administer payment. For victims who have immediate needs or are elderly or destitute, quick money can be a godsend. Where communities are at odds or disagree on other forms of redress, one-off compensation may also be the only realistic option. One-off payments also most resemble the tort damages available in courts for personal injury. However, the amounts of money involved are almost always far less than what a court would grant for equivalent harms. They are rarely large enough to be life changing and are often granted long after the harms occurred. Studies have shown that most one-off payments are used to pay off debts, for medical expenses or school fees, or are simply consumed without creating any real long-term change in the recipient's standard of living.[20] They are too small to have much impact on local markets or to allow people to set up microenterprises, especially without any additional training in finances, banking, or business management.

Individual reparations in the form of lump-sum cash payments can create other types of difficulties. Awarding such payments requires the creation of victim registries, which can be time consuming and difficult where people do not have personal identification or death certificates for their loved ones.[21] Payments can provoke community dislocations: Families divided, towns flooded with hucksters promising fast checks, long-lost and unknown family members suddenly appearing, and some recipients assaulted or threatened into turning over the proceeds of

[19] This concept was first introduced in the Loayza Tamayo case (Loayza Tamayo case, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 42 (November 27, 1998)) and developed in subsequent cases. *See generally* Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case-Law and Commentary*, trans. Rosalind Greenstein (Oxford: Oxford University Press, 2011), 229–230.

[20] Liselotte Viaene, "Voices From the Shadows: The Role of Cultural Contexts in Transitional Justice Processes" (Doct. law diss., Universiteit Gent, 2010); Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (London: Routledge, 2011).

[21] The creation of Peru's registry, for example, has taken roughly seven years, and as of this writing, individual payments are still pending.

their check.[22] Intra-family dynamics can also be impacted: While in some cases women can be empowered by receiving disposable cash in their name, in others male relatives will quickly lay claim to the compensation paid their wives and mothers, which may not then serve its intended purposes.[23] At their worst, such individual payment programs are prone to clientelism, patronage politics, and corruption. They can become the antithesis of reparatory.

There is also a tension, present in all reparations programs but especially acute where individual compensation is involved, between addressing the harm and addressing the need. That is, should reparations programs focus on the neediest victims—the disabled, the elderly, children, and widows—or on those who are legally entitled to reparations because they suffered the worst violations? Of course, in some cases, the categories will overlap, but not in all. Most programs either try to use interim reparations to handle the most urgent cases, and/or prioritize on the basis of a combination of factors, including need, the type of violation, the geographical area, and (unofficially) the political affiliation or importance of the victims.

Pensions or periodic payments may do better. Such payments can act as a kind of social security and can provide minimum economic subsistence. In Chile, for example, reparations included a lump-sum payment equal to a years' pension (approximately US $530 in 1996 currency) and a monthly pension, based on the average wage, for spouses, parents, and children of those killed or disappeared, to be paid according to a fixed percentage of the total for each type of relationship. Pensions do need to be tied to inflation and require a new or existing bureaucracy (for example, one that already deals with pensions for the elderly or for veterans) in order to disburse the funds. In places where the state has no existing structures for periodic distribution of funds, especially in remote areas, a pension system will take longer to set up.

Service provision—for health care, education, or housing—is often a part of reparations schemes. Such provision requires coordination and financing agreements among several government ministries and several levels of government (central, provincial, municipal) and may not serve its goals without a change in how existing government ministries deal with poor and marginalized populations more generally. Where services in general are poor, granting access to them may only be a reminder of the callousness and ineffectiveness of government.

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[22] Marcie Mersky and Naomi Roht-Arriaza, "Guatemala," in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, DC: Due Process of Law Foundation, 2007), 7–32. Elizabeth Lira notes a similar result in the Mapuche areas of Chile, where "in very poor communities the economic reparations distorted family relations of solidarity and negatively affected family and community networks." Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), 63.

[23] Viaene, *Voices From the Shadows*; Ruth Rubio Marin, *The Gender of Reparations* (Cambridge: Cambridge University Press, 2009). *See also* Mersky and Roht-Arriaza, "Guatemala."

Health care and education are the most common services provided as part of reparations packages. As noted above, these can take the form of individual entitlements to medical services or scholarships. Many reparations programs have focused on psychosocial services to allow survivors to cope with the mental harms caused by the violations. Such services have proven successful where they are tailored to the specific needs of, for example, torture victims: An example is the Program of Reparation and Integral Health Services, known by its Spanish acronym as PRAIS, which used specifically trained therapists.[24] In Guatemala, specialized NGOs were contracted to provide these services after it became clear that government psychologists had neither the specialized training nor the empathy with largely indigenous victims necessary to succeed.

Medical care has been a part of reparations "packages" in Chile, Peru, Sierra Leone, and elsewhere. Usually, this entails access for victims and their immediate family to the state-run medical service at little or no cost. The problem has been that these clinics offer indifferent or poor quality care and often do not have the specialized services required. In Sierra Leone, for example, fistula surgery on war victims has been carried out by international NGOs because the local medical system does not have the capacity. At times, racist or sexist attitudes toward victims among medical personnel can discourage them from using existing services.

In victim surveys around the world, education of children ranks high on the list of what people want from a reparations program. Education can be an especially important form of reparation because those who spent their childhoods running and hiding will have missed out on formal schooling; adults may be illiterate and adult education may be an important component of economic betterment. Moreover, because reparations programs have tended to take a long time to establish and fund, education becomes a multigenerational goal, able to respond to the intergenerational aspects of the harm. Reparations programs have often provided scholarships, money for school fees, and the like. For example, in Chile, the reparations body provided free schooling for victims and their descendants until age 35, including post-secondary education. Plans in Guatemala for integral reparations included a focus on bilingual education and Mayan heritage studies, although neither were widely put into practice. In Sierra Leone, educational support is also provided, although since reparations have taken so long to implement, a large number of potential beneficiaries have now aged out.[25] A number of reparations programs have included small vocational training projects, but these have been only modestly successful in leading to permanent employment.

To date, productive activities make up only a small part of the plans of reparations programs. In Guatemala, the National Compensation Program (PNR) set aside a small fund for productive activities and announced that the program

[24] Lira, "The Reparations Policy for Human Rights Violations in Chile," 68.

[25] Mohamad Suma and Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone* (New York: International Center for Transitional Justice, December 2009).

would support investments in, for example, solar energy. It also proposed a fund for women structured along the model of a communal bank. Women would receive small amounts (US $300 to $350) for productive activities, along with literacy classes. The program is still not under way, although several other (private) microcredit schemes are operating within the most hard-hit areas. Several Peruvian community projects approved under the collective reparations program described below involve productive activities, from planting pasture and buying grazing animals to a handicrafts center, although most focus on the basic infrastructure necessary for agriculture and rural life. In South Africa, the private sector Business Trust, in collaboration with local governments, provided skills training and co-financing for tourism and other productive projects in communities heavily affected by apartheid, including several that have recently recovered land. However, although the goals include reconciliation and reconstruction, the program is billed as an antipoverty rather than a reparations initiative.[26]

Collective Reparations

Collective reparations, as defined above, include a variety of public goods provided to a community as a whole, including school buildings, community centers, clinics, roads, irrigation and electrification projects, markets, and the like. They are intended to compensate for harms to community viability and solidarity created by the violations at issue. Governments often prefer collective reparations to individual ones because they are perceived as less expensive to fund and administer and because beneficiaries tend to understand them as a form of government largesse. For the latter reason, human rights advocates tend to be suspicious of collective reparations, seeing them as an attempt to pass off infrastructure development that is already part of government's responsibility as reparations, thus in effect "double-dipping."

This dilemma is most easily solved by having collective reparations supplement, rather than replace, existing government responsibilities in the area of education, health, or infrastructure development. For example, health programs could focus on counseling, supporting traditional medicine, or training new community-based health providers. It is also important to consider the long-term sustainability of such projects, especially infrastructure projects. Who will maintain them over time? Will they be given enough funds for supplies and operation? If reparations funding is short term, how will maintenance and operation be factored into regular ministerial or agency budgets? These practical considerations can make or break a collective reparations endeavor.

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[26] *See* discussion of the Trust's Community Investment Program at Business Trust, "Community Investment," http://www.btrust.org.za/com_investment.html (accessed October 4, 2012).

Collective reparations promise to benefit all members of a community, not just victims. In areas where entire communities were victimized, this may be appropriate, but in others such reparations will be overbroad and thus need to be combined with individualized components. Even if collective reparations have characteristics of public goods, they may still serve a reparatory purpose if it is clear that it was victims' agency, not just condition, which brought them about. Thus, collective reparations should respond to a process by which the community is involved in choosing priorities and the victims play a prominent role. This allows victims to underline their worth as productive citizens and ensures that whatever reparations are provided respond to the perceived needs of the putative beneficiaries. Such reparations should also be combined with symbolic and commemorative aspects to differentiate them from other development projects.

Guatemala made provision for collective reparations but, as discussed earlier, focused almost exclusively on individual compensation. After several years, the reparations program tried to shift its focus to collective reparations for hard-hit communities in the form of housing. While a few pilot projects were built, the program became captive to political patronage and never amounted to much. In Morocco, collective reparations were geographically based, including rehabilitating towns that had been the former sites of prisons or had suffered due to a perception of anti-regime sentiment, and complemented an individual lump-sum allocation.

In Peru, the initial focus was on reparations to communities. The original regulations called for four components: Legal strengthening, including local authorities, human rights, and dispute resolution training; productive and economic infrastructure support; projects aimed at the return of the displaced and dispossessed; and support for educational, health, water, and cultural heritage support projects. Despite this, the government made an executive decision to focus only on the economic and service provision infrastructure components. The collective reparations component was decentralized to the municipal level, with funds assigned to those regions most affected by violence as well as to communities formed by those forcibly displaced from their original homes. To date, different localities have responded differently to the challenge of implementing a reparations program. Some quickly finished constructing their registry of victims and family members, while other areas lagged behind. Local governments were given funds to implement small (up to US $30,000) collective projects, according to priorities that were negotiated between communities and the state through the creation of local implementation councils.[27]

An initial assessment showed that communities most often chose to build a community center with their funds, followed by irrigation projects and schools.

[27] The International Center for Transitional Justice (ICTJ) and Asociación Pro Derechos Humanos (APRODEH), *Perú: ¿Cuánto se ha Reparado en Nuestras Comunidades: Avances, Percepciones y Recomendaciones sobre Reparaciones Colectivas en Peru 2007–2011* (2011), http://ictj.org/sites/default/files/ICTJ-Peru-Reparaciones-2011-Español.pdf.

Over time priorities changed, with a greater emphasis on water and sanitation, livestock, and management training projects in the last two years. Women were underrepresented in the decision-making process. Even where communities placed a high value on memorials and other types of symbolic reparation, local governments have been reluctant to use funds for that purpose, preferring infrastructure projects.[28] Despite the inclusion of urban communities made up of large numbers of displaced villagers in the program's definition of beneficiaries, as of 2011, no projects in these communities had begun.[29] A 2011 survey found that almost half the beneficiaries understood that the projects were collective reparation due to the political violence, but few thought they were sufficient reparation. The final ribbon-cutting ceremonies seem to have played an important role in this awareness.[30]

Reparations for Violations of ESC Rights

To date, efforts to repair violations of ESC rights directly have focused on cases of dispossession of land or other property, which led to denial of livelihood, education, health, and other rights. Only recently have there been efforts to compensate or restitute lands taken for tactical or economic reasons within the context of armed conflict.[31] To date, efforts to repair violations of ESC rights directly have focused on cases of dispossession of land or other property. Within the transitional justice context, these have almost always required a showing that the dispossession was

[28] Ibid.

[29] Ibid. According to this report, as of 2011 projects were underway or completed in almost 1500 localities, with an overall budget of US $52 million. Ibid., 15.

[30] Ibid., 36–37.

[31] There are also cases of land dispossession and restitution that do not fit easily within a framework of transitional justice. For example, a number of countries, including Canada, New Zealand, Australia, and a number of Latin American states, have restituted land to indigenous peoples that had been taken away by colonial administrations. *See*, e.g. Frederico Lenzerini, ed., *Reparations for Indigenous Peoples* (Oxford: Oxford University Press, 2008). A line of jurisprudence from UN and regional human rights commissions and courts has established the rights of indigenous people to their lands and to control what happens on those lands. Examples include: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Case 276/2003, African Commission on Human and Peoples Rights (2009) (recommending restitution and titling of communal lands); *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, UN Human Rights Committee (HRC) (1990) (right to livelihood of indigenous groups is part of minority rights); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Case 12.313, Inter-American Court of Human Rights (2005) (demarcation and titling of indigenous lands previously dispossessed).

deliberately induced for political or discriminatory reasons.[32] Roger Duthie suggests that one contribution of transitional justice thinking about displacement might be to strengthen a rights-based framework, rather than one simply based on humanitarian concern, in dealing with displaced populations.[33] This section briefly traces the history of these claims and then focuses on a number of emblematic cases: South African land restitution, the Colombian land restitution scheme, the case of Kenya, and the effort of Guatemalan Achi Mayan people to obtain compensation for losses incurred when they were moved off their land to facilitate construction of a dam, within the context of government repression and armed conflict.

There is extensive literature on property restitution arising first from Nazi confiscations of Jewish property in the 1940s, and second from the wave of privatizations and restitution that accompanied the fall of the communist governments in Eastern and Central Europe following 1989. Property restitution of Holocaust-era claims includes litigation spearheaded by the Conference on Jewish Material Claims Against Germany, and settlement of claims involving insurance policies and stolen art. There has also been extensive restitution of real property, with the last major claim against Germany settled in 2007.[34]

While that literature is too voluminous to summarize here,[35] some general themes emerge from these efforts. In all the post-communist cases, the issues around property restitution were complicated by various waves of expropriation and by difficult problems in proving the chain of title and in dealing with current private owners who had bought in good faith. Where the property was in the hands of good-faith buyers or used for a public purpose, compensation was paid instead of property restitution. Very little of the compensation was cash; the bulk was paid in either vouchers or government securities, creating a secondary market in such securities. There were enormous administrative problems in identifying and inventorying property, in lack of funds to pay compensation, and in the effects of broad restitution on rents and housing costs.

More recently, Bosnia-Herzegovina's Commission on Real Property Claims looked into restitution and compensation for land and property lost during the 1992–1995 war. The Dayton Peace Agreement included provisions de-legalizing transfers of property made under threat or duress or otherwise connected to ethnic cleansing, and provided for restitution of such property after the commission

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[32] Roger Duthie, "Transitional Justice and Displacement," *International Journal of Transitional Justice* 5, no. 2 (2011): 245–246.

[33] Ibid., 260.

[34] Mark Landler, "German company pays Jewish family for Nazi-era confiscation," *The New York Times*, March 30, 2007.

[35] *See*, e.g., Anna Gelpern, "The Laws and Politics of Reprivatization in East-Central Europe: A Comparison," *University of Pennsylvania Journal of International Business Law* 14, no. 3 (1993): 315–372; Frances Foster, "Restitution of Expropriated Property: Post-Soviet Lessons for Cuba," *Columbia Journal of Transnational Law* 34, no. 3 (1996): 621–656. Regarding indigenous peoples, *see generally*, Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008).

received proof, before a given deadline, of lawful ownership. Proof could come from the 1991 municipal property books, from tax records or inheritance documents. The commission could also, in theory, provide monetary compensation for property when individuals chose not to return to their pre-war residence (because they would be in the minority, and/or for security reasons) but in practice little money for compensation was available.[36] In effect, many of those whose property was restituted chose to rent it or sell it to avoid living as a minority in their former residences. Restitution of property was not necessarily connected to return to the place of prior residence. Nonetheless, restitution involved over 200,000 claimed homes and supported the return of approximately half of those displaced by the conflict.[37]

South Africa

In South Africa, a series of laws progressively dispossessed millions of people. The Natives Land Act of 1913 prohibited black South Africans from owning or leasing land outside small designated areas, later known as "homelands" or "Bantustans." The 1950 Group Areas Act segregated urban areas and led to the removal of non-whites to townships or suburbs. By 1990, millions of people had been dispossessed and only 13 % of the land was reserved for occupation by blacks.[38] When the post-apartheid government came to power, it quickly passed the Restitution of Land Rights Act 22 of 1994. The ruling party, the African National Congress (ANC), faced the need to respect property rights (which was a key demand of the National Party in negotiations with the ANC) while at the same time responding to widespread demands for redress, and the need to begin to de-racialize the spatial landscape of the country. The law reflects this compromise: It limits claims to persons or communities who were dispossessed after the 1913 Land Act, "as a result of racially discriminatory laws or practices," and who were not adequately compensated, or their descendants.[39] Pre-1913, that is, colonial-

[36] Commission for Real Property Claims of Displaced Persons and Refugees, "Dayton Agreement, Annex 7," http://www.unhcr.org/3c3c42794.pdf. *See generally* Lynn Hastings, "Implementation of the Property Legislation in Bosnia Herzegovina," *Stanford Journal of International Law* 37, no. 2 (2001): 221–254.

[37] Duthie, "Transitional Justice and Displacement"; Rhodri Williams, "Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice," *New York University Journal of International Law and Politics* 37, no. 3 (2005): 489.

[38] Ruth Hall, "Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa," in *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, eds. Cherryl Walker et al. (Athens, OH: Ohio University Press, 2010), 18–19.

[39] South Africa Restitution of Lands Act of 1994, sec. 2(1), as amended by Land Restitution and Reform Laws Amendment Act 63 of 1997.

era, dispossession was excluded. Claimants could be both landowners and tenants or other occupiers, given the lack of formal titling of most land held by blacks. Claims had to be filed by 1998.

The bill created a Commission on Restitution of Land Rights (CRLR) to assist claimants, investigate claims, and prepare them for settlement or adjudication, and a Land Claims Court to grant restitution orders and adjudicate disputes; the CRLR was later empowered to settle claims. The difficulties of proving rights in land going back generations, where land was often held communally and without written title, are formidable, and the Land Claims Courts have used testimony from historians and anthropologists as well as local elders to substantiate claims. The Claims Courts attempt to reach a mediated settlement between current occupiers and past claimants, but if they cannot, a panel of judges decides the claim. Remedies can include full ownership, partial rights to the land, rights to equivalent land, or compensation. The present landowners are compensated by the state at market value, although the state has rarely expropriated land and has relied on enticing willing sellers; where sellers are unwilling, alternative land or money are the only remedies.

The process eventually led to some 80,000 claims. The CRLR reported in 2007 that 1.5 million hectares of land had been restored, US $562 million had been spent on buying alternative land, and US $475 million had been spent on cash compensation.[40] A great majority of claims were urban, and these were largely settled by cash awards. Rural claims tended to be larger, to be concentrated in the north and east, and to involve communities rather than individuals as well as negotiation over land rather than cash.

The South African land restitution experience exemplifies a number of the problems, and promise, inherent in large-scale land restitution exercises. First, there were definitional challenges. What constitutes a "community" eligible for group restitution under the Act when people have been dispossessed and dispersed, up to a hundred years before? The South African courts initially focused on shared rules around land use, not cohesiveness or the continuing existence of the community. However, in the *Richtersveld* case, involving a large communal claim by indigenous people, the courts also looked to shared language, culture, and land use norms. A subsequent case found that communal forms of land holding in the past, even when formal title was now held by others, were enough to show evidence of community.[41] Thus, "community" did not require continuing or current existence, or formal land holding.

The South African law imposes a causal link between the dispossession and racially discriminatory laws and practices. But how close a link? Arguably, anything done by a government ruled by racist animus could fit within the requirement.

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[40] Hall, "Reconciling the Past, Present, and Future," 30.

[41] Hanri Mostert, "Change Through Jurisprudence: The Role of the Courts in Broadening the Scope of Restitution," in *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, eds. Cherryl Walker et al. (Athens, OH: Ohio University Press, 2010), 64–68.

For example, in the *Richtersveld* case cited above, the community's land had been taken under the Precious Stones Act because minerals were located there, not in order to enforce racial segregation. Nonetheless, the Appeals Court, and later the Constitutional Court, agreed that the land loss had a discriminatory animus, in that the effect of a facially neutral minerals law was discriminatory. Subsequent decisions found that the dispossession did not have to happen all at once and did not even have to be based on use of force, so long as leaving was involuntary.[42]

The most difficult issues around the land restitution project have involved the type and meaning of the specific remedy granted. Many claimants had fond, even nostalgic memories of growing up or living in their prior homes, especially in multiethnic neighborhoods that were destroyed by the removals. For them, restitution was not just about money; they wanted to reclaim their specific home and to recreate those vibrant communities. This created tensions not only with the current owners but also with local governments: While urban communities like District Six in Cape Town wanted to recreate an intangible sense of place and community, the city government wanted to use the restitution project to bring in low-income people from other areas and treated the project as just another effort to solve the city's housing problem. For rural claimants as well, land was tied up with identity, especially when that identity had been challenged or endangered through the loss of tribal land. The losses had been emotionally wrenching as well as financially ruinous.

And yet, there was little recognition of the non-monetary aspects of the process. Unlike the response to physical integrity rights violations, there were no Truth and Reconciliation Commission type hearings where restitution claimants could talk publicly about what the loss of home, land, and community had meant. Only in one province did awards include, in some cases, money for solatium or suffering.[43] The endless delays and bureaucratic wrangling made it difficult for claimants' groups to insist on restitution. Initially, in many urban areas, claimants started out asking for their old houses back or, if that was not possible, for alternative land where the community could be recreated. Over time, people got worn out and discouraged by the process and opted to take money instead.[44] This suited the government fine, as money was much simpler and allowed them to show how well the program was advancing. The amounts they received bore no logical relationship either to what the property was worth at the time or to what it is worth now. Moreover, in most cases, the money had to be shared among descendants, leaving a small amount for each individual. One of the few studies of how the money was spent[45] found that, consistent with other country's experiences with one-off

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[42] Ibid., 65–74.

[43] Hall, "Reconciling the Past, Present, and Future," 25.

[44] Anna Bohlin, "Choosing Cash over Land in Kalk Bay and Knysna," in *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, eds. Cherryl Walker et al. (Athens, OH: Ohio University Press, 2010), 116–130.

[45] Anna Bohlin, "A Price on the Past: Cash as Compensation in South African Land Restitution," *Canadian Journal of African Studies* 38, no. 3 (2004): 672–687.

payments, the amount was too small to be transformative and was used to pay off debts and meet immediate expenses.

One of the goals of the land restitution program had been to begin to make a dent in the highly segregated nature of residential and agricultural spaces. Overall, the government goal to redistribute 30 % of white-owned farmland to blacks has not been met. Unwilling to force white owners out, the government was left negotiating the sale of land, and few whites were willing sellers at the prices offered. In urban areas, municipal and local governments were reluctant to use scarce land resources for restitution, when these were often the last open spaces available for urban redevelopment. Facing intense pressures to create low-income housing, many government planners resented the competing claims of the former owners, who were often lower middle class rather than poor.

In rural areas, the 1913 cutoff date meant that most restitution claims were concentrated in the arid north of the country, making it difficult for restituted communities to succeed as farmers. Even worse, given how long communities had been scattered, there was no guarantee that restoring the land would mean that people would have the skills to farm it. Early evidence indicated that most restored farms were not producing. The government began urging people to enter into "strategic partnerships" with the former agribusiness landholders, where the communities lease the land back to the former owners in exchange for a share of the profits, but do not actually live on or work the land. While this avoided the newly restituted lands becoming unproductive, it was not exactly the "transformative" result originally intended.[46]

Colombia

Colombia's decades-old armed conflict has featured the violent expulsion of local farmers from large areas of the country, which were taken over by leftist guerrillas, right-wing paramilitaries, drug growers and traffickers, or a combination thereof. Indigenous and Afro-Colombian communities were particularly hard hit by forced displacement as well as killings and other rights violations.[47] Colombia has some 3.6 million internally displaced people, one of the highest levels in the world. Despite a diminution of violence in some areas, in 2010 another 100,000 people were forcibly displaced and armed actors continue to operate with impunity.[48]

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[46] Bill Derman, Edward Lahiff, and Espen Sjaastad, "Strategic Questions About Strategic Partners," in *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa*, eds. Cherryl Walker et al. (Athens, OH: Ohio University Press, 2010), 306–324.

[47] Robin Kirk, *More Terrible Than Death: Drugs, Violence, and America's War in Colombia* (Jackson, TN: Public Affairs, 2004).

[48] United Nations High Commissioner for Refugees, "2012 UNHCR Country Operations Profile – Colombia," http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492ad6&submit=GO (accessed October 5, 2012).

The Colombian government has embarked on an ambitious restitution and reparations program aimed at "integral reparations" that encompass forced displacement as well as physical integrity violations. There have been several overlapping efforts to provide reparations over the last decade. The regulations[49] implementing Colombia's Justice and Peace Law, Law 975 of 2005, aimed at demobilizing paramilitary groups by creating alternative minimum sentences for those convicted of violations of humanitarian law. In order to obtain the reduced sentences, demobilizing individuals were to return ill-gotten gains, including property, to the state for purposes of restitution; while some farms and acreage were turned over, many more were hidden under false names and middlemen. The Justice and Peace law resulted in only a handful of alternative sentences.[50]

Law 975 also created a National Commission on Reparations and Reconciliation, which developed an administrative reparations scheme that provided relatively small amounts to several hundred thousand victims, but was widely seen as insufficient. In addition, the courts have ordered reparations in a number of emblematic cases. The administrative scheme was debated, modified, and eventually enacted into law as part of the Victims' Law, No. 1448 of 2011. The new Victims' Law attempts to deal with some of the shortcomings of the earlier efforts. Its broad scope includes general principles on redress and reparations, participation of victims in criminal proceedings and in general; measures aimed at creating security and protection for victims and claimants; another that details services and assistance to victims, a separate chapter on reparations, including land restitution (detailed below); one on the institutional arrangements that will implement the law; and a special section on programs for demobilized youth.

The Victims' Law is an ambitious effort to address a wide range of violations. It defines as victims people, or the close family members of people, who individually or collectively suffered harm due to events happening after January 1, 1985, that constituted grave violations of human rights or of international humanitarian law in the context of the internal armed conflict.[51] It contains general principles on respect for victims, presumption of good faith, and a differentiated focus on particularly vulnerable groups. It states that the objective of reparations is to contribute to repositioning [recuparar] victims as citizens in the full exercise of their rights and duties,[52] and to "contribute to the elimination of the discrimination and marginalization that could have been the cause of the victimizing events."[53]

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[49] Presidential Decree 3391 of 2006, September 29, 2006, art. 16.

[50] As of this writing, the law is being revised.

[51] Law 1448 of 2011 ("Victims and Land Restitution Law"), June 2011, art. 3. Under the statute, the definition of family includes the spouse, permanent companion, or member of a same-sex couple as well as immediate relatives. Indigenous and Afro-Colombian populations are not covered by the law due to the longer time frame necessary to carry out proper consultations with communities and their authorities to decide on appropriate reparations measures.

[52] Ibid., art. 4.

[53] Ibid., art. 13.

In response to civil society critiques of drafts, the law deals with the overlap between reparations and other forms of assistance. While recognizing that humanitarian and social assistance measures can complement and increase the impact of reparations, they are not a substitute, and therefore, the sums spent on these measures are not to be counted in the reparations budget.[54] It also deals with the interplay of reparations and proceedings against alleged perpetrators. The law provides for reparations to be funded by the perpetrators as well as, when necessary, by the state. It creates specialized police units to track hidden assets of perpetrators and creates an obligation to pass along to the Office of the Prosecutor information implicating individuals, corporations, or public officials in the commission of the crimes for which reparations are sought. If the entity is found guilty, the amount found to have been used to finance illegal organizations is to be destined to the Reparations Fund for the benefit of victims.[55]

It has components similar to those of other reparations programs, including a lump-sum payment (of between 17 and 40 minimum wages, or between US $5,000 and $11,800) depending on the type of violation. The amount is greater if the recipient agrees not to sue the state for damages. It provides for free burial services or reimbursement and emergency aid if needed, in food, basic household goods, and shelter. Access to education is to be free through secondary school to victims who cannot afford to pay, and post-secondary education is to be made accessible through special admissions requirements as well as loans and subsidies, including guaranteed access to state-run training programs. Access to medical care is contemplated through free government health insurance, with government paying any extra fees; victims are to use the same mechanisms used by traffic accident and natural disaster victims, plus they receive free access to private care if the public system is insufficient. It also provides for housing subsidies, specialized psychosocial assistance, exemption from military service, tax relief, and symbolic measures, including a day of remembrance for victims.

The heart of the Victims' Law is the scheme for land restitution. It applies to land lost after January 1, 1991 (not 1985 as with other forms of reparation). The law states, at article 72, that legal and actual return of the land that was dispossessed, along with post-restitution support, is the goal; only when that goal cannot be met (for example, because of continued lack of security) then equivalent land, or compensation, is to be provided.[56] Land is to be returned to owners, occupiers, or possessors, even if they do not have formal title; tenants, however, are excluded. The definition of dispossession is "an action by which, taking advantage of the situation of violence, a person is arbitrarily deprived of their property, possession or occupation, either in fact, through contract, administrative acts, judicial decision, or through the commission of crimes associated with the situation of violence."[57]

[54] Ibid., art. 25.

[55] Ibid., art. 46.

[56] Ibid., art. 72.

[57] Ibid., art. 74.

The law also applies to those who were forced to abandon their land. It only applies to land, not to improvements, livestock, crops, or sub-soil rights.

The law creates a Registry of Dispossessed or Forcibly Abandoned Land, and of those who claim to have been dispossessed. Once both the claimant and the land are registered, an administrative process ensues. One of the most interesting aspects of the Colombian law is the way it establishes the necessary causal link to dispossession. Rather than make the claimant prove that they fit within the definition above, the law reverses the burden of proof through the use of presumptions.[58] Once the claimant shows that they lost their land during the relevant time period, there is a presumption that any contract, title transfer or other document, signed by the claimant or his family, with those who have been convicted of belonging to or financing illegal armed groups or drug traffickers or persons extradited on trafficking charges, directly or through intermediaries, was completed under coercion and is therefore void ab initio. This is also true when the transaction, even if ratified by administrative act or by the courts, took place in an area where at the time of dispossession or abandonment there were generalized acts of violence, collective forced displacement, or grave human rights violations, or where those involved had asked the state for protection. A similar presumption of illegality applies to lands bordering those in which, subsequent to acts of violence, there was a concentration of ownership or a change in the membership of a cooperative farm, or there were substantial changes in land use, for example from subsistence agriculture to monoculture, extensive cattle grazing or industrial mining. A third set of circumstances raising the presumption applies to lands that were sold for less than half their actual value. Any subsequent judicial action is also null and void, and therefore, courts are free to reopen the sale.[59] Thus, lawmakers tried to take into account the prevailing patterns of illegality, whether or not subsequently formalized.

The law allows for alternative land to be granted instead of restitution where the land in question is in the path of a natural disaster, where the house has been destroyed, where there were multiple displacements and the land has already been given back to someone else, or where it is too dangerous for the claimant to go back. Compensation can also be paid; compensation both to victims and to good-faith subsequent purchasers is to be paid by the government.

One of the most controversial provisions of the law concerns areas where the dispossessed lands have been turned into agribusiness projects. As with the South African "strategic partnerships," the goal has been to mesh the rights of claimants with the desire to maintain the economic value of the projects. Article 99 of the law allows the deciding magistrate to recognize the legal rights of claimants, but also authorize the current owner to lease the land for the duration of the project, so long as he or she was a good-faith buyer and not found responsible for the dispossession. If the current owner was responsible, the land reverts to the state agency to be used for collective reparations of the area or to be given to others.

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[58] Ibid., art. 78.

[59] Ibid., art. 77.

In an attempt to avoid having recently returned lands sold under new economic or security pressures, the law forbids the sale of newly restituted land for two years and requires court approval for leases during that period. To avoid land invasions, potential claimants who move back onto their land before a court order grants it to them can be evicted and lose their rights to restitution.[60]

A major potential problem arises from the need to adjudicate these cases before specialized magistrates of the local civil courts; where these do not exist municipal or other local judges may decide. This will involve a huge amount of preparation and training of new judges, which will take some time. Finding adequate competent personnel will be difficult given the persistent insecurity in the countryside, which has already given rise to threats against judges as well as against initial claimants, over fifty of whom have been killed.[61] Where judges are not threatened, they are likely to be part of local elites who passively supported the work of the paramilitary groups. Moreover, the work of surveying and defining the exact property boundaries in many areas is likely to be time consuming and contested.

The land restitution program is an ambitious attempt to solve one of the underlying causes as well as consequences of the long-running conflict. It is supposed to dovetail with a rural development law that will provide post-restitution support for small farmers, including the credit, improved seeds, and technical assistance that will be needed for restitution to have a chance at providing an adequate standard of living. However, its biggest challenge comes from continuing insecurity and armed conflict. Unlike South Africa, Colombia still faces armed challenges from the left-wing FARC, from newly reconstituted paramilitaries (known as Bacrim), and from drug trafficking networks. The armed forces and local authorities have also committed abuses against peasant, indigenous and Afro-Colombian communities, especially where mineral exploitation is at stake.[62] Some areas are safe for restitution, while others are clearly not. The law includes elaborate provisions on security and ties restitution into Colombia's early warning system for human rights violations. It recognizes the participation rights and procedural rights of victims, and "the right to return to his or her place of origin or voluntarily relocate, with security and dignity and in the framework of national security."[63] But if too many returning community leaders are threatened or killed, the process may grind to a halt. Worse, given the precarious security situation alongside the amount of time that has passed since the forced displacements, many people may be settled

[60] Ibid., art. 207.

[61] In this, there is a parallel to Law 975, where part of the reason there were so few convictions is that the investigative personnel needed to confirm the claims of demobilizing paramilitaries was not put in place. Maria José Guembe and Helena Olea, "No Justice, No Peace: Discussion of a Legal Framework Regarding the Demobilization of Non-State Armed Groups," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 120–142.

[62] Human Rights Watch, "Columbia," in *World Report 2012* (New York: Human Rights Watch, 2012).

[63] "Victims and Land Restitution Law," art. 28, 8.

elsewhere or too frightened to return, and may therefore choose to take alternative land or compensation. The South African experience shows that as time goes on without clear resolution, more people will be likely to give up on the land and take the compensation money. If that is the outcome, the restitution program will have served to legalize violent dispossession, even as it leaves the dispossessed with little to show.

The New Frontier

Reparations for violations of ESC rights face the particular difficulty of delimiting the actors responsible for the violations. The physical integrity violations that have been the focus of most reparations programs are also crimes under national and/or international law, and so it is feasible (although not easy) to seek out individual direct and indirect perpetrators as well as to hold the state liable for, at a minimum, failure to protect. It has been very difficult even in this sphere to move beyond the state to hold the financiers, arms providers, or foreign backers of the conflict responsible for their contributions.[64] In the case of ESC rights violations, banks, international financial institutions, or multinational corporations may also play a major role in the denial of food or destruction of livelihoods, yet tracing those connections is even more difficult.

Moreover, the line between conflict-related (or dictatorship-related) violations and the "normal" development process is blurry. Forced displacement, with its attendant loss of livelihoods, also occurs outside the context of armed conflict; millions of people have been displaced in the last quarter century by dams, mines, wildlife reserves and parks, palm oil plantations, and other "development" projects. While theoretically those people who are forced to move are granted equivalent land plus compensation and services, this is often not the case. "Equivalent" land turns out to be available only because no one else wants it, schools are left half built or unstaffed, and it proves impossible for people to continue their prior way of life, which usually included use of the local natural resources. Social disintegration, alcoholism and other ills, and increased marginalization are often the result. This marginalization, in turn, sets the stage for violent protests, which in turn lead to a new cycle of repression and violence. Is this type of violence to be included in a post-conflict or transitional paradigm?

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[64] Several truth commissions, including El Salvador and Sierra Leone, have recommended that those who armed and benefited from the conflict should contribute to repairing the damage, but to date those targeted by such recommendations have not responded. One exception is the contribution of Riggs Bank of Washington, DC to a fund for victims of Pinochet in Chile, exacted as part of a plea bargain with Spanish prosecutors over charges of money laundering and concealment of Pinochet's offshore accounts. Naomi Roht-Arriaza, "The Multiple Prosecutions of Augusto Pinochet," in *Prosecuting Heads of State*, eds. Ellen Lutz and Caitlin Reiger (Cambridge: Cambridge University Press, 2009).

One "overlap" case involves the Chixoy Dam in Guatemala. The dam, financed by the World Bank and the Inter-American Development Bank, was constructed in the early 1980s, and forcibly displaced more than 3,500 Achi Maya. When community members from the village of Rio Negro protested that the alternative lands offered them were unsuitable and the compensation inadequate, they were massacred by paramilitary civil patrols acting under army orders; 444 people were killed. The massacre took place during the height of the genocidal campaign of the 1980s, and the massacre itself was eventually the subject of the National Reparations Program described above as well as several domestic criminal cases against the direct perpetrators and a case against the government in the Inter-American Court of Human Rights.[65]

The victims worked on redress at the national and Inter-American levels simultaneously with a novel strategy of focusing on the banks that had financed the Chixoy project. They argued that the banks, as well as the government, knew that the dam was being constructed by a murderous regime that would be unlikely to make adequate provision for the people being displaced. The damages caused by the project were extensive and included loss of land, dwellings, livestock, crops, fishing grounds, and religious sites. The river was polluted and the community dispersed over four different sites. The community wanted redress for all the losses. Over a decade of negotiations ensued. In 1996, the World Bank investigated the claims and found that the then state-owned electricity company had only partially compensated the community. For example, titles to alternative land were never granted, not all those eligible received land, and the land was of poor quality. Not all the promised houses were built, and those that were built were of poor quality. Potable water had been promised, but supply was expensive and infrequent. Other promised parts of the settlement, like a community truck, a boat, and payments for lost crops, had not been fulfilled. The only parts of the promised compensation that had actually materialized were free electricity, a school, and a health center in the newly resettled village.[66]

It became clear that it was impossible to sue the banks directly in any administrative or legal body due to immunities; nonetheless, as a result of pressure from community organizations and their international civil society partners, the banks did agree to finance a solution by the government.[67] On April 10, 2010, the

[65] The case was decided on September 4, 2012. The Court found the government responsible for violations of the American Convention including Article 22 referring to freedom of movement and residence, as a result, in part, of the forced displacement of the population during the internal armed conflict and the impossibility of returning to their ancestral lands due to construction of the dam and reservoir. Case of the Rio Negro Massacres v. Guatemala, September 4, 2012, Series C, No. 250, 172–182.

[66] Barbara Johnston/Center for Political Ecology, "Reparations and the Right to Remedy," World Commission on Dams Briefing Paper (2000).

[67] For a discussion of IFI immunities, *see* Steven Herz, "Rethinking International Financial Institution Immunities," in *International Financial Institutions and International Law*, eds. Daniel Bradlow and David Hunter (Alphen aan den Rijn: Kluwer, 2010), 137–165.

Reparations Plan for Damages Suffered by the Communities Affected by the Construction of the Chixoy Dam was signed and agreed to by all parties. The plan includes provisions to compensate community members up to US $154.5 million for material and non-material damages and losses, construct and repair homes, and improve roads, water, and sewage systems. The government commits to creating a management plan of the Chixoy Basin based on integrated watershed management, including adequate water flow. In addition, the President of Guatemala will present an apology. The communities will have access to documents in the Historical Archive of the National Police related to the original massacre and displacement. Despite the agreement, as of this writing, it still remains to be implemented.[68]

Chixoy is a "hybrid" case because the reparations for the physical integrity (massacre) violations in a transitional justice setting and those for economic violence overlap. Although no proceedings have yet begun, claims arising out of abuses in Burma/Myanmar would be another such hybrid, as large-scale dam and mineral projects in the eastern region populated by ethnic minority like the Karen have led to resistance and repression in the area. These violations can be dealt with within the confines of existing transitional justice mechanisms because of the overlap and the apparent intentionality of both the displacement and the physical violence.

However, the line is a blurry one: Is the forced dispossession of the traditional lands of the Endorois in Kenya part of a transitional justice narrative connected to forced dispossession for political gain, or of a resource privatization narrative more connected to globalization, or both? The Endorois are a group of indigenous pastoralists, some 400 families strong, who grazed cattle around Lake Bogoria, which they consider to be the center of their spiritual world. Their lands were held communally as "trust lands" until former President Moi designated the area as a "game reserve" in 1973. Despite this status, companies whose owners were close to the government were licensed to mine rubies in the area, and luxury lodges sprang up in the reserve. The community was not consulted regarding any of the tourism or mining projects, nor, despite official promises, were they beneficiaries. Instead, the Endorois were expelled from their land. No suitable alternative land was ever found and "a community which hitherto was self-dependent in its food security, [was] reduced to a state-dependent group of internally displaced persons."[69] Eventually, the Endorois organized themselves, found allies, and brought suit to reclaim access

[68] According to the Human Rights Office of the Presidency, the problem has been a combination of bureaucratic confusion about payment mechanisms and uncertainties about what exactly was paid out in the original, incomplete settlement with the electricity company. At one point, the government tried to get legislation to fund the settlement, but it was defeated. The post-agreement talks broke down, with each side blaming the other for further delays. Note from the Presidential Commission of Human Rights (COPREDEH) to the UN Special Rapporteur on Indigenous Peoples explaining delays in settlement, 2011 (on file with author).

[69] Korir Sing'Oei, "The Endorois' Legal Case and Its Impacts on State and Corporate Conduct in Africa," http://www.natureandpoverty.net/find/?eID=dam_frontend_push&docID=1285 (accessed October 6, 2012).

to Lake Bogoria and the lands around it. When local courts found against them, they took their case to the African Commission on Human and Peoples' Rights, claiming restitution of their ancestral land, compensation for wrongful displacement from Lake Bogoria Game Reserve and a finding that their right to property, culture, religion, natural resources, and development had been contravened.[70] The commission agreed with the complainants all along the line and recommended that the Endorois' rights be accommodated within the Reserve and that compensation be paid. To date, the Kenyan Government has not complied.

Is this a "transitional" violation that can be redressed using the mechanisms of transitional justice? Clearly, successive waves of land dispossession and transfer lie at the heart of Kenya's ethnic and political tensions and periodically explode into violence, most spectacularly in 2007.[71] The Truth, Justice, and Reconciliation Commission is expected to address these issues in its long-delayed report and recommendations. On the other hand, unlike the South African, Colombian, or Guatemalan cases, here the dispossession was not in the service of a violent political or military campaign, but simply a result of exclusionary politics, venality, greed, and misplaced development objectives. How different does that make it?

In some ways, not so different at all; the effect on the dispossessed is similar, as is the lack of consultation and the denial of justice. On the other hand, what makes reparations programs feasible is that they are "transitional," that is, exceptional. For run-of-the-mill land expropriations or dispossessions, compensation is supposed to be paid as a matter of due process, by states or by the private actors who benefit. It is only because this is not the case—communal landholdings are not recognized in law, "equivalent" land never turns out to be equivalent, there is no actual negotiation but simply a decree—that it becomes advantageous to the victims of "ordinary" dispossession to couch their claims in the language of transition, to turn the ordinary into the extraordinary.

For reparations in such cases to be meaningfully distinguished, a few criteria may help sort out the cases on each side of the blurry line between "transitional" and "development related." One might be the direction of causality: Does violence and dispossession, with government action or failure to protect, lead to dispossession? If so, that would suggest events more like the "ethnic cleansing" familiar to transitional justice processes. If it is the dispossession that leads to violence which then causes a wide range of violations, that would tend to suggest that other types of reparatory processes will be needed. Alternatively, one could distinguish between "primary" and "secondary" effects: Is dispossession the goal, or is it an unfortunate byproduct? None of these tests will be satisfactory in some difficult

[70] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.* A full discussion of the implications of the case is beyond the scope of this chapter. *See* Sing'Oei, "The Endorois' Legal Case."

[71] Tensions are again rising. *See*, e.g., Joseph Akwiri and Drazen Jorgic, "Rival Kenyan Tribes Clash Again over Land," *Reuters*, September 11, 2012.

cases, but they would help in thinking about how to expand the universe of compensable harms without stretching it beyond the breaking point.

Conclusions

This chapter has posed some of the difficulties involved in treating ESC violations within reparations schemes. Several overall threads can be drawn through this narrative.

What Kind of Reparations?

As noted, most "integral" reparations programs include cash, as well as service provision and some attention to symbolic, non-monetary measures. Cash is usually a lump-sum payment. Similarly, land restitution programs offer the option of a cash payment instead of land, and frustrated claimants may choose cash instead of waiting longer for land. Cash is also the most problematic type of reparation, especially since there is rarely enough of it, when divided among family members, to be life changing.

The impact of reparations may in some cultural contexts be different depending on whether reparations are made in-kind or through cash payments, and whether they attempt to compensate material loss rather than wrongful death; especially for violations of the rights involved in adequate livelihood (food, shelter, water, etc.), restitution in kind including housing materials, farm or grazing animals, seeds, and work and domestic implements such as hoes and pots may be more appropriate. Explicit recognition of ESC rights violations might make it clearer that such in-kind restitution corresponds to making good these material losses. It may also have more cultural resonance: Customary dispute resolution in much of Africa, for example, requires payment of damages in cattle, not cash. At the same time, the line between personal and property losses may not be the same in all societies. In some places, domestic animals may be seen as sentient beings more akin to extended family, while in others even crops and domestic goods may have spirits.

Restitution in goods rather than cash may change the intra-family and gender-based effects of the payment. The domestic economy tends to be the sphere of women, while the cash economy is that of men. Control over the resources will then tend to depend on whose sphere they belong to, so that provision of goods will more likely retain them in the hands of women. Domestic animals in particular are more likely than cash to be used for improving the family's nutrition or to augment an income stream under the control of women. In turn, studies show that income controlled by women is more likely to be spent on nutrition and education of children.

Admittedly, restitution in kind may not be practicable in urban areas nor have the same resonance in all cultures, even rural ones. But even there, care should be taken to think about culturally appropriate and economically beneficial forms of non-cash

individual payments, whether these be housing materials, for example, or tools that would give victims the means to live with dignity. Thought should also be given to the nature and size of available markets: If the things people most need cannot be bought locally, cash payments may end up benefiting urban or foreign elites and not creating any kind of multiplier effect at the local level. They may even serve to drain the local economy of human resources, as when people use their reparations payments to send their young people abroad to work as migrant laborers.

Process as Key

Like other transitional justice measures, reparations are at least as much about a process as a result. Brandon Hamber notes that genuine reparation and healing do not occur only or primarily through the delivery of an object or acts of reparations, but also through the process that takes place around the object or act.[72] For many recipients, reparations have not felt reparatory because there has been no discussion or negotiation with them, individually or as communities, of what should be repaired, and how. People are for the most part simply passive recipients of checks or of services. Lieselotte Viaene has shown how, for example, for Maya K'ekchi communities, meaningful reparations would have to involve collective negotiations with the government, and collective decisions over the form and content of reparatory measures.[73] Even in Peru, where the collective reparations program has involved a process of community ranking of possible projects to be carried out by the local government, many recipients felt that their preferences were given short shrift by municipalities with other priorities.[74]

A process perspective will privilege acknowledgment of harms and individual and community agency. Where rights violations have stemmed from marginalization and exclusion, a rebalancing of local power dynamics in favor of the excluded and marginalized will be key. Special attention to gender dynamics, both intrafamily and within local communities, is especially needed.[75] A well-designed reparations program can help rebalance local power. Most obviously, it can put much-needed resources into the hands of the worst off, which in turn may underscore and make public the state's recognition that those people have suffered disproportionately. But even such services as schools, roads, or health centers, which

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[72] Brandon Hamber, "Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), 580.

[73] Viaene, *Voices From the Shadows.*

[74] The International Center for Transitional Justice (ICTJ) and Asociación Pro Derechos Humanos (APRODEH), *Perú: ¿Cuánto se ha Reparado en Nuestras Comunidades?*

[75] Ruth Rubio, *What Happened to the Women?: Gender and Reparations for Human Rights Violations* (Brooklyn, NY: Social Science Research Council, 2006).

will benefit everyone living in the area, including perpetrators, bystanders, and rescuers as well as victims,[76] may help rebalance power in favor of victims. If needed services for all come to the community because of the needs—and, even better, the efforts—of victims and survivors, it provides them with a source of status and pride in the eyes of their neighbors. One source of status in many cultures and communities is the ability to bring resources to bear for the common good, to be a benefactor.[77] By making clear that victims are the reason that services arrive, even if those services benefit everyone, collective reparations can begin to address an existing power imbalance. This may, in turn, allow for broader participation by the victims in local governance.

Who Pays for Reparations?

For the most part, states have paid even when the violations were actually committed by non-state actors, on the theory that the state failed to protect and ensure rights. This is legally correct, but especially where ESC rights are concerned a much wider range of actors bears moral and practical responsibility. Putting the entire burden of reparations on the government, especially a government that was not in charge when the violations happened, undermines political support for any reparations and negates the symbolic importance of wrongdoers acknowledging their wrongs.

There are some precedents for private funding for reparations, although most of the examples are underscored by the reluctance of private actors to take any actions that could be construed as admitting culpability for the victims' harms. The South African Truth and Reconciliation Commission recommended that the private sector pay a one-time levy on corporate income and a donation of 1 % of market capitalization of public companies, a retrospective surcharge on corporate profits, and a "wealth tax" to make repairs for the excess profits generated by apartheid-era wages and restrictions on labor. The private sector refused, though a Business Trust has provided funds to hard-hit communities without naming them as reparations.[78] The Peruvian Comprehensive Reparations Plan (PIR) is financed

[76] These categories are obviously fluid: The same individual may fall into more than one category by, e.g., rescuing some people while attacking others; within families there are often representatives of all of them. It may be impossible to benefit only the "right" victims; Peru's Comprehensive Reparation Plan (PIR), e.g., excludes members of subversive groups, but this provision has raised a host of criticisms that the exclusion is discriminatory and sweeps much too broadly.

[77] This phenomenon takes different forms in different cultures. It is (derogatorily) talked about as the ability to act as a godfather, big man, or mover and shaker, but the same impulse motivates, at least in part, large wedding feasts, and hefty donations to the ballet or new hospital wing.

[78] Chris Colvin, "Overview of the Reparations Program in South Africa," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), 209.

in part by the "*óbolo minero*," a voluntary contribution of 3 % of net profits to the government by mining companies, but it is not specifically tied to reparations and has many claimants; a windfall profits tax on mining in Peru was rejected.

Private funds could also come from the tracing and confiscation of the assets of perpetrators and the ill-gotten gains of former leaders. In addition to the Colombian laws described above, the Peruvian PIR was also partially financed from a special fund set up to hold monies recovered from former government officials accused of embezzlement from the state.[79] In those cases of large-scale corruption or raiding of public resources that often accompany other kinds of rights violations, the assets of those responsible should be used at least in part to repair the victims.

ESC violations will often involve private businesses or international (multinational or binational) funders. In the case of private businesses, the emerging international framework calls on private enterprises to use due diligence to avoid violating rights and to provide a remedy for those violations that occur.[80] As the remedy framework develops, it would be important to ensure that it is consistent with evolving thinking about reparations from states, especially with regard to the need for acknowledgment and the treatment of complainants.

What Kind of Reforms?

Finally, treating ESC rights violations seriously would require some broadening of what we mean by "guarantees of non-repetition," a key component of the international framework on reparations. To date, most of these measures have been connected to reforms of the police and military, and of judicial and prosecutorial capacity and detention practices. Here, a broadening of the framework to include ESC rights violations would require early and equivalent attention to measures aimed at reducing or overcoming marginalization and denial of services. Educational reform and social protection programs, for example, would become part of transitional planning, not something to be put off until "normality" has returned. This would require changes in donor and IFI time frames and mind-sets as well as those of government.

Reparations can be a source of improving ESC rights, and violations of ESC rights can, and should, be redressed through specific strategies and programs. As massive violations of human rights are increasingly intertwined with threats to land and livelihoods, a rethinking of reparations for these harms is necessary.

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[79] Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development," in *Transitional Justice and Development: Making Connections*, eds. Pablo De Greiff and Roger Duthie (Brooklyn, NY: Social Science Research Council, 2009), 213.

[80] United Nations Human Rights Council, "Human Rights and Transnational Corporations and Other Business Enterprises," Un. Doc. A/HRC/17/L.17, June 10, 2011. For more on the so-called Ruggie Principles, which are beyond the scope of this article, *see generally* Fletcher Forum, "Business and Human Rights: Together at Last? A Conversation with John Ruggie," *The Fletcher Forum of World Affairs Journal* 35 (2011): 117–122.

Corruption, Human Rights, and Activism: Useful Connections and Their Limits

Chris Albin-Lackey

Human rights activists and anti-corruption campaigners have grown increasingly comfortable on one another's turf, and the lines that divide their work have become quite porous. Human rights activists are learning to grapple with the human rights impacts of corruption, and anti-corruption campaigners frequently deploy a human rights analysis to bolster their case for reform. This chapter describes how the blurring of the line between human rights and anti-corruption work has enhanced the work of activists on both sides. In borrowing from one another's work, both sets of campaigners have found powerful new ways to describe the real human impact of the abuses they fight against. In some cases, they have also found new ways to make use of powerful accountability mechanisms like anti-corruption and money-laundering laws. And there have been less direct benefits that are every bit as important. For instance, work on corruption has helped push relatively conservative human rights organizations to become more comfortable with work that deals squarely with the progressive realization of economic, social, and cultural rights.

On the other hand, this chapter also argues that there are limits to all of this, which ought to be respected. Corruption and human rights abuse overlap in innumerable ways, but they are not the same thing. Activists and academics who forget or deliberately attempt to obliterate that distinction tend to undermine their own credibility and potentially that of others as well. And even where the overlap between corruption and human rights problems is real, a human rights analysis is not always the most important or effective framework to deploy in analyzing the issue.

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The Connection Between Corruption and Human Rights: A Brief Overview

Corruption often causes human rights abuse or is part of the reason why governments fail to live up to their responsibilities to achieve broader and fuller enjoyment of rights. The following pages provide a basic overview of why the linkages between corruption and human rights are important and a few examples of what they look like in real-world scenarios.[1]

The Impact of Corruption on Economic, Social, and Cultural Rights

Under international law as well as many domestic legal frameworks, governments are obliged to work toward their citizens' full enjoyment of economic, social, and cultural rights (ESC rights). ESC rights include the rights to health, education, and "an adequate standard of living," among other guarantees.[2] Graft can prevent governments from meeting these responsibilities.

Human rights guarantees are widely described as containing both "positive" and "negative" obligations. Those that are "negative" in nature prohibit the denial of or unjust interference with certain freedoms rather than dictating affirmative steps governments should take in order to expand the enjoyment of rights. Examples include the prohibitions against torture, arbitrary detention, and unjust interference with the freedom of expression, such as censorship. By contrast, to meet "positive" obligations, governments must invest in and expand access to rights, rather than simply refrain from trampling them. "Positive" obligations have a particularly central role in securing respect for most ESC rights. The right to health, for instance, is generally understood to require governments to work

[1] Far more detailed elaboration of the complex relationship between corruption and human rights has been undertaken elsewhere. *See,* e.g., International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (Versoix: International Council on Human Rights Policy, 2009).

[2] The International Covenant on Economic, Social, and Cultural Rights, one of the documents making up the "International Bill of Human Rights" (along with the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights), spells out most of the ESC rights recognized under international law. Beyond those listed above, other guarantees spelled out in the Covenant include rights related to working conditions and the right to work, the formation of trade unions, social security, freedom from hunger, and the right "to take part in cultural life." International Covenant on Economic, Social, and Cultural Rights (CESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976.

toward the provision of adequate primary healthcare services.[3] Similarly, the right to education includes a core minimum obligation to provide free and compulsory primary education that strives to meet certain basic standards.[4]

International law recognizes that a government's capacity to advance the enjoyment of ESC rights depends partly on the resources it has at its disposal. The Central African Republic can hardly be expected to deliver healthcare services on par with what Norwegians are accustomed to—at least not in the near term. Thus, the world's governments are not required to provide a uniformly high standard of health, education, and other basic services to all but rather to take steps "to the maximum extent of (their) available resources" to progressively realize those rights over time.[5] The UN's Committee on Economic, Social, and Cultural Rights has explained the requirement of "progressive realization" this way:

> …[T]he obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights…It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social, and cultural rights. On the other hand, the phrase [progressive realization]…imposes an obligation to move as expeditiously and effectively as possible towards that goal.[6]

In some cases—and especially at the extreme margins of bad governance—corruption is a direct cause of government failures to meet the obligations this "progressive realization" framework imposes. For example, if a government knowingly allows scarce revenues to be siphoned off with impunity by corrupt officials rather than deploying those resources to address glaring health or education needs, it is not living up to its human rights obligations to make sure that ESC rights are realized to the maximum of available resources.

An especially stark example of what this looks like in the real world can be found in the tiny oil-producing nation of Equatorial Guinea. The country produces oil in such vast quantities relative to its tiny population that it boasts a per capita

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[3] UN Committee on Economic, Social, and Cultural Rights, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights," General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 (2000), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument.

[4] UN Committee on Economic, Social, and Cultural Rights, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights," General Comment No. 13, The Right to Education, UN Doc. E/C.12/1999/10 (1999), http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument. The "core minimum obligation" framework is essentially an attempt to strike a balance between respect for the link between ESC rights obligations and available resources and the need to ensure that these rights cannot be stripped of all meaningful content on grounds of state poverty.

[5] CESCR, art. 2.

[6] UN Committee on Economic, Social, and Cultural Rights, General Comment 3, The Nature of States Parties Obligations (Art. 2, para 1 of the covenant), UN Doc. E/1991/23 (1990), para 9. http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument.

income of approximately $30,000—one of the highest in the world.[7] Yet the country ranks 136th out of 180 countries in the United Nations Development Program's Human Development Index.[8] Much of the population remains mired in grinding poverty and without access to adequate health and education services. Not only has the government failed to invest in health and education, but ample evidence indicates that vast revenues have been stolen, squandered on white elephant projects, or otherwise egregiously misused by public officials.[9]

Equatorial Guinea is something of an extreme, but it is not unique. Many other resource-rich countries such as Nigeria, Angola, and Papua New Guinea have been afflicted by the so-called resource curse—a phenomenon where mineral-rich countries see large and often opaque new revenue streams generate corruption, waste, and abuse rather than social progress and the advancement of human rights.[10] While the relationship between corruption and ESC rights problems can be more complex and harder to isolate in less extreme circumstances—an important issue that is discussed later in this chapter—the basic idea that corruption is often a serious impediment to the progressive realization of ESC rights holds true across a range of different contexts.

Other Links Between Corruption and Human Rights

The relationship between corruption and human rights can be quite straightforward even outside the realm of economic, social, and cultural rights. Nigerian electoral races have devolved into violent contests between corrupt politicians eager to reap the spoils of office.[11] Voters have been disenfranchised through the malfeasance of electoral officials, while gangs of hired thugs have attacked polling stations, stolen ballot materials, and even bundled protesting election observers

[7] As of 2012, Equatorial Guinea has a population of roughly 700,000 and a GDP of just under $20 billion.

[8] United Nations Development Programme (UNDP), "International Human Development Indicators, Country Profile: Equatorial Guinea," http://hdrstats.undp.org/en/countries/profiles/GNQ.html (accessed December 17, 2012).

[9] Human Rights Watch, *Well Oiled: Oil and Human Rights in Equatorial Guinea* (New York: Human Rights Watch, July 2009). Global Witness has also done extensive work on corruption in Equatorial Guinea that analyzes the government's failure to progressively realize ESC rights. *See* Global Witness, Country Page: Equatorial Guinea, http://www.globalwitness.org/campaigns/corruption/oil–gas-and-mining/equatorial-guinea (accessed December 17, 2012).

[10] There is extensive literature on the "resource curse" phenomenon. For a good overview of the human rights and governance implications of this problem (with ample references to other sources), *see* Oxfam International, *Lifting the Resource Curse: How Poor People Can and Should Benefit From the Revenues of Extractive Industries* (Oxfam International, 2009), http://www.oxfam.org/en/policy/lifting-resource-curse.

[11] For a good contemporary analysis of Nigerian politics (and its criminalization), *see* John Campbell, *Nigeria: Dancing on the Brink* (New York: Rowman and Littlefield, 2010).

into the trunks of cars.[12] These abuses proliferate because many Nigerian politicians regard public office as an opportunity to plunder public coffers, so elections are often more a fight over economic resources than any kind of legitimate political or ideological contest. In India, anti-corruption campaigners and right to information activists have been attacked and even murdered—sometimes by public officials—in reprisal for their work.[13]

In other cases, there are subtler yet still very important relationships between corruption and human rights abuse. And in some of those cases, patterns of human rights abuse cannot be usefully described without reference to the patterns of corruption that underlie them. For example, corruption can create discrimination by preventing individuals who cannot or will not pay bribes from accessing government services. Corruption can also severely erode the overall capacity and integrity of public institutions like the judiciary or police that play a central role in guaranteeing respect for human rights or preventing human rights abuse. For example, corruption may not be "the reason" for police torture in many countries, but it may help create the climate that allows or even fuels such abuses. A corrupt police force may become so generally unaccountable that impunity attaches to torture just as it does to other kinds of police malfeasance, or so starved of capacity that officers resort to torture as a way of producing confessions in lieu of actual investigation.

The causal link can work in reverse as well—human rights abuse can fuel corruption. Political repression can restrict freedoms whose exercise is integral to efforts to expose and combat corruption. As Amnesty International Secretary General Salil Shetty has put it, "If you don't have some fundamental freedoms—freedom of information, freedom of expression, freedom of association—all of these things are only going to exacerbate corruption because at the end of the day…if people are not able to raise their voice against corruption, all you are going to have is more corruption."[14] For example, during the long years of military dictatorship in Nigeria, the authorities brutally suppressed civil society protests and media efforts that sought to denounce or expose government corruption. The resulting lack of transparency helped fuel debilitating corruption and public sector debauchery on such a scale that Nigeria itself became a byword for corruption in many quarters.[15]

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[12] *See* Human Rights Watch, *Criminal Politics: Violence, Godfathers and Corruption in Nigeria.* (New York: Human Rights Watch, 2007).

[13] *See,* e.g., Lydia Polgreen, "A High Price for India's Information Law," *The New York Times*, January 22, 2011.

[14] TrustLaw, "Interview with Salil Shetty of Amnesty International on Corruption and Human Rights," November 11, 2010, http://www.youtube.com/watch?v=NfHfs6CGlyU *(accessed December 17, 2012).*

[15] For more discussion on specific scenarios where acts of corruption can meaningfully be linked to human rights abuse, *see* International Council on Human Rights Policy, *Corruption and Human Rights,* 31–63.

The connections between corruption and human rights abuse mean that there is—and ought to be—a great deal of natural overlap between the work of human rights activists and anti-corruption campaigners. As the following pages describe, civil society campaigners have grown increasingly adept at making use of those connections, in ways that have enhanced their ability to engage with human rights abuse, corruption, and the myriad situations where the two problems blend together as part of the same set of problems.

Positive Developments in Activism and Analysis

Human rights campaigners and anti-corruption activists increasingly draw upon one another's work and take up one another's issues as their own. These connections often make the work of both groups more effective and compelling. Anti-corruption work has provided one very powerful way for traditionally reticent human rights groups to address ESC rights issues. Deeper understanding of the linkages between corruption and human rights can also help bolster efforts by human rights groups to engage in more sophisticated ways with the broader issues of governance that often underlie human rights abuse. In some cases, accountability mechanisms targeting corruption can be more robust weapons against officials who are *both* abusive and corrupt than other, more explicitly rights-focused mechanisms. And for anti-corruption campaigners, proving a link between graft and rights abuse can make it easier to put their critiques at center stage by describing corruption's impact in real, human terms. The following pages describe these positive developments in more detail.

Facilitating Work on Economic, Social, and Cultural Rights

The first section of this chapter described how many economic, social, and cultural rights obligations are defined as goals that governments should work to "progressively realize" over time. They are rooted in an understanding that governments possess limited resources and are faced with legitimate competing priorities. This has left some commentators skeptical as to whether it makes sense to think of them as rights at all. *The Economist* magazine once stated rather sarcastically that, "Whether or not water is a right, it is also a commodity which, unlike liberty or expression or freedom from torture, is costly to provide."[16] In point of fact, the idea that ESC rights are expensive while civil and political rights are essentially cost-free is something of a false dichotomy. On the face of things, it might seem

[16] The Economist, "Clean Water is a Right—But it Also Needs to Have a Price," November 11, 2006.

that it should cost an abusive government nothing to end torture by its own security forces. In reality, it might require substantial investment in things like human rights training, oversight mechanisms with real capacity to investigate wrongdoing, and careful vetting of new personnel. Similarly, the rights associated with a fair trial may require a judiciary that is not only independent but also empowered with adequate institutional resources, as well as legal resources at the disposal of indigent defendants. All of these things cost money.

Still, it is hard to deny that ESC rights obligations are especially bound up with governments' basic prerogatives to make public policy and set priorities across a broad range of public goods. And this poses real complications. As a matter of principle and as a guide to public policy, the concept of progressive realization is probably clear enough—governments should work assiduously to improve health, education, and other basic services that are integral to the enjoyment of economic, social, and cultural rights. But as a binding human rights norm, "progressive realization" often tends to defy clear, prescriptive definitions of compliance or abuse. Outside of extreme situations, how does one identify an objectively defensible line between adequate and inadequate government efforts to improve the enjoyment rights to health and education, among other ESC rights? Largely for this reason, the progressive realization framework is often notoriously difficult for advocates to deploy as the basis for credible, specific critiques of government policy.

ESC rights are generally held to carry an immediate obligation to take concrete and "appropriate" steps toward realization "as expeditiously and effectively as possible."[17] Again, this may be clear enough as a general guide to responsible public policy. But is it possible to define objective benchmarks that measure compliance with this standard? Some, including the UN's Committee on Economic, Social, and Cultural Rights, the treaty body charged with monitoring compliance with the International Covenant on Economic, Social, and Cultural Rights, argue that the Covenant carries with it "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights (guaranteed by the Covenant)" and that any failure to do so constitutes a *prima facie* violation.[18] That standard is fairly exacting but even it only tries to concretize minimum, immediate obligations, not the broader goal of progressive realization over time, and is only of central relevance at all in situations of acute material deprivation.

The bottom line is that there is no generally accepted set of norms that actually dictate what proportion of resources governments should invest in steps toward the progressive realization of ESC rights relative to other spending priorities. This does not imply that the concept of ESC rights or the way they are articulated is

[17] UN Committee on Economic, Social, and Cultural Rights, General Comment No. 3, paras 2 and 9.

[18] Ibid., para 10.

flawed (though many have argued otherwise),[19] but it does create practical problems for human rights advocates. Groups like Human Rights Watch and Amnesty International tend to approach human rights problems from a perspective grounded primarily in objective documentation of compliance or abuse. Their advocacy seeks to push actors into compliance with their human rights obligations and secure accountability for serious abuses. Their approach often assumes that for advocacy to be fully effective, it should be possible to identify a clear violation of human rights, the party or parties responsible for that violation, and a possible remedy.[20]

Many human rights advocates have feared that progressive realization issues may be too slippery and amorphous to be credibly addressed using the methodologies they are accustomed to. ESC rights violations are not necessarily rooted in abusive behavior by actors who should be held accountable as criminals. Elected public officials who neglect the provision of badly needed health services in order to focus on the construction of superhighways, for instance, cannot be described in the same terms as torturers. Furthermore, the paths to compliance with ESC rights obligations are potentially numerous and varied and may not center on immediate remedial action. And outside of discrimination or extreme cases involving near-total government inaction or unjustified "deliberately retrogressive measures,"[21] it can sometimes be hard to see the boundary between questionable policy and a clear-cut ESC rights violation. Attempts to argue otherwise tend to skirt the issue's practical complexity. For example, a key problem with many attempts to define violations of ESC rights is that in practice they "tend to bypass the economic and fiscal dimensions of compliance."[22] It is all well and good to denounce cutbacks in funding for primary education in an impoverished country, but that critique is only useful if it shows that the cutbacks were avoidable or explains what sacrifices the government should be willing to make in order to maintain higher levels of funding.

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[19] Some, like Open Society Institute President (and former head of Human Rights Watch) Aryeh Neier, have rejected the concept of ESC rights as a matter of principle. Neier has described ESC rights as essentially an attempt to secure "a fairer distribution of the world's resources" which for a variety of reasons is best pursued "through the political process." *See*, e.g., Aryeh Neier "Social and Economic Rights: A Critique," *Human Rights Brief* 13, no. 2. (2006). Such views were widespread during the Cold War, when Soviet Bloc governments rhetorically denigrated the importance of civil and political rights relative to that of the ESC rights they claimed to guarantee, while Western governments did the opposite.

[20] *See* Kenneth Roth, "Defending Economic, Social, and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26, no. 1 (February 2004): 68.

[21] The Committee on Economic, Social, and Cultural Rights notes that such measures "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." Committee on Economic, Social, and Cultural Rights, General Comment 3, para 9.

[22] Edward Anderson and Marta Foresti, "Assessing Compliance: The Challenge for Economic and Social Rights," *Journal of Human Rights Practice* 1, no. 3 (November 2009): 471.

Partly because of all these headaches, until relatively recently many mainstream Western human rights groups deliberately avoided work that focused primarily on the progressive realization of ESC rights. In 2004, current Human Rights Watch Director Kenneth Roth wrote an influential—and widely criticized—article arguing that international human rights groups should not undertake work on ESC rights violations unless that work was linked to discriminatory or arbitrary government action. It warned human rights groups against diluting their own credibility—and straying beyond the boundaries of what they actually do well—by "sloganeering" on matters of "purely distributive justice."[23] He was not alone in these concerns, which were especially popular topics in conservative political quarters. In 2001, *The Economist* magazine, a somewhat frequent critic of human rights groups' work on ESC rights issues, warned that:

> Rather than investing basic demands for social reform with the moral authority of their campaign for basic liberties, as they may hope to, human rights watchdogs run the risk of doing the opposite: Tainting their defense of basic liberties with an overtly political platform on social, and economic policy.[24]

Roth's article remains widely cited (and criticized) today, but it was written in 2004. Human Rights Watch and others have moved beyond the boundaries it articulated—albeit deliberately, cautiously, and with more than a little trepidation. Human Rights Watch has a reasonably large body of research that deals explicitly (though less often *centrally*) with progressive realization issues and an entire thematic program dedicated to health and human rights issues. Amnesty International has launched a major campaign focused on rights—including ESC rights—that the organization has identified as causes of poverty and disempowerment.[25] All this is at least partly the result of experimentation which has shown that human rights groups' traditional investigatory methodologies can, at least sometimes, be usefully applied to carry out credible, objective work on progressive realization issues. This has been aided by examples of research focused on the human rights impacts of pervasive government corruption. That work has provided a clear example of how in some cases a methodology that was designed primarily to document criminality and abuse can be *exactly* the right tool to analyze progressive realization issues.

Official corruption gives rise to many of the situations where it is the easiest to perceive a clear state violation of the obligation to progressively realize ESC rights. If a government is failing to improve upon dangerously inadequate healthcare services because officials have squandered badly needed resources through systemic corruption or mismanagement, there is no thorny discussion to be had

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[23] Kenneth Roth, "Defending Economic, Social, and Cultural Rights," 63–73.

[24] The Economist, "The Politics of Human Rights: Does it Help to Think of Poverty or Inadequate Health Care as Violations of Basic Rights?," August 16, 2001.

[25] Much of the work HRW has done on ESC rights issues can be found at http://www.hrw.org/topic/esc-rights. The work around Amnesty International's Demand Dignity campaign can be found at http://www.amnesty.org/en/demand-dignity.

about the relative value of competing public priorities. Nor do human rights groups whose expertise might be poorly suited for the task end up being called upon to sketch out long-term budgetary frameworks aimed at the progressive realization of rights. The International Council on Human Rights Policy put it this way:

> Corruption implies that the state is not taking steps in the right direction. When funds are stolen by corrupt officials, or when access to healthcare, education and housing is dependent on bribes, a state's resources are clearly not being used maximally to realize economic, social, and cultural rights.[26]

It really is that simple.

The corrupt acts that give rise to violations of ESC rights are usually criminal offenses in and of themselves. This makes it easier to identify "violators" of the ESC rights involved and to urge meaningful, concrete steps to hold them accountable—something that may not be possible to do intelligently when simply critiquing the budgetary priorities of a freely elected government. When ESC rights are undermined by systemic corruption, it is also easier for rights groups to identify and prescribe concrete remedies upon which to build an advocacy campaign. These often center on robust government action to stop corruption and hold corrupt officials to account. Remedies that successfully curtail government corruption can have the practical effect of increasing either the revenues allocated to the realization of ESC rights, the size of the state's overall budgetary pie, or both. Less money being stolen by officials in charge of the healthcare system, for example, means more money for health care. Furthermore, proposed remedies that focus on tackling systemic official corruption are usually accepted as legitimate and important by the public and possibly even by a more diverse range of influential actors than those who actually prioritize the successful realization of ESC rights.

In short, focus on a corruption–human rights nexus offers an easy point of entry for mainstream human rights groups to work on progressive realization issues, using the methodologies they are most comfortable with. This is not to argue that rights groups must or even *should* insist upon such a comfortable point of access. The point is merely that in practice, many activists have found it easier to tackle progressive realization issues directly when the basic components of their "usual" research and advocacy on civil and political rights issues are easily applied. At Human Rights Watch, a large proportion of the research that has focused on progressive realization issues as its central theme has examined cases where (a) basic health and/or education services are inadequate and (b) it appears that corruption or mismanagement has led to the loss of resources significant enough that their impact could have been transformative.[27]

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[26] International Council on Human Rights Policy, *Corruption and Human* Rights, 46.

[27] Human Rights Watch has published numerous reports that address the progressive realization of ESC rights. However, most of these focus *primarily* on other rights issues—either on civil and political rights, on other dimensions of ESC rights compliance such as discrimination, harmful retrogressive measures that roll back enjoyment of ESC rights, or on state failure to meet minimum "core" requirements of ESC rights like offering palliative care. Only a relative handful of HRW reports are primarily and centrally focused on progressive realization arguments.

Here is an example of how this approach has worked in practice: In 2006, Nigeria's oil-rich Rivers State (one of 36 states in the country) had a budget of $1.3 billion. Excluding all federal government spending, this gave Rivers a significantly higher level of per capita public expenditure than the central governments of many West African countries. The state's local governments—whose primary responsibilities revolve around the provision of basic health and education services—had seen their revenues increase tenfold in the space of just seven years. Revenues at the state level were several times higher than those of many other Nigerian states. In spite of these tremendous resources, the quality of primary healthcare and education services across Rivers State was dismal and failing to improve. Human Rights Watch research showed that many local governments spent very little on health and education services, while there was clear evidence of large-scale corruption and mismanagement at both the state and local levels. Local governments "allocated" massive funds to white elephant projects that were sometimes never even built, and the state governor enjoyed a travel budget of $65,000 per day—larger than the entire capital budget for the state's health sector. With all of these facts established, it was straightforward to argue that corruption and mismanagement of public revenues had left government institutions in breach of their obligations to work toward the progressive realization of the rights to health and education.[28]

The example of Rivers State is an extreme one, both in terms of the resources available to the authorities and in terms of the scale of waste and corruption that seemed to prevail. This made it relatively easy to describe the failure to progressively realize ESC rights as a clear-cut "violation" of human rights being carried out by identifiable public officials. In some contexts, corruption may be less obvious and therefore harder to document. In others, it may not be as clear that lost revenues are significant enough that their responsible deployment could have a tangible impact on addressing health and education needs. On the other hand, the reality is that extremes analogous to the situation in the Niger Delta are depressingly abundant. In Angola, Human Rights Watch research contrasted the government's failure to advance enjoyment of the rights to health and education with officials' total inability to account for several billion dollars in "missing" oil revenue.[29] In Equatorial Guinea, Human Rights Watch research has linked the dire state of health and education services with vast mineral wealth that gives the country one of the world's highest per capita GDPs—along with evidence that much of that wealth has been wasted or stolen by the country's abusive ruling clique.[30] In Indonesia, researchers examined the human rights impact of criminality and

[28] Human Rights Watch, *Chop Fine: The Human Rights Impact of Corruption and Mismanagement in Rivers State, Nigeria* (New York: Human Rights Watch, 2007).

[29] Human Rights Watch, *Transparency and Accountability in Angola* (New York: Human Rights Watch, 2010).

[30] Human Rights Watch, *Well Oiled*.

corruption in the logging sector, emphasizing the impact of lost revenues on the country's failure to improve delivery of basic services.[31]

Opinions differ as to whether Human Rights Watch's cautious approach to campaigning on progressive realization issues is the right one. This chapter does not seek to wade into that debate. What can be fairly said, however, is that core ESC rights obligations are often marginalized in mainstream political discourse, and this problem will inevitably be made worse if prominent human rights groups are ignoring progressive realization issues in their own work. While not as extensive as some might have hoped, work on corruption issues has provided one important avenue for relatively conservative human rights NGOs to engage more directly with progressive realization issues. This has to be a good thing, whether one sees it as a viable end state or just the first of what should be many more steps forward.

Deeper Analysis of Context

Patterns of human rights abuse are often inextricably bound up with broader contextual factors that give rise to them or even make up part of the abuses themselves. Analyses of human rights problems that are not firmly grounded in that deeper context can turn into boilerplate affairs that offer little practical guidance or insight about possible ways forward. Sometimes this might be unavoidable. For instance, in 2010, Human Rights Watch called on Somalia's Transitional Federal Government (TFG) to "ensure that all credible allegations of humanitarian law violations by TFG forces are promptly, impartially, and transparently investigated and that those responsible for serious abuses, regardless of rank, are held to account."[32] That recommendation felt unhelpful even to this author, who co-authored the report. It was important as a statement of what human rights obligations actually required, but at the time, the TFG was a functional government in name only and its armed forces were essentially a semi-organized collection of undisciplined militia fighters. Since there was no clear path toward addressing Somalia's broader lack of real governance, recommendations from all quarters about ending abuse often took on an air of fantasy. But few contexts are so extreme, and it is often possible to think about how even contextual factors that are not directly linked to human rights abuse could be engaged in a way that could make steps to end abuse more feasible or likely to succeed.

Most human rights groups are very well aware of the need to tackle key contextual factors in their analysis, but this is not always easy to do well. Work that bridges the gap between human rights and corruption has provided some useful examples on this front. In Nigeria, for instance, human rights groups have

[31] Human Rights Watch, *"Wild Money": The Human Rights Consequences of Illegal Logging and Corruption in Indonesia's Forestry Sector* (New York: Human Rights Watch, 2009).

[32] *See* Human Rights Watch, *Harsh War, Harsh Peace: Abuses by al-Shabaab, the Transitional Federal Government and AMISOM in Somalia* (New York: Human Rights Watch, 2010).

documented how corrupt police officers regularly detain, abuse, and sometimes murder ordinary citizens with impunity. While documenting these police abuses has long been an important aspect of the work of international and domestic human rights groups, it simply is not possible to make sense of this behavior without understanding the systemic corruption that underpins it. Many of the worst violent abuses are part and parcel of police officers' systematic efforts to extort bribes from motorists, traders, shopkeepers, and even criminal suspects. Accordingly, Human Rights Watch research on this topic did not just catalog the abuses. Rather, it emphasized that ordinary police officers are not just in it for themselves—they are expected to make regular "returns" to their superiors that they can only raise by extorting bribes from the citizens they are supposedly being paid to protect.[33] What this means is that it probably is not possible to curtail violent abuses by low-level police officers without stamping out pervasive corruption right up through the ranks. Understanding the linkages between corruption and human rights abuses makes clear that there is little point in human rights groups focusing their advocacy efforts solely around calls to investigate and prosecute violent abuses by the police. To have value, any government action would also have to tackle the context of corruption that helps give rise to the abuse.

Sometimes, crafting meaningful recommendations in response to human rights problems means engaging with underlying issues of governance that do not feel viscerally connected to any one incident of abuse. Human rights groups are not necessarily comfortable with this—they are in the business of documenting and campaigning against abuses, not analyzing problems of governance writ large. It is not always easy to know where to draw the line between contextual issues that have to be addressed to arrive at useful analysis and recommendations, and issues that stretch the boundaries of human rights advocates' expertise or credibility. Again, some of the work human rights groups have done on corruption issues has provided useful examples of how these situations can be approached. In 2011, Human Rights Watch published a report that analyzed the successes and failures of Nigeria's Economic and Financial Crimes Commission (EFCC), the country's preeminent anti-corruption agency. The report was unusual for Human Rights Watch, as it was focused almost entirely on identifying institutional failures in the fight against corruption and plausible remedies for some of them. It did not lay out new evidence of the links between corruption and Nigeria's myriad human rights problems. Instead, it focused on issues like judicial delay, the ways in which anti-corruption officials could be better insulated from political pressure, and allegations that key anti-corruption prosecutions had been derailed through political pressure and corruption.[34] The broader point is that sometimes documenting and understanding the contextual factors that allow or encourage abuse are just as important as documenting the abuses themselves if the goal is to identify a real way forward.

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[33] Human Rights Watch, *"Everyone's in on the Game": Corruption and Human Rights Abuse by the Nigeria Police Force* (New York: Human Rights Watch, 2010).

[34] Human Rights Watch, *Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission* (New York: Human Rights Watch, 2011).

New Tools for Advocacy and Accountability

High-level corruption often generates visceral public outrage, especially where it stands in ugly contrast to widespread poverty and deprivation. But corruption's practical relevance as a political issue has often proved limited even where it is universally condemned. In 2011, for instance, anti-corruption protests in New Delhi drew domestic and international headlines for months and catapulted some of the protest leaders to political stardom. It is not clear whether that outpouring of public outrage actually yielded any concrete victories though. Sweeping anti-corruption legislation was proposed but then watered down and as of the time of writing had not actually been passed at all, in any form. Some analysts pointed out that politics in India revolves around huge blocks of poor voters and argued that oddly enough, corruption seems to be a middle-class issue—a hypothesis one could see reflected in the makeup of the New Delhi protestors.[35] Similarly, in Nigeria, corruption is a constant and central part of public discourse. But widespread public disgust and fascination with the antics of corrupt officials have not even translated into major public protest, let alone serious and effective grassroots campaigns for reform.

Making the link between corruption and specific patterns of human rights abuse can help lend momentum to anti-graft efforts and heighten public outrage over corruption. Focusing on the human rights impacts of corruption means campaigners can describe the damage corruption does to real human beings—not just to government finances. As the International Council on Human Rights Policy put it:

> When people become more aware of the damage corruption does to public and individual interests, and the harm that even minor corruption can cause, they are more likely to support campaigns and programs to prevent it. This is important because, despite strong rhetoric, the political impact of most anti-corruption programs has been low. Identifying the specific links between corruption and human rights may persuade key actors—public officials, parliamentarians, judges, prosecutors, lawyers, business people, bankers, accountants, the media and the public in general—to take a stronger stand against corruption.[36]

The advantage here is not just a political one. Institutionally, the accountability mechanisms that exist to target corruption are often more robust and/or further reaching than those aimed squarely at securing accountability for human rights violations. There are only a handful of international mechanisms that can attach

[35] It is also worth mentioning that some of the most prominent protest organizers, such as Anna Hazare, came saddled with allegations that they supported not just an anti-corruption agenda but also a right-wing Hindu nationalist one. At least a few prominent commentators also argued that some of the anti-corruption movement's demands were fundamentally anti-democratic. *See* Arundhati Roy, "I'd Rather not be Anna," *The Hindu* (August 21, 2011), http://www.thehindu.com/opinion/lead/article2379704.ece?homepage=true (accessed December 17, 2012).

[36] International Council on Human Rights Policy, *Corruption and Human Rights,* 5.

criminal liability for human rights abuse and are all strictly limited in scope.[37] In most circumstances, human rights abusers meet with accountability or impunity, depending mostly on the actions of their own governments. While some governments take their responsibility to criminalize and punish serious human rights violations more seriously than others, nearly all states' approaches to the prosecution of human rights abuses that take place *beyond* their own borders are for the most part lackluster or even non-existent.

International law recognizes the principle of universal jurisdiction for a narrow set of serious human rights-related crimes including war crimes, crimes against humanity, and genocide. Simply put, this means that any state can, in principle, prosecute any person who has committed any of these crimes anywhere in the world, against anyone. But while quite a few states have laws on the books that allow for such prosecutions, they are rarely undertaken.[38] In Spain and Belgium—the two countries whose courts have been most ambitious in their use of universal jurisdiction to pursue gross human rights abuses that took place abroad—efforts have been curtailed in response to domestic and international political pressure.[39] In the United States, the Alien Torts Claims Act has long been an unwieldy but important tool that allowed abuse victims to bring civil (but not criminal) suits against foreign officials in US courts. But it has come under sustained assault from multinational corporate defendants, their home governments, and skeptical US judges. Its future as a useful tool in human rights cases is an open question.[40]

Outside the realm of universal jurisdiction, states have every right to prosecute extraterritorial human rights abuses that involve their own citizens as perpetrators or victims. But outside of narrow contexts like child sex abuse, few if any

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[37] The International Criminal Court (ICC) is the international legal system's nuclear option, a forum of last resort whose scope is in any case sharply limited to cases of war crimes, crimes against humanity, and genocide. Ad hoc tribunals like the International Tribunals for Rwanda and Yugoslavia have been similarly limited in scope as well as geographically. Mechanisms like the European Court of Human Rights, the Inter-American Commission on Human Rights, and even the International Court of Justice can and do direct states to address non-compliance with their own human rights obligations—but cannot always enforce meaningful compliance and cannot hold individual human rights abusers to account directly.

[38] For more details on various universal jurisdiction statutes and the obstacles to their useful implementation, *see* Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (New York: Human Rights Watch, 2006).

[39] The Belgian law—which had been used to pursue Rwandan *génocidaires* as well as former Chadian dictator Hissène Habré—was amended in response to heavy-handed pressure by the Bush Administration. The US government opposed the law on the theory that it could be used against US government officials accused of war crimes, torture, or other serious international crimes. Baltasar Garzon, a Spanish judge who was the driving force behind judicial efforts to pursue international human rights violations in Spanish courts, was convicted in February 2012 of wiretapping—a case that many condemned as politically motivated.

[40] In 2013, the US Supreme Court is due to issue a ruling in the *Kiobel* case: An ATCA case involving allegations of human rights abuse by oil major Shell in the Niger Delta. Many commentators expect that the Supreme Court may use the case to put an end ATCA's use against corporate defendants.

governments make vigorous efforts to apply that prerogative. The picture is even bleaker when it comes to corporate human rights abuses. No government in the world even rigorously monitors, let alone regulates, the human rights practices of its own corporate citizens when they go abroad to work in other countries. In developing countries whose own governments are too weak or disinterested to oversee them, these powerful corporate actors are in effect often left to regulate and oversee the human rights and environmental impacts of their own operations—with sometimes disastrous consequences.

If legal mechanisms to secure extraterritorial accountability or redress for human rights violations are often weak and in some cases growing weaker, the opposite trend prevails in anti-corruption enforcement. There is a strong global trend toward states criminalizing even extraterritorial acts of corruption by their citizens and corporations. The United States government used the Foreign Corrupt Practices Act (FCPA) to secure fines of more than $500 million from 15 companies in 2011—all involving acts of corruption that took place in other countries and many of them involving non-US companies.[41] FCPA enforcement has grown so vigorous that the US Chamber of Commerce has lobbied—so far unsuccessfully—for changes that would restrict the law's reach.[42] While many FCPA enforcement actions involve deferred prosecution agreements that garner fines from companies but no individual criminal liability for officials, this is not always the case.[43] In 2012, former Kellog Brown and Root CEO Albert Stanley was sentenced to 30 months in jail for his role in a $180 million bribery scheme in Nigeria.

The United States' robust Foreign Corrupt Practices Act (FCPA) has long stood out as the world's gold standard of anti-corruption laws—but it is less of an outlier than it used to be.[44] Driven in part by their obligations under the Organization for

[41] This was actually down from a record $1.8 billion in fines in 2010. *See* Debevoise and Plimpton LLP, "The FCPA in 2011: The Year of the Trial Shapes Enforcement," *FCPA Update* 3, no. 6 (January 2012), http://www.debevoise.com/files/Publication/20960d4e-4743-40b8-bd29-27e9ed1a16c3/Presentation/PublicationAttachment/287fbc56-a440-4e41-97f1-3d76e6128a19/FCPAUpdateJanuary2012.pdf (accessed December 17, 2012). *See also* Mark Srere, "The Ever-Increasing Enforcement of the FCPA," *Westlaw Expert Commentary Series: FCPA Update,* January 2011, http://www.bryancave.com/files/Uploads/Documents/WLJ_FCPA2011_Commentary_Srere.pdf (accessed December 17, 2012).

[42] Andrew Weissmann and Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* (Washington: US Chamber Institute for Legal Reform, 2010). http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf.

[43] Critics of the US government have argued that the dearth of FCPA-related case law creates uncertainty that effectively forces companies to settle suits even when they do not believe they have broken the law. *See*, e.g., Nathan Vardi, "The Bribery Racket: How the Crackdown on Payoffs Hurts Business and Enriches Washington, DC insiders," *Forbes online,* May 28, 2010. http://www.forbes.com/fdc/welcome_mjx.shtml (accessed December 17, 2012).

[44] And as *The Economist* noted, because of its OECD membership, "Even the United States… has had to undergo scrutiny at the hands of its peers and listen meekly to ideas for better enforcement. That contrasts sharply with the rejectionist American approach to many other forms of international legal scrutiny." The Economist, "The Tents of the Righteous: At 50 the Rich-Country Club for Number-Crunchers and Sleaze Fighters is Thriving," September 17, 2011.

Economic Cooperation and Development (OECD) bribery convention, a spate of powerful new anti-corruption laws have been passed around the world.[45] In 2011 and 2012, the UK's new Bribery Act rattled British companies with operations that require them to deal with corrupt overseas governments.[46] The strength of this trend should not be exaggerated—in 2011, Transparency International found that only 7 out of 37 signatory countries were "actively" enforcing the OECD anti-bribery convention[47]—but as an emerging field of extraterritorial accountability through law enforcement, it is far more dynamic than the development and expansion of domestic legal frameworks focused explicitly on human rights violations.

The relevance of these trends for human rights campaigners is not just hypothetical. While still rare, there are increasingly numerous examples of abusive government officials being successfully or at least vigorously pursued for offenses related to corruption—even when they have long seemed immune from any sort of accountability for myriad other crimes. In April 2012, a UK court convicted former Nigerian governor James Ibori of money-laundering charges involving some $67 million after extraditing him from the United Arab Emirates to stand trial. Ibori was implicated in fueling widespread corruption along with political violence and electoral chaos during his tenure as governor of Nigeria's oil-rich Delta State. Attempts to prosecute him in Nigeria ended with the effective firing of the country's top anti-corruption official and a dismissal of all charges against the well-connected former governor.[48] Ibori's UK prosecution was somewhat analogous to Al Capone's famous conviction on charges of tax evasion—he was tried for offenses that are dwarfed in scale and seriousness by some of the other allegations against him.[49] But the bottom line is that allegations rooted in corruption saw a politician who was untouchable at home imprisoned abroad, while allegations of human rights abuse did not.

Similarly, the tiny West African nation of Equatorial Guinea has long been plagued by superlatively bad governance. Neither long-serving President Teodoro Obiang nor his jet-setting playboy son Teodorin (also a government minister) has faced any serious extraterritorial legal threats stemming from allegations of pervasive repression and human rights abuse on the part of their government. Yet the President's son has had either corruption or money-laundering-related cases

[45] The OECD convention requires member countries to criminalize bribery of foreign officials.

[46] The UK's Bribery Act is in some respects stronger even than the FCPA, but as of the time of writing, there was little precedent available to judge its practical application.

[47] Transparency International, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention* (Transparency International, 2011), http://issuu.com/transparencyinternational/docs/oecd_report_2011?mode=window&backgroundColor=%23222222 (accessed December 17, 2012).

[48] *See* Human Rights Watch, "UK Conviction a Blow Against Corruption: Nigerian Politician Stole Millions, Laundered Fortune Overseas," April 17, 2012, http://www.hrw.org/news/2012/04/17/nigeria-uk-conviction-blow-against-corruption.

[49] Ibori was widely accused of fomenting political violence and electoral fraud in his home state as well as egregious acts of corruption including an alleged attempt to bribe top Nigerian anti-corruption officials to drop the case against him with $15 million in cash. Ibid.

lodged against him in both France, where officials seized his collection of expensive sports cars, and the United States, where prosecutors have been working to freeze assets including a private jet they allege was purchased with the proceeds of corruption.[50]

Examples like these show how positive global trends in anti-corruption enforcement can be used to bolster efforts to hold rights-abusing politicians to account, even if the basis for accountability is ultimately not predicated on violations of international human rights law. To be sure, corruption or money-laundering prosecutions are no substitute for direct accountability for human rights abuses. But in some cases where no viable legal path exists or where political will is otherwise lacking to hold abusive officials to account for human rights crimes, the growing international willingness to treat corruption as an international crime can provide an invaluable if imperfect alternative. A Spanish judge's 1999 attempt to extradite Augusto Pinochet from the UK for alleged human rights crimes feels to some extent like the memory of a different era. In today's world, at least in the short term, the thing that makes abusive politicians reticent about overseas travel may well end up being the threat of corruption-related, rather than rights-related, prosecutions. While this phenomenon might be little more than an unintended byproduct of efforts led by Western governments to check the spread of corruption through their own public institutions and multinational corporations that does not make it any less useful.

New Alliances

The growing overlap between the work of human rights and anti-corruption campaigners has led to the creation of important initiatives that bring both groups together around issues of common concern. Most notably, human rights and anti-corruption groups came together to help form the Publish What You Pay Coalition (PWYP) and the Extractive Industries Transparency Initiative (EITI). Those initiatives seek to increase transparency around payments by multinational oil, mining, and gas companies to the governments of developing countries. They are rooted in a desire to address the so-called resource curse, an affliction that has often seen vast but opaque revenue streams created by extractive industries fuel corruption and bad governance rather than broad-based economic growth. PWYP is a coalition of NGOs that works to campaign for greater transparency around revenues derived from extractive industries in countries around the world. It includes both

[50] Equatorial Guinea's government also came under sustained and withering criticism over efforts to fund a UNESCO prize for research in the life sciences. Human rights groups joined anti-corruption advocates in a high-profile campaign against the prize, on the grounds that the provenance of the funds was almost certainly illicit. *See* Human Rights Watch, "Equatorial Guinea: UNESCO's Shameful Award," July 16, 2012, http://www.hrw.org/news/2012/07/16/equatorial-guinea-unesco-s-shameful-award.

human rights and anti-corruption groups. EITI is a multistakeholder initiative that brings together civil society groups, governments, investors, and some of the world's major oil, mining, and gas companies. EITI requires member companies and governments to each separately publish the amount member companies pay into member government treasuries through their operations. EITI then verifies and reconciles that data. The basic idea is to ensure that accurate, verifiable data about the revenues governments derive from extractives projects are available to the public. Human rights groups see EITI and PWYP as useful mechanisms to combat corruption through fiscal transparency. They share the hope that increased transparency will help ensure that revenues are put to constructive use, expanding the enjoyment of fundamental human rights down the road. These initiatives emphasize not just the need for fiscal transparency, but also the robust and unfettered participation of local civil society groups in member countries. Neither is without its critics—some argue that their narrow focus on transparency is misguided because it requires nothing in the way of transparency where it really counts—around government expenditures.[51] But at the very least, revenue transparency is an important first step in the right direction.

Similarly, human rights and anti-corruption groups have joined hands to oppose efforts aimed at weakening anti-corruption laws—including business-led efforts to amend the US Foreign Corrupt Practices Act. The International Corporate Accountability Roundtable, a Washington, DC-based umbrella group that brings together a range of human rights and anti-corruption groups, has played a leading role in pushing back against efforts to amend and weaken the FCPA.[52] This reflects a clear appreciation on the part of human rights groups that strong anti-corruption laws are a centrally relevant part of efforts to promote corporate accountability and the protection of basic rights.

A Bridge Too Far

The preceding pages attempted to describe how new synergies between human rights and anti-corruption work have enhanced research and advocacy efforts. But as useful as these connections are, they have their limitations and work that ignores those boundaries risks undermining its own credibility. In some quarters, the articulation of new links between corruption and human rights has become something of an intellectual fad, with results that are not universally helpful. The

[51] Nigeria, for example, is a member of EITI. But enhanced transparency around the scale of revenues the country receives from its oil industry has not translated into any kind of meaningful transparency about how government at the federal, state, and local levels actually disposes of those revenues.

[52] For an overview of that work, *see* International Corporate Accountability Roundtable, "Defending the FCPA," http://accountabilityroundtable.org/campaigns/defending-the-fcpa. ICAR also campaigns on issues related to the private security industry, conflict minerals, corporate accountability and promoting increased use of human rights due diligence by companies.

concerns expressed in the following pages should not be overstated—generally speaking, the emerging links between the work and discourse of human rights and anti-corruption campaigners have enriched the efforts of both. But as work in this area continues to advance, it is worth signaling a note of caution against taking things too far.

Corruption is Not a Human Rights Abuse

In a 2004 speech, Transparency International chairman Peter Eigen had this to say about the human rights impact of corruption:

> "[C]orruption is a human rights abuse. Corruption denies people the fundamental economic and social rights guaranteed to them by the Universal Declaration of Human Rights…corruption perpetuates discrimination, corruption prevents the full realization of economic, social, and cultural rights, and corruption leads to the infringement of numerous civil and political rights…Corruption robs children of their future, and it kills."[53]

These are stirring words, but they are also inaccurate from the standpoint of international human rights law. As the first section of this chapter described, while corruption and human rights abuse *are* often inextricably bound up with one another, that does not mean they are the same thing. Corruption often causes or fuels human rights abuse, but that link is not inevitable and cannot simply be assumed into existence. Sometimes corruption has no meaningful human rights implications at all.

The temptation toward hyperbole and simplification is understandable. Drawing a link between corruption and human rights abuse may strengthen the case for real action and help mobilize public or political pressure in that direction. The point is often to make demands for reform and accountability more compelling, and more nuanced formulations may not be stirring enough to mobilize public opinion one way or the other. Former Amnesty International Secretary General Irene Kahn once said in an interview that "[c]orruption very frequently causes human rights violations."[54] Former UN Special Rapporteur on Corruption and Human Rights Christy Mbonu has written that "the fiscal distortions caused by corruption erode the quality of government services, with particularly serious consequences for the poor."[55] Both statements are measured and accurate, but neither is very good as a clarion call to action against graft. Yet despite the understandable

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[53] "Corruption is a Human Rights Issue," remarks by Peter Eigen, Chairman, Transparency International, 2004 Business and Human Rights Seminar, December 4, 2004.

[54] Interview with Irene Khan, former Secretary General of Amnesty International, *Transparency International Newsletter*, December 2008, http://www.transparency.org/publications/newsletter/2008/december_2008/interview (accessed November 1, 2012).

[55] UN Commission on Human Rights, "Corruption and its Impact on the Full Enjoyment of Human Rights, in Particular Economic, Social, and Cultural Rights," Preliminary Report of the Special Rapporteur, Christy Mbonu, UN Doc. E/CN.4/Sub.2/2004/23, July 7, 2004, sec. IV.A, http://www.unhcr.org/refworld/pdfid/4152c27e4.pdf.

temptation to elide complexity, insisting that corruption is always human rights abuse ultimately diminishes the power and credibility of rights-based arguments against corruption where they do hold real water.

None of this is to deny that there are good arguments to be made in favor of the idea that there *ought to be* a right to be free of corruption. For example, Raj Kumar, an Indian legal scholar who has written extensively on corruption and human rights in India, has argued for an internationally recognized right to corruption-free governance:

> The right to a society free of corruption is inherently a basic human right because the right to life, dignity, equality and other important human rights and values depend significantly upon this right. That is, it is a right without which these essential rights lose their meaning, let alone be realized…[I]t may be argued that the state is in violation of the right to economic self-determination if it transfers in a corrupt manner the ownership of national wealth to select power-holders who happen to be influential in a society at a particular point of time. This violation by the state also results in a situation where people are denied individually and collectively their right to use freely, exploit and dispose of their national wealth in a manner that advances their development.[56]

There are many compelling arguments to be made in favor of the idea that an internationally recognized right to corruption-free governance *should* exist. But that is not the same thing as arguing that such a right *actually does.* As Kumar himself argues elsewhere:

> The campaign to contain corruption and the movement to protect and promote human rights are not disparate processes. They are inextricably linked and interdependent… Having said that, it needs to be borne in mind that this generalized system of linkage need not be applicable in all situations. Hence it should not be presumed that the fight against corruption is synonymous with the struggle to enforce human rights.[57]

In some cases, attempts to discover and elucidate new links between corruption and human rights abuse are taken to particularly unhelpful extremes. A 2006 article published in the Journal of International Criminal Justice argued that "deprivation of food and medical care" could be considered a crime against humanity if "the government is misappropriating foreign aid and the country's resources for the purposes of illicit enrichment."[58] This argument is problematic on a number of levels. The threshold elements of a crime against humanity are very precisely

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[56] C. Raj Kumar, "The Human Right to Corruption-Free Service: Some Constitutional and International Perspectives," *Frontline* 19, no. 19 (September 14–27, 2002), http://www.flonnet.com/fl1919/19190780.htm.

[57] Ibid.

[58] Ilias Bantekas, "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies," *Journal of International Criminal Justice* 4, no. 3 (July 2006): 466-484. The same article argued that international mining firms could be held liable for crimes as humanity as well where their contract with a "corrupted government… rendered access to food and medicine for the civilian population for the next ten years almost impossible."

defined in international law.[59] These consist of one or more specifically enumerated crimes—which do not include corruption—"when committed as part of any widespread or systematic attack against any civilian population, with knowledge of the attack."[60] The corruption as crime against humanity argument is at best an example of serious overreaching. Such arguments often seem to reflect misguided efforts to force a square peg into a round hole with the idea that if the ruse is pulled off, the real-world results would be good ones. The article cited above, for example, argued that a principle advantage of its analysis lays in the fact that "criminal sanctions for crimes against humanity are more severe, not to mention that it better depicts the heinous nature of the crime."[61] While perhaps well intentioned, this argument puts the cart squarely before the horse. One cannot argue that corruption is a crime against humanity simply because we all might like to see corrupt officials punished more harshly when their actions devastate the lives of poor and disempowered people any more than we can argue that corrupt officials are murderers or rapists just because the punishment and social stigma attached to those crimes are satisfyingly harsh.

The "corruption as crime against humanity" argument is admittedly put forward here as something of a straw man (though it has been made in other forums and even less coherently),[62] but it speaks to a broader point. Even credible activists and thinkers sometimes stray into hyperbolic insistence that corruption *always* causes human rights abuse or even that it somehow *is* a human rights abuse in and of itself. But the credibility of any rights-based argument depends on its proponent having the discipline to confine his or her critiques to abuses of rights that actually exist. To be sure, for better or worse human rights, groups do attempt—sometimes successfully—to stretch human rights discourse to include problems that were previously seen as outside its purview. But corruption is too large and sprawling a phenomenon to be crammed entirely inside of a human rights analysis. The power of arguments linking corruption and human rights abuse lies in their ability to show how corruption is harming people in specific, provable ways. Replacing that kind of rigor with boilerplate slogans about corruption and human rights abuse is self-defeating. There are many situations where even overwhelming evidence of corruption has no obvious human rights implications. A police officer who allows a motorist to escape a parking violation in return for a small bribe might in some miniscule way be fueling

[59] In some circumstances, it might be possible to cast the theft of humanitarian assistance as a human rights abuse (not a crime against humanity), but even there the argument would probably depend on facts not assumed in the hypothetical, like a deliberate government policy to encourage such theft.

[60] Rome Statute of the International Criminal Court, art. 7(1).

[61] Bantekas, "Corruption as an International Crime."

[62] For instance, then Kenyan Minister of Justice and Constitutional Affairs Kiraitu Murungi once said that grand corruption is a "crime against humanity," but appeared to be using the term as a non-specific placeholder for "terrible crime." Speech by Kiraitu Murungi at the Opening of the 11th International Anti-Corruption Conference, May 25, 2003. http://iacconference.org/en/speakers/details/kiraitu_murungi.

broader patterns of police graft that leads to human rights abuse. Yet is hard to take that kind of an argument seriously because it comes across more like dogmatic rigidity than sensible analysis. There is no point in trying to force a link into existence if it is not there or to pretend that the relationship between corruption and a set of human rights problems is simpler than it really is.

In other cases, there may be a real link between corruption and human rights abuse that is simply impossible to prove or quantify. This is especially true of attempts to link evidence of corruption to a government's failure to progressively realize economic, social, and cultural rights. Peter Eigen of Transparency International has said that corruption always and inevitably causes a range of human rights abuses and that "[i]f the rights to basic health care, education, and sanitary conditions are part of the system of human rights, then corruption must be seen as a violation of the most basic economic and social rights."[63] But this again is hyperbole. Reality is more complex, and Eigen's statement is true of some contexts but not of others. Corruption is relevant to the rights to health and education only if it actually impedes the delivery of those services. But in some contexts, it might be possible to prove corruption but impossible to establish whether the loss of stolen resources has had a material impact on the delivery of basic services. It may not always be possible to isolate corruption's impact on particular, rights-relevant revenue streams. Horribly dysfunctional public institutions charged with delivering health and education services may suffer from corruption that is more a secondary symptom of deeper failures of governance than a root cause of failed service delivery. In these and other cases, it may be impossible to prove that resources lost to corruption would have made any dent in improving basic services had they not been stolen. It is important that rights campaigners not assume that a strong causal link exists between corruption and human rights abuse simply because it seems plausible or because it sounds compelling as a declaration of grand principle. This is not just an issue of credibility. A misplaced emphasis on corruption could lead advocates to focus their energies on pushing for anti-graft remedies that would not actually solve the underlying human rights problems they want to address. Of course, corruption may have tremendous relevance as a human rights issue even in situations where the link between the two cannot be objectively documented—but human rights groups might not be able to bring much to the table in those situations.

Not Always the Best Lens, Even Where it Fits

Not every link between corruption and human rights problems is important enough to be worth emphasizing. Sometimes the most important and effective arguments lie elsewhere, especially where the area of overlap between corruption and patterns of

[63] Peter Eigen, "Chasing Corruption Around the World—How Civil Society Organizations Strengthen Global Governance," Stanford University, October 4, 2004, p. 6, http://iis-db.stanford.edu/evnts/3922/Eigen10'04.pdf.

human rights abuse is only one small facet, or even a symptom, of much larger problems. For example, corruption has plagued Somalia's weak Transitional Federal Government, and this has very real human rights implications. Institutional corruption fuels incompetence and abuse among security forces that are undisciplined to begin with and has at times led to the theft of badly needed food aid. These issues are undoubtedly important and worth analyzing in their own right. But the anti-corruption lens is not adequate to the task of understanding the central and most important realities of Somalia.[64] Among these are the facts that the country has had no effective government for more than 20 years, has been wracked by brutal and abusive conflict for even longer than that, and is held back by a deeply entrenched norm of impunity for serious abuses. Any effort to tackle corruption by itself would probably be both doomed and beside the point in that context.

Lessons for Transitional Justice Initiatives?

As evidenced by the other chapters in this volume, there is growing awareness that transitional justice initiatives have to find better ways to address broad issues of economic governance, corruption, and the outright pillage of valuable resources. Indeed, the need to address corruption-related issues is probably even more important for most transitional justice initiatives than it is for human rights groups operating in non-transitional contexts. Because transitional justice initiatives often occur in the wake of catastrophic social breakdown, they must necessarily reckon with the broader context in a way that human rights advocacy does not *always* need to. Transitional justice initiatives must grapple not only with a clear-eyed picture of past abuse and injustice, but also of the context that gave rise to those abuses. In some cases, that means dealing squarely with issues of corruption or "economic violence" and identifying larger factors that fuel and sustain those problems. Human rights advocacy might suffer for failing to take account of such factors, but it can often still have value in spite of such shortcomings. The same might not be said as often of transitional justice initiatives.

While the analogy is far from perfect, there may be useful lessons for transitional justice initiatives in the experiences of human rights groups that this chapter describes. Truth Commissions and other transitional justice institutions have traditionally focused far more closely on repression, discrimination, and violent abuses of state power than on broad issues of economic governance like corruption, foreign investment, and the (mis)allocation of state resources. Likewise, human rights groups' entry into the field of anti-corruption research and advocacy has been a sometimes tentative departure from a more straightforward focus on bread-and-butter civil and political rights issues. Many of the same concerns human rights groups have had about tackling corruption issues also have relevance

[64] Of course, one could make the same argument about the relevance of any analysis of Somalia's problems that focuses entirely on human rights issues.

for transitional justice initiatives faced with important issues of economic governance. Human rights groups are already proving that it is possible to produce rigorous and useful analysis of corruption's role in causing human rights violations. Transitional justice initiatives might therefore be on relatively safe ground if they tie their examination of corruption, mismanagement, or "economic violence" to the objective human rights impacts of those problems. On the other hand, transitional justice initiatives might find a useful cautionary tale in the mild proliferation of unconvincing analyses which purport to tie human rights and corruption together in dubious circumstances. The experience of human rights groups should lessen any trepidation about examining issues of corruption, but it should also serve as a reminder that that work needs to have a coherent framework and responsibly set boundaries. Open-ended examination of issues of economic governance can lead to territory that is hard to police for rigor or objectivity. Analysis that tries to cloak (even reasonable) principled or political arguments in the trappings of international human rights law serves no valid purpose and risks undermining the credibility of otherwise valuable work.

Moving Forward

The preceding pages highlight a number of worries related to the danger of hyperbole and overreaching on corruption and human rights issues. None of that should distract from the central message of this chapter, which is that the ability and willingness of human rights and anti-corruption groups to bring their expertise to bear on one another's issues is a significant advance. It has helped contribute to greater public understanding about the importance of corruption as a global problem and the relationship of human rights problems to broader issues of governance that need to be tackled. In a broader sense, these advances and linkages also reflect the increasing sophistication of many civil society groups, who have learned the importance of situating narrower causes and campaigning within the broader web of real-world issues they form a part of.

Transitional Justice, Development, and Economic Violence

Roger Duthie

Introduction

In the aftermath of systematic and widespread human rights violations, societies are faced with numerous and difficult challenges. As such violations frequently occur during armed conflict or under authoritarian regimes, they are often addressed during or after a period of transition. Transitions can be from war to peace, or to varying degrees of peace. They can also be political transitions—from authoritarianism to democracy, or to some sort of polity that lies in between the two. Societies undergoing transitions also frequently struggle to effect economic and social changes: To move from state controlled to market economies, to reduce poverty and inequality and achieve varying degrees of socioeconomic development, and to reduce levels of corruption and increase institutional capacity and integrity. In virtually all cases, transitions will be mixed and nonlinear: War-to-peace and political transitions may occur at the same time, may progress at different speeds, and may ultimately be reversed or stopped somewhere short of complete peace or democracy.[1] Transitions often take years or decades; socioeconomic development, in particular, generally takes generations if it is achieved to any significant degree.[2]

[1] *See,* e.g., Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (2002): 5–21; World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington DC: World Bank, 2011).

[2] World Bank, *World Development Report 2011*.

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When societies attempt to confront past serious and massive human rights abuses, then, they often do so in the midst of complex, long-term, and uncertain transition. Transitional justice measures—including criminal prosecutions, truth-telling initiatives, reparations programs, and certain types of institutional reform—are generally understood to be a specific response to such abuses. Recent research in this field has examined the links between these measures and the broader transitional context in which they are implemented—including security, humanitarian, and development activities, undertaken by local, national, and international actors.[3] Development is a broader field than transitional justice, generally now understood to refer to the improvement of people's standard of living and the choices available to them. While the set of measures included under the concept of development is obviously far wider than even the most expansive notion of transitional justice, development—both a country's level of development as well as the policies and projects aimed at increasing it—is very often an important element of the transitional context. As with the other elements of this context, transitional justice and development are distinct but interacting notions. It is therefore helpful to understand as best we can the practical and conceptual links between the two.

In this chapter, I address the relationship between transitional justice and development, primarily from the perspective of transitional justice. That is, I examine the contribution that transitional justice measures may make to the development process. Expanding on prior research spearheaded by Pablo de Greiff at the Research Unit of the International Center for Transitional Justice (ICTJ), the argument is that transitional justice can make its most significant contribution to development by legitimizing state institutions, strengthening civil society, and improving state–society relations. It does this mainly by effectively achieving its goals of recognizing victims, fostering civic trust, and strengthening the rule of law. Furthermore, to the extent that transitional justice can effectively respond to economic violence, which involves the economic and social aspects of injustice caused by human rights violations, it may make a further contribution to development processes. However, it is important to have realistic expectations about the extent of this contribution, which will most likely be indirect and long term, and, given the complexity and duration of most transitional and developmental processes, difficult to measure empirically; nor should we ignore the potential tensions between the goals and interventions of justice and development. Nevertheless, it is reasonable to think that the contribution of transitional justice measures to development is real and, furthermore, that examining its nature will provide guidance on how such measures might be designed in such contexts to heighten the possibility of long-term synergies.

As part of the context in which transitional justice measures are designed and implemented, levels of development as well as development policies and programs can also have an important bearing on the potential for and efficacy of transitional justice. The level of development in a country or region can affect the resources and institutional capacities that are available to implement transitional justice

[3] *See,* e.g., ICTJ projects on the relationships between transitional justice and disarmament, demobilization, and reintegration (DDR), displacement, development, and on the broader context more generally: http://ictj.org/research.

measures. Consequently, economic and institutional reconstruction and development assistance can in some ways facilitate that implementation. Furthermore, the support, participation, cooperation, and experience of actors engaged more directly in development processes can contribute to making those justice measures more effective. However, this side of the relationship is beyond the scope of the chapter.[4]

The first section of the chapter explains the understandings of transitional justice and development that I use throughout and explores some of the overlap and differences between them as well as the notions of justice—corrective and distributive—that are generally associated with them. The next section looks at the ways in which transitional justice may impact development even without attempting to address development issues—through strengthening the rule of law, facilitating social integration, promoting institutional reform, preventing the recurrence of abuses, and catalyzing civil society organization. These are the types of impact that are most likely to be felt only in the long term, but they may be the most significant contribution that transitional justice can make to development. The final section examines how transitional justice measures may contribute to development by responding directly to economic violence. It is here where I review some of the arguments for and against expanding the mandates of transitional justice measures beyond the traditional focus on civil and political rights violations to include economic, social, and cultural rights violations. I argue that in some contexts, it makes sense for transitional justice to adopt a relatively narrow approach to economic violence.

Transitional Justice and Development: Distinct but Related Notions

Definitions of Transitional Justice and Development

"Transitional justice" generally refers to a set of measures that are designed and implemented to redress the legacies of massive human rights abuses that occur during armed conflict and under authoritarian regimes, thereby strengthening

[4] *See,* e.g., ICTJ Research Unit, "Transitional Justice and Development," ICTJ Briefing, September 2009; *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009), in particular Marcus Lenzen, "Roads Less Travelled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice" and De Greiff, "Articulating the Links Between Transitional Justice and Development"; Helen Clark, "A Role for Development in Transitional Justice: The Arab Spring and Beyond," New York University-ICTJ Emilio Mignone Lecture on Transitional Justice and Development, November 14, 2011; ICTJ and the UK Department for International Development (DFID), "Donor Strategies for Transitional Justice: Taking Stock and Moving Forward," conference report, October 15–16, 2007; Ingrid Samset, Stina Petersen, and Vibeke Wang, "Maintaining the Process? Aid to Transitional Justice in Rwanda and Guatemala, 1995–2005," paper prepared for the conference "Building a Future on Peace and Justice," June 25–27, 2007, Nuremberg, Germany; Patricia Lundy and Mark McGovern, "The Role of Community in Transitional Justice," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008).

human rights norms that were previously systematically violated.[5] The different measures that together make up a holistic approach to transitional justice (one whose constituent elements are complementary both practically and conceptually) seek to provide recognition for victims, to foster civic trust, and to strengthen the rule of law.[6] They include, but are not necessarily limited to: Criminal prosecutions of those most responsible for violations; reparations programs that distribute a mix of material and symbolic benefits to victims (such as compensation and apologies); restitution programs that seek to return housing, land, and property to those who were dispossessed; truth-telling initiatives that investigate, report, and officially acknowledge periods and patterns of past violations; and justice-sensitive security system reform (SSR) that seeks to transform the military, police, and judiciary responsible for past violations through processes such as vetting.[7]

The term transitional justice emerged in the 1990s as a particular way of addressing serious human rights violations and facilitating the political transitions to democracy underway at that time in Latin America and Eastern Europe. As such, the particular violations transitional justice dealt with were primarily civil and political rather than economic and social, even though economic and social injustices existed in such contexts. Since then, the measures associated with transitional justice have been increasingly applied in post-conflict contexts—as opposed to post-authoritarian ones—as well as in countries that are still experiencing conflict and those that have not undergone significant political transition.[8]

Different understandings of the notion of transitional justice affect its relationship with the broader field of development. Importantly, for example, predominant and narrower conceptions of transitional justice tend not to include among their objectives accountability and redress for violations of economic, social, and cultural rights. Such conceptions are not necessarily based on the idea that civil and political rights are intrinsically more important than economic, social, and cultural rights; instead, "this view sees transitional justice as being meant to address one part of the problem with the hope that it can contribute to solving the whole."[9] Transitional justice initially developed as a particular way of both addressing serious human rights violations and facilitating transitions to democracy; responding to claims for justice for the violation of economic and social rights was not part of

[5] Pablo de Greiff, "Theorizing Transitional Justice," in *NOMOS LI: Transitional Justice*, ed. Melissa Williams, Rosemary Nagy, and Jon Elster (New York: New York University Press, 2012).

[6] Ibid.

[7] *See* ICTJ, "What is Transitional Justice?" http://ictj.org/about/transitional-justice.

[8] On the history of the concept of transitional justice, *see* Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 322–364; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004); Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69–94.

[9] Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?," *International Journal of Transitional Justice* 2, no. 3 (2008): 310–330.

this understanding of how best to effect such a transition.[10] The reasons for transitional justice's continued neglect of economic and social rights violations since then may include the legalistic bias of the discipline of human rights (of which the field is a part), the influence of criminal justice and international law on the field's development, as well as the field's association with liberal peacebuilding, including the rule of law, electoral democracy, and neoliberal economic reforms.[11] According to one critic of this predominant conception, "the retributive roots of transitional justice and the narrow agenda of its practitioners continue to prevent the emergence of a practice that can deliver a broader justice after conflict that includes addressing the social injustices that led to conflict."[12]

More recent and broader conceptions of transitional justice include accountability and redress for past violations of all human rights—not just civil and political rights but also economic, social, and cultural rights.[13] The arguments for adopting this broader conception include that under authoritarian regimes and during conflicts, violations of economic and social rights can be more widespread than violations of civil and political rights, involving more perpetrators and affecting more victims; the harms caused by the former violations to individuals and society can be just as serious as those caused by any other abuses.[14] The broadest conceptions of transitional justice would seem to be expansive enough to include not just measures aimed at redressing economic and social rights violations, but almost any activity undertaken during a transition. Transitional justice, according to one definition, is the "effort to respond to the needs of societies emerging from conflict or political violence,"[15] or, according to another, "the range of processes and mechanisms that are utilized to enable war-affected or post-authoritarian societies to make a transition to a more democratic and peaceful dispensation."[16] One recent journal article argues that, given the importance of the "everyday experience of criminal activity"

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[10] Arthur, "How 'Transitions' Reshaped Human Rights."

[11] Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social and Legal Studies* 21, no. 2 (2012): 173.

12 Simon Robins, "Transitional Justice as an Elite Discourse," Critical Asian Studies 44, no. 1 (2012): 21.

[13] *See,* e.g., Louise Arbour, "Economic and Social Justice for Societies in Transition," Second Annual Transitional Justice Lecture, New York University School of Law Center for Human Rights and Global Justice and the International Center for Transitional Justice, New York, NY, October 25, 2006; *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission* (Nairobi: Government Printer, 2003).

[14] Carranza, "Plunder and Pain," citing in particular the African Transitional Justice Research Network, http://www.transitionaljustice.net; Priscilla Hayner and Lydiah Bosire, "Should Truth Commissions Address Economic Crimes? Considering the Case of Kenya," Transparency International report, March 26, 2003.

[15] Robins, "Transitional Justice as an Elite Discourse," 3, citing Teitel.

[16] Yvette Selim and Tim Murithi, "Transitional Justice and Development: Partners for Sustainable Peace in Africa?" *Journal of Peacebuilding and Development* 6, no. 2 (2011): 59.

in countries such as Guatemala, transitional justice needs to address both past *and present* violence.[17]

"Development" is an older field than transitional justice, dating from the 1950s, also with a range of understandings, from the narrow to the broad, but it is now used typically to refer to processes generally aimed at improving the socioeconomic conditions of people.[18] During its history, the scope of the field of development has grown, and now it is seen to include not just measures to improve economic growth and reduce inequality, but also measures related to the social, institutional, and political factors that could impinge on economic well-being. Different conceptions of development include "human development," espoused by the United Nations Development Program (UNDP) and closely related to Amartya Sen's approach based on capabilities—that is, the choice and opportunity that people have to exercise their reasoned agency.[19] Human development includes but is not limited to economic development. Another conception, the "rights-based approach to development," as explained by Peter Uvin, differs from other approaches to development in that it is "about helping people realize claims to rights, not providing them with charity," and in that it involves "the realization that the process by which development aims are pursued should itself respect and fulfill human rights."[20] Human development and the rights-based approach to development are useful for identifying links between transitional justice and development because of their focus on capabilities, human rights claims, and processes that respect human rights.

Corrective and Distributive Justice

Transitional justice and development can be understood as distinct but related notions. Pablo de Greiff suggests, for example, that one way to think about "both the proximity and the distinctness of the two fields" is in terms of the relationship

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[17] Helen Chang Mack and Monica Segura Leonardo, "Editorial Note: When Transitional Justice Is Not Enough," *International Journal of Transitional Justice* 6, no. 2 (2012): 176–177.

[18] *See* Erik Thorbecke, "The Evolution of the Development Doctrine, 1950–2005," in *Advancing Development: Core Themes in Global Economics*, ed. George Mavrotas and Anthony Shorrocks (New York: Palgrave Macmillan, 2007).

[19] *See* Amartya Sen, *Development as Freedom* (New York: Knopf, 1999). The United Nations Development Programme (UNDP) defines human development as "a process of enlarging people's choices. The most critical ones are to lead a long and healthy life, to be educated, and to enjoy a decent standard of living. Additional choices include political freedom, guaranteed human rights and self-respect." United Nations Development Programme (UNDP), *Human Development Report* (New York: UNDP, 1990), 10.

[20] Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004), 175–176.

between the corrective and distributive elements of justice.[21] Corrective justice, on the one hand, can refer to the repair of harms to individuals or groups, while distributive (or social) justice, on the other hand, can refer to the distribution of goods and opportunities and to equitable outcomes.[22]

This distinction can be used as the basis for advocating a narrow conception of transitional justice. In the view of Lars Waldorf, "transitional justice is inherently short-term, legalistic, and corrective. As such, it should focus on accountability for gross violations of civil and political rights. This is not to deny the importance of addressing past and present socio-economic inequalities as a matter of both justice and potential conflict prevention. But that should be done through democratic politics and distributive justice—not through elite bargains and transitional justice." In contrast, "the remedying of socio-economic injustices is a long-term political project."[23] Similarly, according to de Greiff, "justice" in the broad sense that contributes to social transformation includes both corrective and distributive dimensions: "Transitional justice is functionally designed to address issues in the sphere of corrective justice, and development can also deal with issues in the 'distributive' side of justice."[24]

At the same time, however, a relationship exists between corrective and distributive justice that can be the basis for considering the relationship between transitional justice and development:

> Just as transitional justice is interested not merely in correcting isolated, "token" abuses, but also in correcting systematic violations, which obviously requires systemic reform, development should not be thought to be interested merely in distributing already existing material goods and possibilities, but must take seriously how existing goods and possibilities came about. This is precisely what leads to the overlap between them; the "correction" of past abuses ultimately has an impact on prospective life chances. At the same time, however, the "distribution" of life chances must heed not just end points but starting points as well. Both "corrective" justice and "distributive" justice are necessary, and in some ways they implicate and reinforce one another.[25]

At this broad level, many have likewise proposed that transitional justice and development have the potential to reinforce each other in the pursuit of shared long-term goals—including the transformation of society. If one or the other type of initiative is absent, these shared objectives may be undermined. If reconciliation of individuals, groups, and society is among the goals of transitional justice measures,

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[21] Pablo de Greiff, "Articulating the Links Between Transitional Justice and Development: Justice and Social Integration," in *Transitional Justice and Development*, 63.

[22] *See* Pablo Kalmanovitz, "Corrective Justice versus Social Justice in the Aftermath of War," in *Distributive Justice in Transitions*, ed. Morten Bergsmo, Cesar Rodriguez-Garavito, Pablo Kalmanovitz, and Maria Paula Saffon (Oslo: Torkel Opsahl Academic EPublisher, 2010), 85; Rhodri Williams, "Protection in the Past Tense: Restitution at the Juncture of Humanitarian Response to Displacement and Transitional Justice," in *Transitional Justice and Displacement*, ed. Roger Duthie (New York: Social Science Research Council, 2012), 102.

[23] Waldorf, "Anticipating the Past," 179.

[24] De Greiff, "Articulating the Links Between Transitional Justice and Development," 63.

[25] Ibid.

for example, Alex Boraine suggests that "reconciliation without economic justice is cheap and spurious."[26] Within a similar but somewhat different framework, Rama Mani argues that effective peacebuilding efforts must incorporate three mutually reinforcing dimensions of justice—legal, rectificatory, and distributive.[27] In 2007, at the conference "Building a Future on Peace and Justice" in Nuremberg, one workshop explored "how development work and transitional justice mechanisms can mutually reinforce the process of overcoming socioeconomic as well as political inequalities and contribute to sustainable peace and justice."[28] The "transformative" potential of transitional justice and postconflict development work is emphasized by experts in both fields,[29] although some suggest the need for a broader notion of "transformative justice" that would respond to structural problems as well as crimes.[30]

Despite the potential complementarity, however, the conceptual distinction between transitional justice and development processes can have important implications for the achievement of different measures' goals. Reparations programs, for example, are probably the transitional justice measure most easily connected to development outcomes because they are the measure that aims most directly at improving the quality of life of victims and, in the case of collective reparations, whole communities. The distribution of a variety of benefits, including cash as well as healthcare and education, has real if modest overlap with development aims. Governments, however, are frequently tempted to treat reparations and development programs as substitutes for one another, usually trying to pass existing development projects as reparations.[31] But while reparations and development programs may distribute similar benefits to groups that largely coincide and may affect and be coordinated with each another, as discussed below, they are

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[26] Alex Boraine, *A Country Unmasked* (Oxford: Oxford University Press, 2000), 357.

[27] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity/Blackwell, 2002).

[28] Susanne Reiff, Sylvia Servaes, and Natascha Zupan, "Development and Legitimacy in Transitional Justice," report from workshops co-organized by the Working Group on Development and Peace at the conference Building a Future on Peace and Justice, Nuremberg, June 25–27, 2007. For the papers presented at the conference, *see* Kai Ambos, Judith Large, and Marieke Wierda, eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Heidelberg: Springer, 2009).

[29] Ruth Rubio-Marín and Pablo de Greiff, "Women and Reparations," *International Journal of Transitional Justice* 1 (2007): 318–337; Gerd Junne and Willemijn Verkoren, "The Challenge of Postconflict Development," in *Postconflict Development: Meeting the Challenges*, eds. Gerd Junne and Willemijn Verkoren (Boulder: Lynne Rienner, 2004); and Martina Fischer, Hans Gießmann, and Beatrix Schmelzle, eds., *Berghof Handbook for Conflict Transformation*, online resource published by the Berghof Research Center for Constructive Conflict Management, http://www.berghof-handbook.net/.

[30] *See* http://www.wun.ac.uk/research/transformative-justice-network, the website of the Transformative Justice Network, and its concept note at http://www.wun.ac.uk/sites/default/files/transformative_justice_-_concept_note_web_version.pdf.

[31] *See* chapter by Naomi Roht-Arriaza in this volume.

conceptually distinct initiatives that rest on separate grounds and relate to different dimensions of justice. Most importantly, reparations involve an explicit acknowledgment of responsibility for wrongdoing, which development programs generally do not.[32]

How Transitional Justice Can Contribute to Development

It is likely that the most significant impact that transitional justice has on development will be indirect and long term. This contribution is made through the effect of transitional justice measures on the relationship between society and its institutions, at both a general and more specific level, and it is a contribution that, to the extent that it occurs, does so whether or not transitional justice measures directly address development or economic violence.

General Contribution of Transitional Justice

At a general level, the potential contribution of transitional justice to development can be seen by comparing the effects of atrocities to those of poverty and marginalization. Victims of both, de Greiff suggests, often suffer from similar consequences, including lower expectations and mistrust toward other groups and institutions. Furthermore, because massive human rights violations involve the systematic and deliberate breaking of norms, their effects are felt by all citizens, not just direct victims. "Massive violations weaken the general capacities of agency, the ability to lay claims on others and on institutions, and make it more difficult to coordinate social action," de Greiff explains. "The diminution of agency, the depletion of social capital or the growth of distrust, and the weakening of institutions can be curbed through the application of measures whose mission is to reaffirm basic norms and strengthen institutions that give force to these norms."[33] It is through the recognition of victims (both as victims and as citizens), fostering civic trust (among citizens and between them and state institutions), and rebuilding the rule of law, then, that transitional justice can contribute to the process of overcoming marginalization—that is, as a mechanism of social integration.[34]

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32 ICTJ Research Unit, "Transitional Justice and Development," ICTJ Briefing, September 2009, 4; Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development," in *Transitional Justice and Development*; Pablo de Greiff, "Justice and Reparations," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006).

33 ICTJ Research Unit, "Transitional Justice and Development," 2; De Greiff, "Articulating the Links Between Transitional Justice and Development."

34 De Greiff, "Articulating the Links Between Transitional Justice and Development."

This general level contribution has recently, and importantly, been recognized by international institutions such as the UN, the Organisation for Economic Cooperation and Development (OECD), and the World Bank. In his 2011 report on Transitional Justice and the Rule of Law, for example, the UN Secretary-General stated that: "Transitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance."[35] The OECD points to security and justice—including meeting the needs of victims of past atrocities—as a core function of the state, one that is "essential to perceptions of state legitimacy and effectiveness and provide[s] the basis for economic development, private investment, employment creation and government revenues."[36]

The World Bank, an important international development actor, in its 2011 *World Development Report: Conflict, Security, and Development*, highlighted the importance of transitional justice in signaling to citizens a state's commitment to the rule of law and therefore in building confidence.[37] National transitional justice programs, the report claims, can help to restore confidence and transform institutions and are "crucial for sustained violence prevention."[38] Even small steps to initiate transitional justice can be significant, sending "powerful signals about the commitment of the new government to the rule of law."[39] "Even if institutional or political factors do not allow for full redress," the Bank notes, "early gathering of evidence of human rights violations and assisting victims can signal serious intent to overcome legacies of impunity and rights violations at both the community and national level."[40]

Transitional Justice Measures and State Institutions

At a more specific level, transitional justice measures can impact institutions in various ways that may be conducive to development. Reparations programs, for example, may have moderate spillover effects in terms of institutional capacity, as Naomi Roht-Arriaza and Katharine Orlovsky have suggested.[41] Providing victims

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[35] United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, UN Doc. S/2011/634, October 12, 2011, 6.

[36] OECD, "Supporting Statebuilding in Situations of Conflict and Fragility," Policy Brief, June 2011.

[37] *World Development Report 2011*, 16.

[38] Ibid., 18.

[39] Ibid., 125, 251.

[40] Ibid.

[41] Roht-Arriaza and Orlovsky, "A Complementary Relationship."

medical services may catalyze the creation of similar programs for non-victims, as has happened in some cases with mental health care programs originally created for victims. Similarly, civil registry and titling initiatives sparked by property restitution programs can lead to broader efforts to clarify registry of land, and such spillover can occur in the areas of budgeting, oversight, and procurement. There is also potential for reparations programs to strengthen local and regional governments more generally. The implementation of reparations, for instance, can bring an infusion of resources and attention to the local level, in countries such as Peru and Guatemala, which may allow provincial and municipal governments to become more effective service providers across the board. Collective reparations, conceptualized to include "public goods tied to specific communities," can include schools, health clinics, and infrastructure, as in Morocco.[42]

Truth commissions and criminal prosecutions may have a moderate impact on the institutions of a country's judicial system (they may also address other sectors related to development through economic violence, as discussed below). Given the relationship between the rule of law and development, which is beyond the scope of this chapter to discuss,[43] one of the more important functions of truth commissions from a development perspective may be to promote the rule of law by appraising the specific role of the judicial system in past abuses, exposing compromised personnel, and making recommendations to improve the capacity, efficiency, and independence of the system.[44] Criminal trials may also contribute to judicial reform and the rule of law in multiple ways. In addition to signaling the state's commitment to fight impunity, trials observing all due process requirements may have important demonstration effects in transitional contexts. Prosecutions also offer opportunities for local capacity building—national and hybrid tribunals more so than international tribunals. This can include contributions to human resource and professional development, through recruitment, training, and skills transfer, as well as physical infrastructure, including facilities, evidence, and court records.[45]

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[42] Ibid.; ICTJ Research Unit, "Transitional Justice and Development," 5.

[43] *See,* e.g., UN General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff*, UN Doc. A/67/368, September 13, 2012; Michael Trebilcock and Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar Publishing, 2008); Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings Institution Press, 2006).

[44] ICTJ Research Unit, "Transitional Justice and Development," 3; De Greiff, "Articulating the Links Between Transitional Justice and Development"; Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York and London: Routledge, 2002), 102–106. Pablo de Greiff, "Truth Telling and the Rule of Law," in *Telling the Truths: Truth Telling and Peacebuilding in Post-Conflict Societies*, ed. Tristan Anne Borer (Notre Dame, IN: University of Notre Dame Press, 2006).

[45] ICTJ Research Unit, "Transitional Justice and Development," 7; Muna B. Ndulo and Roger Duthie, "The Role of Judicial Reform in Transitional Justice and Development," in *Transitional Justice and Development*; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (New York and Geneva: United Nations, 2008).

Security sector reform, a concept that emerged within the international development community, is another area in which transitional justice can make an indirect contribution to development. In particular, a "justice-sensitive" approach may facilitate the achievement of SSR goals by calling attention to the systemic causes of abuse, mobilizing support behind systemic reform efforts that address such causes, and helping SSR programs to effectively confront the legacy of such abuses. Addressing these legacies through SSR involves measures aimed at improving: accountability for past abuses; participation, representation, and empowerment of victims and other marginalized groups; The legitimacy of institutions; and coherence of SSR efforts with transitional justice measures.[46] For transitional justice measures such as vetting and prosecutions, one of the most significant impacts on institutions is likely to be, as de Greiff describes it, their "disarticulation potential." That is, rather than being thought of as measures aimed at deterring individuals, they should be thought of as measures aimed at disabling the structures that allowed serious crimes to occur in the first place.[47] It is through these potentially direct effects on institutions responsible for past abuses that vetting and criminal justice reform are likely to have a preventive impact.

Catalyzing Civil Society Organization

Civil society can also provide a link between transitional justice and development, both through the work that certain organizations perform and their contribution to the level of social capital in a society, which is generally understood to be an important factor in development. Civil society organizations may be strengthened through their engagement with transitional justice measures. Reparations, for instance, can stimulate the creation and growth of civil society organizations that lobby for and help implement such programs. Examples include the role of the Human Rights Advisory Council in formulating and delivering the reparations ordered by the Moroccan truth commission, and the reliance on civil society intermediaries for carrying out the projects of the Victims Trust Fund of the International Criminal Court (ICC). In Peru, civil society organizations have played a key role in monitoring the implementation of community-level reparations.[48] As the OHCHR tool on reparations explains, "participatory processes catalyse the formation of civil society organizations. The mere fact that a reparations programme is on a country's agenda gives an incentive for potential beneficiaries

[46] ICTJ Research Unit, "Transitional Justice and Development," 6; Alexander Mayer-Rieckh and Roger Duthie, "Enhancing Justice and Development Though Justice-Sensitive Security Sector Reform," in *Transitional Justice and Development*.

[47] Pablo de Greiff, "Transitional Justice, Security, and Development," World Development Report 2011 Background Paper, October 29, 2010, 17–18.

[48] ICTJ Research Unit, "Transitional Justice and Development," 5; Roht-Arriaza and Orlovsky, "A Complementary Relationship."

to organize themselves. Participatory processes add an incentive for such organizations to build up their strength and capacity."[49]

Truth commissions can make a similar contribution by catalyzing civil society and political will. Commissions can give rise to the mobilization of those representing the justice claims of victims, who often belong to the most underprivileged sectors, during transitional periods in which public decisions are more likely to be adopted. As highly public mechanisms, they can draw attention to the need for a long-term process of change and mobilize support.[50] Criminal prosecutions may do the same. As Dustin Sharp has argued, "Pinochet-style prosecutions carry enormous emancipatory possibilities, perhaps most importantly the possibility of strengthening local civil society and building the rule of law."[51] And according to OHCHR, "the influx of international legal actors that a hybrid [court] can bring may further yield extremely important benefits for civil society in terms of building technical capacity and augmenting political standing."[52] Finally, vetting measures can include "training civil society organizations in monitoring law enforcement agencies and in reporting abuses" and "informing and training civil society organizations, and citizens generally, about accountability mechanisms and how to effectively use them."[53]

Some organizations may be involved with transitional justice measures and go on to work specifically in justice and development areas after the conclusion of those measures; examples include Timap for Justice in Sierra Leone, the Sierra Leone Court Monitoring Programme, the Freetown-based Lawyers Centre for Legal Assistance, and in Timor-Leste the Judicial System Monitoring Programme.[54] Furthermore, to the extent that transitional justice measures impact civil society organizations—regardless of what they do, whether they are human rights NGOs, religious groups, labor unions, or development organizations—then those justice measures may have an effect on social capital—and therefore development.[55] The extent to which transitional justice does act as such a catalyst, however, will depend on the design and process of its measures, as well as effort and resources.

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[49] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (New York and Geneva: United Nations, 2008), 16.

[50] ICTJ Research Unit, "Transitional Justice and Development," 4; Rolando Ames Cobian and Felix Reategui, "Toward Systematic Social Transformation: Truth Commissions and Development," in *Transitional Justice and Development*. Jane Alexander, "A Scoping Study of Transitional Justice and Poverty Development: Final Report," prepared for the UK Department for International Development (DFID), January 2003, 53.

[51] Dustin Sharp, "Prosecutions, Development, and Justice: The Trial of Hissein Habré." *Harvard Human Rights Journal* 16 (2003): 159, 173–176.

[52] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, 2, 6, 20–21.

[53] Alexander Mayer-Rieckh, "On Preventing Abuse: Vetting and Other Transitional Reforms," in *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Alexander Mayer-Rieckh and Pablo de Greiff (New York: Social Science Research Council, 2007), 503.

[54] *See* Roger Duthie, "Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective," ICTJ Research Unit, November 2009.

[55] Ibid.

For transitional justice processes to engage civil society requires participatory processes and broad consultation; these are not always part of justice measures, and they do not happen by accident. Furthermore, even with participatory processes, the relationship between justice measures and civil society may be "complex"—as one study describes the role of NGOs in the South African truth commission, for a host of different reasons, in some cases even diminishing its capacity.[56]

Reintegrating Specific Groups

If transitional justice measures can contribute to development by helping to integrate victims and marginalized populations broadly, as discussed above, they can also have this effect in particular ways on specific war-affected groups, including formerly displaced persons (both internally displaced and refugees) and demobilized ex-combatants. For example, a recent research project of ICTJ and the Brookings-LSE Project on Internal Displacement concluded that one of the more important long-term contributions that transitional justice can make to resolving displacement is in facilitating the integration or reintegration of displaced persons into communities and societies. Reintegration is a critical aspect of all three durable solutions—return, local integration, and resettlement—which are a focus of much work on displacement.

Reintegration is a concern not just of humanitarian actors but development ones too. UNDP, for example, seeks to help different groups, including displaced and returnees, "obtain access to reasonable choices in conducting their lives and promoting social inclusion,"[57] and leads the Cluster Working Group on Early Recovery of the "humanitarian reform process,"[58] which is development oriented and includes the reintegration of displaced populations.[59] The World Bank is con-

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[56] Hugo van der Merwe, Polly Dewhirst, and Brandon Hamber, "Non-governmental Organisations and the Truth and Reconciliation Commission: An Impact Assessment," Centre for the Study of Violence and Reconciliation, 1999, 26–32; David Backer, "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects," *Journal of Human Rights* 2, no. 3 (2003): 306; ICTJ, "Truth Commissions and NGOs: The Essential Relationship," Occasional Paper Series, ICTJ, April 2004, 33.

[57] UNDP, "Overview of UNDP's Involvement in the Reintegration of IDPs and Returnees in Post-Conflict Contexts," http://www.undp.org/cpr/documents/recovery/UNDP_and_IDPs.pdf (accessed December 12, 2011), 3.

[58] "Humanitarian reform seeks to improve the effectiveness of humanitarian response by ensuring greater predictability, accountability and partnership. It is an ambitious effort by the international humanitarian community to reach more beneficiaries, with more comprehensive needs-based relief and protection, in a more effective and timely manner." *See* "Humanitarian Reform and the Global Cluster Approach," *OneResponse*, August 15, 2011, http://oneresponse.info/COORDINATION/CLUSTERAPPROACH/Pages/Cluster%20Approach.aspx.

[59] Cluster Working Group on Early Recovery, quoted in Vicky Tennant, "Return and Reintegration," in *Post-Conflict Peacebuilding: A Lexicon*, ed. Vincent Chetail (Oxford: Oxford University Press, 2009), 318.

cerned with reintegration because forced displacement leads to the loss of housing, land, property, jobs, physical assets, social networks, and resources, as well as to food insecurity, increased morbidity and mortality, and social marginalization, which may hinder economic and social progress.[60] However, while reintegration may be significantly hindered by legacies of past abuses, which can impact both individuals and the communities they reintegrate into, the actors working most directly on displacement do not generally focus on dealing directly with past abuses. There is a need from a reintegration perspective, then, for measures to address these legacies.

Criminal justice and justice-sensitive SSR can facilitate reintegration by improving the safety and security of formerly displaced persons—through actually removing known perpetrators from security institutions and local communities—and by making reintegration more durable by helping to prevent the recurrence of the abuses that led to displacement—through dismantling the criminal networks and structures that made the abuses that led to displacement possible. Reparations and restitution can facilitate economic reintegration and the rebuilding of livelihoods, increasing access to shelter and land, supporting the construction of homes and businesses, or providing mental health or education assistance. Truth telling can contribute to social reintegration by reducing tensions between those who stayed home, those who were displaced and host communities—all groups who suffer in different ways during conflict, but not in ways necessarily mutually understood. At a broad level, the goals of transitional justice—trust, recognition, rule of law—can facilitate political reintegration generally, but are particularly relevant for displaced persons whose relationship with the state will have been inherently damaged.[61]

Furthermore, as with displaced populations, the reintegration of ex-combatants—often through disarmament, demobilization, and reintegration (DDR) programs—also has multiple elements and rationales. As Lars Waldorf explains, reintegration has economic, social, and political aspects, and it is a concern from the security, humanitarian, and development perspectives. Assisting ex-combatants to reintegrate into communities and societies can provide them with livelihoods so that they do not participate in organized crime and banditry, and with education, skills, and connections in response to their needs as a vulnerable group, and it can foster reconstruction and development by helping them to become a "large pool of potential human capital."[62] Again, transitional justice measures may in some ways promote this reintegration process: By giving ex-combatants public spaces to tell the truth about their

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[60] Asger Christensen and Niels Harild, *Forced Displacement: The Development Challenge* (World Bank, Washington, D.C., December 2009), 11–12.

[61] Roger Duthie, "Contributing to Durable Solutions: Transitional Justice and the Integration and Reintegration of Displaced Persons," in *Transitional Justice and Displacement*, 37–64.

[62] Lars Waldorf, "Introduction: Linking and Transitional Justice," in *Disarming the Past: Transitional Justice and Ex-Combatants*, ed. Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf (New York: Social Science Research Council, 2009), 20.

actions and, if necessary, apologize, thereby reducing fears between them and receiving communities; by providing reparations to victims, thereby reducing resentment toward ex-combatants because of the assistance they receive; and assuring victims and communities that perpetrators among the ex-combatants will be punished, but at the same time individualizing responsibility for abuses. Transitional justice "may help reduce reprisal, stigmatization, or discrimination against ex-combatants—something that will obviously benefit DDR."[63]

I have argued in this section that transitional justice can make its greatest contribution to development indirectly and in the long term, but in a number of different ways. First, at the most general level, transitional justice can help overcome marginalization by recognizing victims, fostering civic trust, and rebuilding the rule of law. By signaling the state's commitment to breaking with the past, transitional justice can improve the relations between society and its institutions. Second, at a more specific level, transitional justice measures may have more direct effects on institutions, changing them so as to increase their legitimacy in particular ways. This can include spillover effects on capacity and reforms that disable the structures that allowed abuses to occur. Third, transitional justice measures may catalyze civil society, which can be beneficial from a development perspective in multiple ways, including increased social capital and the specific functions of civil society actors. Finally, transitional justice can facilitate the reintegration of specific war-affected groups, including displaced populations and former combatants. In the next section, I turn to the contribution that transitional justice may make to development by engaging directly with economic violence.

Transitional Justice, Economic Violence, and Development

Since development refers in large part to processes aimed at improving people's social and economic conditions, transitional justice may potentially contribute to development to the extent that its measures can directly and effectively respond to the economic and social aspects of past injustices. This would be in addition to the contribution discussed above. Violations of economic and social rights can result from individual and systemic economic crimes as well as from more structural problems such as poverty and inequality. Both economic crimes and structural problems can also be among the factors leading to conflict and repression, during which a wide range of serious human rights abuses frequently occur. As Dustin Sharp defines it in this volume, the economic and social aspects of past injustices often result from "economic violence," a concept that includes "widespread corruption, theft and looting from civilians, plunder of natural resources to fuel wartime economies and fill warlords' pockets, and other violations of economic and social rights."[64]

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[63] Ibid.

[64] Dustin N. Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond," in this volume.

By responding to economic violence, then, transitional justice measures may impact development. As Sharp points out, however, such a response could include a range of measures: The broadest approach to economic violence might include addressing structural problems such as poverty and inequality and may be difficult to distinguish from development policy, while the narrowest approach might focus only on economic violence perpetrated by individuals and in direct connection to civil and political rights violations.[65] One problem with using the notion of economic violence may be that it is so broad as to prompt such a wide range of responses, that it may in fact make it more difficult to determine the line between intended and unintended, individual and structural acts, which is why I try to be as specific as possible in suggesting the types of wrongs to which I believe transitional justice measures can realistically respond.

In the past decade, transitional justice measures have increasingly addressed economic violence, while still being criticized for treating such issues merely as background and contextual matters. A number of academics, practitioners, policymakers, and important documents support further expanding the mandates of transitional justice measures to more squarely address economic violence and/or increasing the types of measures that are considered to be transitional justice in order to do so; some commentators suggest that contributing to the resolution of structural problems such as poverty and inequality should be among the aims of transitional justice. Others caution against such an expansion, arguing that transitional justice measures are inappropriate mechanisms for addressing broader economic violence or injustice, that attempting to do so may hinder their ability to achieve their traditional mandate, and that they should therefore limit their focus to serious violations of civil and political rights.

Given the myriad connections between physical and economic violence, violations of different kinds of rights, and inequality and conflict, there are good reasons in some contexts for transitional justice measures to address economic violence to some extent, depending on the measure in question. There are also, however, good reasons to be cautious about doing so—reasons that do not necessarily depend, as is often claimed, on the presumption of a hierarchy of rights. That economic and social rights may be as equally important as civil and political rights, for example, does not in itself mean that any one set of particular measures represents the most effective set of tools for addressing violations of both types of rights. Ideally, societies would be able to achieve accountability and redress for all human rights violations, regardless of scope and severity. Given the reality of political, legal, resource, and capacity constraints and contexts, however, this may not always be possible.

As pointed out above, transitional justice measures were initially conceived as responses to the most widespread and serious violations of civil and political rights and to international crimes perpetrated by authoritarian regimes during political transitions. The more that these measures are implemented in post-conflict,

[65] Ibid.

developing, and fragile state contexts, the stronger the reason to rethink both the mandates of such tools as well as the types of tools that are considered part of the transitional justice set. In contexts in which economic violence leads to widespread injustice, then, societies should consider designing and implementing measures that most effectively pursue accountability and redress for the most serious violations of economic and social rights and the international crimes that constitute that economic violence. The current set of transitional justice measures should be used toward this end to the extent that is makes sense to do so—that is, to the extent that they are effective in responding to economic violence or in facilitating more effective responses from other types of actors. Where there are reasons to support implementation of additional tools instead of or together with the current set of transitional justice measures, this would seem the most appropriate path.

In practice, various constraints will in most contexts likely make truth-telling initiatives the most appropriate transitional justice measures to address the theme of economic violence, as truth commissions have demonstrated their (limited) ability to shed light on the broader and more structural causes and economic and social aspects of past abuses. Where serious economic crimes occur, these would ideally also be targeted by criminal prosecutions, but political, resource, and legal constraints may sometimes make this difficult. And where serious violations of economic and social rights occur, reparations programs would ideally provide benefits to the victims, but the scope of the potential universe of victims in such cases may preclude the provision of individual and material benefits and call for more collective and symbolic forms of repair. Considering the additional challenges that transitional justice may face in expanding its purview to address economic violence, however, I would emphasize the importance of maintaining realistic expectations about what these measures can actually accomplish, particularly in terms of their impact on development outcomes. The most important contribution transitional justice measures can make in this regard, I argue, is in changing public narratives about the past, which can have significant implications for the future.

Responding to Economic Violence

A number of voices have recently called for transitional justice measures to further engage economic, social, and cultural rights, and economic crimes. The former UN High Commissioner for Human Rights, Louise Arbour, for example, has argued for integrating economic, social, and cultural rights into the transitional justice framework, thereby making "the gigantic leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition."[66] In 2008, the *International Journal of Transitional Justice* devoted a special issue to the topic of transitional justice and development, in which a number of contributors argued for the expansion of the purview of transitional justice to include

[66] Arbour, "Economic and Social Justice for Societies in Transition."

economic violence, including issues traditionally understood as development or distributive justice issues. Zinaida Miller, for example, examines the potential costs for transitional societies if transitional justice institutions continue to neglect the economic roots and consequences of conflict, the absence of socioeconomic redistribution, and government development plans. The divorce of development strategies from transitional justice, she argues, "allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based. It suggests that inequality is a question of time or development rather than the entrenched ideology of elites, as well as that the need to memorialize the past does not require the narration of past economic oppression."[67] Ruben Carranza contends that an impunity gap results when transitional justice measures ignore accountability for large-scale corruption and economic crimes, pointing to the strategic role that such crimes play in maintaining systems of abuse as well as use of the assets from such crimes to avoid criminal accountability for human rights violations. "Addressing poverty and social inequality," he argues, "must be regarded as among the strategic goals of any transitional justice undertaking."[68]

Others have echoed these arguments, particularly concerning truth commissions.[69] Lisa Hecht and Sabine Michalowski of the University of Essex Transitional Justice Network, which includes a research focus on economic dimensions of transitional justice, observe that practitioners from poorer countries often "call for holding responsible those who deliberately contributed to perpetuating a state of mass poverty" and for recovering assets that were wrongly acquired.[70] Economic policies in general can be relevant to transitional justice, they suggest, because such policies can be "designed to support and sustain authoritarian regimes or conflict and war," while "oppressive regimes might be instated in order to make the pursuit of certain economic policies possible." Sovereign debt incurred by previous regimes could also be an issue addressed by transitional justice: "To investigate the history of these debts and their role in the commission of human rights violations, and to establish responsibilities in this respect, may in itself contribute to achieving some of the goals of transitional justice," such as truth telling. "Debt repudiation could signal a break with past crimes" and in addition free up resources for the transition.[71] Another related argu-

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[67] Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 267–268.

[68] Carranza, "Plunder and Pain," 314, 316, 329.

[69] *See,* e.g., Alexander, "A Scoping Study of Transitional Justice and Poverty Reduction"; James Cockayne, "Operation Helpem Fren: Solomon Islands, Transitional Justice, and the Silence of Contemporary Legal Pathologies on Questions of Distributive Justice," Center for Human Rights and Global Justice Working Paper, Transitional Justice Series, No. 3, 2004, NYU School of Law; James L. Cavallaro and Sebastian Albuja, "The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond," in *Transitional Justice from Below*.

[70] Lisa Hecht and Sabine Michalowski, "The Economic and Social Dimensions of Transitional Justice," no date, 2, http://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf.

[71] Ibid., 3 and 4; s*ee also* chapter by Bohoslavsky and Torelly in this volume.

ment is that economic and social rights violations disproportionately affect women and girls, which means that by failing to respond to these types of violations, transitional justice measures are not presenting an accurate picture of women's suffering and missing an opportunity to facilitate public debate on gender inequality.[72]

Support for including economic and social rights violations in transitional justice mandates has now appeared in important UN documents as well. According to the 2010 *Guidance Note of the Secretary-General on the UN's Approach to Transitional Justice*, for example:

> Successful strategic approaches to transitional justice necessitate taking account of the root causes of conflict or repressive rule, and must seek to address the related violations of all rights, including economic, social, and cultural rights (e.g., loss of deprivation of property rights). Peace can only prevail if issues such a systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted institutions.[73]

The note goes on to recommend that truth commissions examine and make recommendations for redressing violations of economic, social, and cultural rights; that prosecutions should target crimes involving such rights violations; and that reparations measures should redress rights violations in the areas of health, housing, education, and economic viability.[74] In addition, the 2011 *UN Secretary-General's Report on the Rule of Law and Transitional Justice* observes "a growing recognition" that truth commissions should address the economic, social, and cultural rights dimensions of conflict and that, more generally, "the United Nations must promote dialogue on the realization of economic and social rights and provide concrete results *through transitional justice mechanisms*, legal reform, capacity-building, and land and identity registration efforts, among other initiatives."[75]

Lars Waldorf suggests the increased push to address socioeconomic injustice through transitional justice can be explained at a broad level, and in part, by the international human rights movement's championing of economic and social rights and their justiciability, the emphasis in post-conflict programming on holistic and complementary approaches, and the potential advantages to be gained with regard to donor funding.[76] Demands for transitional justice to engage economic violence, however, also emerge from the different experiences of the countries in question: The types of crimes perpetrated and violations suffered affect the nature of the justice claims made during transition. The ongoing political transitions in the Middle

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[72] Evelyne Schmid, "Gender and Conflict: Potential Gains of Civil Society Efforts to Include Economic, Social and Cultural Rights in Transitional Justice," paper prepared for the SHUR Final Conference Human Rights in Conflict: The Role of Civil Society, June 4–6, 2009, Luiss University, Rome.

[73] United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010, 7.

[74] Ibid., 10.

[75] United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, 2011, 7, 15. Emphasis added.

[76] Waldorf, "Anticipating the Past," 174.

East and North Africa region, for example, will likely have to address issues such as corruption in some way, given the extent to which the problem permeated many of those societies. In Tunisia, notes Sarah Chayes, where corruption represented the "capture of the state by a structured criminal network," activists want "to expand the definition of 'gross violations of human rights' to include systematic economic crimes. They want perpetrators to answer for these crimes in a public reckoning, as part of a transitional justice process."[77] Similarly, in Egypt, activists have called for "a drastic investigation and transparent prosecution of all economic crimes," including the theft of public funds.[78] In Nepal, where one study showed that victims of the conflict prioritized social and economic needs over rights and that greater poverty and marginalization lowered the importance they assigned to the judicial process, Simon Robins argues that the transitional justice agenda should be expanded to include the social and economic injustices that led to conflict.[79]

There are, then, a number of reasons for transitional justice measures to consider responding to economic violence. These include: First, some acts of economic violence can constitute serious international crimes, including war crimes and crimes against humanity, which result in widespread harms to victims; second, even if economic violence does not rise to the level of serious international crime, it is often so intertwined with "physical violence" and serious violations of civil and political rights that it does not make sense to respond to the latter in isolation from the former if the objective is to make a legitimate attempt to provide accountability and redress; and, third, addressing economic violence through transitional justice measures may make a *modest* contribution to progress in resolving structural problems such as poverty and inequality through development initiatives.[80]

As Evelyne Schmid has noted, some of the most serious violations of economic and social rights can amount to war crimes. The most straight forward examples involve violations of the state's obligation to respect economic and social rights, such as unlawful interference with people's health, housing, food, water, or education, which can constitute the crimes of willful killing, unlawful deportation or transfer, collective punishment, pillage, destruction of property, attacking cultural property, or starvation (some of these would at the same time constitute violations of civil and political rights, such as the right to life).[81] Furthermore, certain serious violations of economic and social rights may amount to other serious international

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[77] Sarah Chayes, "Corruption is Still Tunisia's Challenge," *Los Angeles Times*, June 10, 2012.

[78] Reem Abou-El-Fadl, "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," *International Journal of Transitional Justice* 6, no. 2 (2012): 326, quoting Moataz El Fegiery.

[79] Robins, "Transitional Justice as an Elite Discourse," 15, 26.

[80] For a more detailed discussion, *see* Roger Duthie, "Toward a Development-Sensitive Approach to Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 292–309.

[81] Evelyne Schmid, "War Crimes Related to Violations of Economic, Social and Cultural Rights," *Heidelberg Journal of International Law* 71, no. 3 (2011): 3, 5, 9–17.

crimes: Forced evictions violate the right to housing and can constitute the crime against humanity of forcible transfer; forced labor violates the right to work and to just and favorable conditions for work and can constitute the crime against humanity of enslavement; destruction of homes violates the right to housing and can amount to persecution; violations of the rights to work, education, housing, food, and health can be part of crime of apartheid; and enforced sterilization can violate reproductive health rights and can constitute a crime against humanity. "There are no legal reasons," argues Schmid, "to conclude a priori that ESCR [economic, social, and cultural rights] violations should or cannot be addressed by attempts to deal with an abusive past."[82] A recent report by the organization Displacement Solutions explains that while a major impunity gap remains for violations of housing, land, and property rights, for example, a normative and institutional framework, including the ICC, does exist for the international community to prosecute war crimes and crimes against humanity that violate such rights.[83]

Criminal prosecutions and civil sanctions can therefore be applied to economic violence, as pursuing accountability for civil and political abuse may be rendered less effective by the neglect of economic crimes facilitating and motivating that abuse, while persistent impunity for widespread economic crimes in itself can undermine the rule of law. There are a few examples of efforts to hold perpetrators of such economic violence legally accountable: Charges against the Revolutionary United Front and Charles Taylor at the Special Court for Sierra Leone included crimes directly associated with efforts to control diamond mines in Sierra Leone; a civil case at the International Court of Justice found that Uganda failed in its obligation to prevent the pillage of natural resources by its armed forces and non-state collaborators in the Democratic Republic of Congo[84]; and the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia recognized in the *Kupreskić* case that the comprehensive destruction of homes and property can potentially be constitutive of the crime against humanity of persecution.[85]

Other elements of economic violence that can be targeted by criminal prosecutions include corruption, famine, and corporate complicity. Carranza argues that, given the absence of an international tribunal with jurisdiction over large-scale corruption and the fact that the anticorruption movement for the most part has been concerned with improving governance rather than seeking accountability for

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[82] Evelyne Schmid, "Violations of Economic, Social and Cultural Rights as Components of International Crimes," http://www.ius-gentium.ch/PosterEvelyneSchmid_ESCR_Crimes.pdf.

[83] Displacement Solutions, "Housing, Land and Property Rights and International Criminal Justice: Holding HLP Rights Violators Accountable" (Geneva: Displacement Solutions, September 2012).

[84] Emily Harwell and Philippe Le Billon, "Natural Connections: Linking Transitional Justice and Development Through a Focus on Natural Resources," in *Transitional Justice and Development*, 292–293.

[85] *See* Mark Drumbl, "Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development," Research Unit, International Center for Transitional Justice, New York, November 2009, 14–16.

the past, human rights courts should prosecute such crimes. "The concept of system crimes," he writes, "should be an opportunity for human rights courts to prosecute and try human rights violations and economic crimes together." Large-scale corruption, it has also been suggested, could potentially be characterized as crime against humanity.[86] And while no court has convicted someone for an international crime predicated on famine, contends Randle DeFalco, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has the opportunity to pursue such charges against the leadership of the Khmer Rouge (KR), given that widespread famine under their regime was "solely the product of the socioeconomic policies of the KR." How the ECCC addresses famine and starvation, he says, "may be decisive in the overall public perception of the Court as a success or failure."[87] The issue of corporate complicity is somewhat different, in that economic non-state actors could be charged with direct or indirect involvement in a range of serious crimes, including physical violence, as has been done in Colombia. Some have nevertheless argued that it is important to include corporate accountability in transitional justice processes.[88]

In legal cases involving serious economic violence, trial testimony, evidence, and arguments can generate momentum for change by raising public awareness of such injustice, its connection to other massive abuses, and the need for institutional reforms, which are all important from a development perspective.[89] Criminal and civil cases involving economic crimes can also potentially lead to the recovery of assets, which have been used in Peru to fund anticorruption and transitional justice measures, and could, it has been suggested, be used to finance reconstruction efforts or community development programs as a form of collective reparation.[90]

Investigating and reporting on past human rights violations and making recommendations on how to remedy abuses and prevent their recurrence, which truth commissions seek to do, would often be incomplete if it were to ignore the economic violence that is so often an integral part of or factor in massive abuse. Helen Clark, the Administrator of UNDP, has said that development and transitional justice actors can "work together to address the root causes of economic, social, and cultural rights violations, which transitional justice mechanisms are increasingly

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[86] Carranza, "Plunder and Pain," 327–328; *see also* Ilias Bantekas, "Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies," *Journal of International Criminal Justice* 4, no. 3 (2006): 466–484.

[87] Randle DeFalco, "Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes Against Humanity of Extermination, Inhumane Acts and Persecution," *International Journal of Transitional Justice* 5, no. 1 (2011): 158.

[88] Hecht and Michalowski, "The Economic and Social Dimensions," 8.

[89] ICTJ Research Unit, "Transitional Justice and Development," 7; Harwell and Le Billon, "Natural Connections."

[90] Carranza, "Plunder and Pain," 324; De Greiff, "Articulating the Links Between Transitional Justice and Development," 34; Kora Andrieu, "Dealing With a 'New' Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?," *Journal of Human Rights* 11, No. 4, (2012): 537–557.

uncovering. This can help guide us on targeting development policies and programmes."[91] Clark points in particular to the recommendations made by truth commissions as a good example of a transitional justice process that can inform development programming.[92] Truth commissions have typically focused on violations of civil and political rights, but they also try to explain the factors that made those violations possible, rather than focusing only on individual responsibility. This has often led commissions to include in their final reports accounts of the root causes of violations, including the marginalization of communities, structural inequalities, and the institutional dimensions of mass violations, which all have a bearing on development.[93]

Truth commissions in countries such as Chad, Ghana, Sierra Leone, Timor-Leste, Liberia, South Africa, Peru, Guatemala, and Kenya have examined economic violence to various extents, including the role of natural resources in facilitating conflict and the targeting of victims, as well as the institutional weaknesses that enabled such crimes. They can also help to raise awareness of land issues in past abuses, to reach consensus on a history of land claims, and to draw attention to the need for land tenure reform, although few commissions have addressed land issues with great detail. Truth commissions in such countries as Peru and Sierra Leone have examined the role of the education sector in conflict and abuse, making recommendations for reform, and in Timor-Leste and Sierra Leone have addressed the failure of health institutions during conflict—although such insight has not led to specific strategies for reconstruction.[94] Commissions in Chad, Sierra Leone, and Timor-Leste "show that truth commissions *can* examine and report on legacies of corruption, economic crimes and other socioeconomic rights violations,"[95] which, observes Kora Andrieu, can contribute to the democratic transition and the "delegitimization of the previous regime."[96] In this volume, Sharp explores how truth commissions in Africa have overall done a great deal "to move economic violence into the foreground."[97]

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[91] Clark, "A Role for Development in Transitional Justice."

[92] Ibid.

[93] ICTJ Research Unit, "Transitional Justice and Development," 3; Hayner, *Unspeakable Truths*; de Greiff, "Truth Telling and the Rule of Law."

[94] ICTJ Research Unit, "Transitional Justice and Development," 3–4; Harwell and Le Billon, "Natural Connections: Linking Transitional Justice and Development Through a Focus on Natural Resources"; Chris Huggins, "Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development," in *Transitional Justice and Development*; Julia Paulson, "(Re)Creating Education in Postconflict Contexts: Transitional Justice, Education, and Human Development," ICTJ Research Unit, November 2009.

[95] Carranza, "Plunder and Pain," 321.

[96] Andrieu, "Dealing With a 'New' Grievance"; Cavallaro and Albuja, "The Lost Agenda."

[97] Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond," in this volume.

Institutional reform may also target economic violence and actors through vetting. Since vetting procedures are administrative rather than criminal, for example, "they can make use of relaxed evidentiary and procedural rules that may make them more efficient than criminal trials as forms of redress for certain types of abuses," including "typically hard-to-prove economic crimes, such as illicit enrichment, money laundering, and so on."[98] Vetting may also play a role in reforming sectors such as natural resource management. The Liberia Forest Initiative, for instance, is an initiative for assisting comprehensive institutional reform in post-conflict Liberia. As part of this process, human rights advocates collected statements about abuses committed by logging companies and their security forces during the war, which contributed to the establishment of a vetting policy for concession bidders. According to this policy, individuals providing security for forest companies are vetted using criteria that exclude those who have credible allegations of abuse against them.[99]

Challenges and Constraints in Responding to Economic Violence

While there are good reasons in some contexts to address economic violence through transitional justice measures, doing so presents a set of challenges and constraints that call for a relatively narrow approach to economic violence—focusing on only the most serious and widespread crimes, which are likely to have the greatest negative impact on economic and social rights—as well as modest expectations in terms of impact on development outcomes. These challenges have led some to doubt whether transitional justice measures are "practically suited" for correcting socioeconomic wrongs.[100] Such measures will likely face capacity and legal limitations in addressing economic violence and may also face increased political resistance, as problems such as corruption often are widespread and implicate powerful economic and political actors in transitional contexts.[101]

Truth commissions usually face short deadlines and have tight budgets and low institutional capacity, while those who may have benefited from economic crimes and remain in government may obstruct commission activities should they believe

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[98] De Greiff, "Articulating the Links Between Transitional Justice and Development," 38. *See* Alexander Mayer-Rieckh, "On Preventing Abuse: Vetting and Other Transitional Reforms," and Federico Andreu-Guzmán, "Due Process and Vetting," in *Justice as Prevention*.

[99] Harwell and Le Billon, "Natural Connections"; ICTJ Research Unit, "Transitional Justice and Development," 6.

[100] Waldorf, "Anticipating the Past," 179.

[101] Duthie, "Toward a Development-Sensitive Approach to Transitional Justice"; Madalene O'Donnell, "Corruption: A Rule of Law Agenda," in *Civil War and the Rule of Law: Toward Security, Development, and Human Rights*, ed. Agnes Hurwitz (Boulder, CO: Lynne Rienner Publishers, 2007).

it endangers their economic interests.[102] It may therefore be unrealistic to expect truth commissions to make informed strategic recommendations on topics for which they are not given the capacity, resources, expertise, or methodologies for analysis and policy formulation.[103] They could in such cases risk oversimplifying complicated issues and generating misleading conclusions and unhelpful policy recommendations.[104] Some have also expressed concern that expanding the scope of commissions to include economic violence may distract the public's attention from massive atrocities,[105] although, as Carranza notes, examining economic violence did not lead to unreasonable delays for commissions in Sierra Leone and Timor-Leste or prevent them from simultaneously looking at legacies of other human rights violations.[106]

Criminal prosecutions of economic violence may face challenges such as prosecutors' and judges' unfamiliarity with the proper charges; multiple jurisdictions; lack of political will to pursue cases that undermine the economic interest of those in power; and evidence being located in remote and politically unstable places, particularly for crimes related to natural resources.[107] Importantly, prosecutions are also likely to face constraints imposed by the current limitations of law; de Greiff argues that they are likely to be less effective in addressing economic crimes than atrocities mainly because of the "overarching structural limitation" that both national law and international law are much less developed for the former than the latter.[108] Views differ on the feasibility of integrating the crime of corruption into the mandate of the International Criminal Court,[109] but a number of people have pointed to civil and other non-criminal remedies as perhaps more appropriate avenues for addressing economic violence and economic actors, such as corporations.[110] Criminal prosecutions at the ICC, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and in Colombia have targeted crimes such as forcible displacement, particularly when it constitutes crimes against humanity, but have faced significant resource and

[102] ICTJ Research Unit, "Transitional Justice and Development," 4.

[103] Hayner and Bosire, "Should Truth Commissions Address Economic Crimes?"; Waldorf, "Anticipating the Past," 176.

[104] Duthie, "Toward a Development-Sensitive Approach to Transitional Justice."

[105] Hayner and Bosire, "Should Truth Commissions Address Economic Crimes?"

[106] Carranza, "Plunder and Pain," 321–322.

[107] ICTJ Research Unit, "Transitional Justice and Development," 7; Harwell and Le Billon, "Natural Connections."

[108] De Greiff, "Articulating the Links Between Transitional Justice and Development," 40.

[109] Andrieu, "Dealing With a 'New' Grievance"; Bantekas, "Corruption as an International Crime."

[110] Hecht and Michalowski, "The Economic and Social Dimensions," 8; Drumbl, "Accountability for Property Crimes and Environmental War Crimes."

evidentiary constraints that have led prosecutors to prioritize more traditional crimes.[111]

Reparations programs would face significant practical and other challenges in attempting to provide benefits to victims of economic violence, often a much larger and more difficult to identify group than victims of more physical abuses. Reparations for victims of corruption would "raise enormous technical and conceptual difficulties," writes Kora Andrieu, "given the complex levels of causality and responsibility in cases of corruption."[112] Reparations programs may provide benefits to victims of forcible displacement: Programs in Guatemala and Peru include displacement as a violation that merits reparations, and in Colombia, the administrative reparations program established in 2011 anticipates providing redress for forcible displacement. However, displacement can affect millions of people in a single country alone; determining who qualifies as victim of forcible displacement and a potential reparations beneficiary would be difficult, while providing material compensation to that many people is often unaffordable and/or technically and institutionally challenging for transitional governments.[113] Restitution programs, which inherently respond to violations of people's rights to housing, land, and property, with the program in post-war Bosnia being the most well-known example, have been criticized in contexts such as Afghanistan, DRC, and Timor-Leste, because "strictly corrective restitution programs could end up inadvertently recreating land relations that development experts had been seeking to transform, precisely because they were so unjust or unsustainable that conflict could ensure."[114]

That transitional justice measures would likely face challenges in addressing economic violence does not mean that they should not respond to such injustice. Many of the challenges are practical in nature, which means that innovative and realistic program design could help to overcome them. For example, collective and symbolic reparations may be more appropriate in cases where the number of potential victims of an economic crime would make individual and material benefits unfeasible. Truth commissions could work with experts in corruption and other economic crimes and/or in conjunction with parallel or future anticorruption commissions or similar bodies.[115] Prosecutors and judges can be trained in proper

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[111] Federico Andreu-Guzmán, "Criminal Justice and Forced Displacement: International and National Perspectives," in *Transitional Justice and Displacement*; Federico Andreu-Guzmán, "Criminal Justice and Forced Displacement in Colombia," ICTJ Research Unit/Brookings-LSE Project on Internal Displacement, July 2012.

[112] Andrieu, "Dealing With a 'New' Grievance."

[113] ICTJ Research Unit/Brookings-LSE Project on Internal Displacement, "Transitional Justice and Displacement: Challenges and Recommendations," June 2012; Peter Van der Auweraert, "The Potential for Redress: Reparations and Large-Scale Displacement," in *Transitional Justice and Displacement*.

[114] Williams, "Protection in the Past Tense," 96; ICTJ Research Unit/Brookings-LSE Project on Internal Displacement, "Transitional Justice and Displacement," 3.

[115] Andrieu, "Dealing With a 'New' Grievance."

charges and jurisdictions, or specific units can be created to deal with crimes such as corruption of forcible displacement, as in Colombia.[116] And finally, international law and domestic law continually evolve such that new categories of crimes may be more realistically prosecuted in the future.[117]

For serious and widespread economic violence, the question should not be whether transitional justice or development interventions should respond, but rather how both can work together or in complementary fashion, depending on the context, to provide justice and broader change. Transitional justice measures should not necessarily assume that "someone else will address those 'other' systematic violations,"[118] because most other actors working on overlapping issues do not directly address the legacies of past abuses associated with those issues. The international anticorruption movement, for example, argues Carranza, did not develop a subfield analogous to transitional justice within the human rights movement. "The anticorruption movement was more forward looking, seeking to prevent corruption rather than push for accountability for past actions. It promoted the nebulous notion of 'good governance' instead of confronting legacies of large-scale corruption and economic crimes."[119] Nevertheless, since transitional justice measures will inherently be limited in their ability to directly confront economic violence, their aim should be to facilitate or catalyze other interventions and broader reform, including those more squarely in the field of development, by among other things highlighting the relevance of past economic and social injustice. Whether or not this means transitional justice takes the lead in responding to issues such as corruption, as alternative means for dealing with the legacies of such crimes and the human rights violations associated with them, should depend on the context; and whether or not interventions such as anticorruption commissions should be considered part of a transitional justice program should depend on the extent to which they directly deal with those legacies.[120]

How broad an approach to economic violence transitional justice should take is a contested issue. As I have argued, some acts of economic violence—particularly those that constitute international crimes and lead to widespread and serious economic and social rights violations—seem to warrant efforts to provide accountability and redress. A broader approach, as discussed above, would also respond to more structural problems such as poverty and inequality, framed either as root causes of conflict and the physical violence that took place or as major injustices themselves. The argument that transitional justice measures would be effective means of responding to these structural issues is less convincing. One difficulty comes in identifying who should be accountable for such problems and who should receive redress, in addition to the practical constraints that would present

116 Andreu-Guzmán, "Criminal Justice and Forced Displacement in Colombia."

117 Carranza, "Plunder and Pain."

118 Ibid., 316.

119 Ibid., 317.

120 *See* Carranza, "Plunder and Pain," and Andrieu, "Dealing With a 'New' Grievance."

even greater obstacles than a narrower approach to economic violence.[121] "In contrast to economic crimes," Hecht and Michalowski explain, "poverty often lacks specifiable perpetrators who can be held accountable. Poverty is anchored in the structures of society."[122] This "makes such injustices unsuitable for criminal prosecution and even in truth seeking processes it is difficult to assign responsibility. Furthermore, the prosecution of individuals could hardly be a remedy for a complex problem like structural violence."[123] Similarly, OHCHR's guidelines on truth commissions warn that if a commission were to take such a broad approach to economic violence that included "poverty, homelessness, education policy failures and other social ills," it may risk expanding its mandates "so broadly that it may be impossible to reasonably complete its task."[124]

A well-known, if contested, explanation for why certain measures may be better suited for achieving certain justice-related outcomes is Kenneth Roth's argument that, if the aim is to shame the perpetrator of an abuse, clarity is needed about the violation, violator, and the remedy—all things that are clearest "when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC [economic, social, and cultural] rights violation. These three dimensions are less clear when the ESC shortcoming is largely a problem of distributive justice." These dimensions can, he says, be present in cases of corruption and social exclusion, but they are less likely to be present in cases of general poverty: "A lack of public goods tends to be a matter of distributive justice. In ESC right terms, however, policies of social exclusion tend to have a relatively clear violation, violator, and remedy."[125]

While transitional justice measures often go beyond the "naming and shaming" that Roth focuses on, it remains true that achieving accountability and redress for human rights violations is most feasible when the violation, the violator, and the remedy are clear. This is most often the case with civil and political rights violations, but also in some cases with economic and social ones, as discussed. It will not always be clear, however, where to draw the line between economic violence that transitional justice should address and that which it should not. Some forms of structural violence may constitute clear and intentional social exclusion or discriminatory practices: "When lack of access to the most basic provisions of life subsistence, health care and education arbitrarily disadvantage some rather than other people, the resulting poverty is no longer the outcome of mere state incapacity but a discriminatory practice. Moreover, the impoverishment of certain groups

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[121] Waldorf points to the "enormous practical difficulties" of addressing "historically constructed socio-economic inequalities" with transitional justice measures. Waldorf, "Anticipating the Past," 179.

[122] Hecht and Michalowski, "The Economic and Social Dimensions," 5.

[123] Ibid., 6.

[124] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (New York and Geneva: United Nations, 2006), 9.

[125] Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26 (2004): 68–73.

of society can be deliberately used as a tool of oppression and violence at the hand of authoritarian regimes."[126]

Lisa Magarrell has described the Peruvian truth commission's efforts to design a national reparations program that considered a broad approach to economic injustice. One proposed model was envisioned as a response to consequences of violence, as opposed to specific violations, including "adverse living conditions, inequality and exclusion, and negative institutions." However, the commission soon realized that this would lead to an enormous universe of harm and a victim population that was difficult to define; categories of harm that were very generalized; and understandings of causation which became mixed with social problems that had exacerbated or coincided with harms. Furthermore, reparations benefits might have ended up providing what citizens had a right to receive anyway, with the impact of such efforts appearing to be only "minor bandages" on a much broader and more complicated problem. "The program," she explains, "began to aspire to achieve the goals of the whole transitional process instead of just an important piece of it."[127]

In the end, the proposed Comprehensive Reparations Plan (PIR), according to the commission's final report, "cannot and should not be considered as one more instrument of social policy. The PIR does not seek to resolve problems of poverty, exclusion and inequality, which are structural in nature and respond to the overall operation of the political and economic system." That the program's primary aim was to repair and recognize victims "does not mean that the State should not also undertake a policy of social development aimed at attacking poverty and inequality at the root—and the TRC formulates concrete proposals elsewhere in this report on necessary institutional reforms—but the PIR responds to other goals."[128] A truth commission can and often does make recommendations related to development policy, but the main goal of a reparations program is not to resolve poverty and inequality.

Those actors that work more directly to bring about social and economic development, or in addressing the root causes of a human rights-related problem such as displacement, "have recourse to a broad range of measures that may include elements related to reparations and restitution but also involve prospective reform in areas such as land tenure, taxation, and title registration," notes Rhodri Williams.[129] Burdening a transitional justice measure such as restitution of housing, land, and property with resolving historical patterns of property violations, he argues, is likely to create unrealistic expectations. Resolution of such structural problems in a society is more likely to emerge from "domestic political

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[126] Hecht and Michalowski, "The Economic and Social Dimensions," 5.

[127] Lisa Magarrell, "Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice," *Windsor Yearbook of Access to Justice* 22 (2003): 85–89, 91, 93–94.

[128] Ibid., 95, citing TRC Final Report, Vol. IX, section 2.2.2.1, 148. Magarrell's translation.

[129] Williams, "Protection in the Past Tense," 116.

processes," resulting from the overall transition to democracy and rule of law.[130] This does not mean that there is no overlap between transitional justice and development measures in terms of the types of human rights violations that they are acknowledging. However, the distinction between measures that are primarily aimed at corrective justice and those primarily aimed at distributive justice remains important. "Truly distributive measures may be motivated by the need to address the effects of past violations," explains Williams, "but do so indirectly, channeling resources to marginalized groups based first and foremost on the fact of their marginalization rather than on whether it arises as a result of past violations."[131] In post-Apartheid South Africa, for example, restitution and reparations programs sought to respond to the direct effects of the dispossession of land while separate measures to facilitate land acquisition served a more of a distributive measure. The key is to leverage transitional justice and development measures to reinforce each other rather than conflating them, or worse, ending up with them working at cross purposes.[132]

Realistic Expectations for Development Outcomes

Given the challenges faced by transitional justice measures in responding to economic violence, it is important to maintain realistic expectations about the direct difference such measures can make on their own from a development perspective. In Egypt, where under President Hosni Mubarak a "system of crony capitalism enabled the violation of millions of Egyptians' basic economic rights by politicians enjoying immunity from the law," the demands of activists and the public during the transition are for trials, corruption investigations, an overhaul of state institutions (including vetting), compensation for victims of state violence, fundamental change in the political system, social justice, and examination of the culpability of development agencies and international financial institutions for the previous regime's actions—a mix of transitional justice and broader measures.[133] This seems reasonable. However, the inflated rhetoric that can accompany discussions of transitional justice in such cases, I would argue, can at times risk creating unrealistic expectations, potentially undermining the effect that transitional justice may have in other areas by assigning it failures for things that are inherently beyond its capacity. Abou-El-Fadl, for example, concludes that the breadth and complexity of the needs in Egypt suggest "serious problems of scope in conventional transitional justice practice, illustrating that its rigorous standards *may nevertheless not represent a panacea* in the Egyptian case."[134] We can certainly debate the potential expansion of transitional justice mandates to deal with interconnected

[130] Ibid., 119, 120.

[131] Ibid., 103.

[132] Ibid.; Huggins, "Linking Broad Constellations of Ideas."

[133] Abou-El-Fadl, "Beyond Conventional Transitional Justice," 6, 7–8.

[134] Ibid. Emphasis added.

rights violations of different kinds, but nobody should expect transitional justice in any context to represent any sort of panacea for a transitional society's problems.

In a recent study of local experiences in rural Sierra Leone, many people interviewed felt that the truth-telling process in the country had not had a discernible impact on their lives. As Gearoid Millar explains, however, local experiences of the truth commission were related to people's expectations of it. "At the time of the hearings," he reports, "most locals did not expect only talk from the TRC. Quite to the contrary, they expected the reconstruction of local and national infrastructures and the provision of social services. These expectations reflect a local present- and future-oriented justice, one that focuses on survival and moving forward, instead of on investigating the past."[135] One local chief believed that "the TRC should have 'come along with tractors because we have great fields,' 'sen[t] medicines for us because health is very important' and 'help[ed] us to ensure we progress with our education,' 'to help us see our children educated.'"[136] Someone else expressed frustration that the government was not providing the services that people need, and in part blamed the truth commission for this failure. "Most Makeni residents felt that the work of a transitional justice project aimed at bringing peace to the country must include the construction of schools, medical facilities, roads, etc., not trials, nor truth telling."[137] One conclusion that could be drawn is that the existence of demands for social services, education, healthcare, and jobs represents a demand for an expansion of current notions of transitional justice.[138]

This would be problematic for a number of reasons. First, to do so ignores the legitimate concerns mentioned above about the practical challenges in using transitional justice measures to address social and economic injustice. It is not, in my view, realistic to expect ad hoc truth-telling institutions to reconstruct infrastructure, provide social services, medicines, and tractors, and build schools and hospitals. It is, of course, important to respond to the needs and claims of victims and citizens, to know how those people prioritize traditional transitional justice measures relative to other demands, and to understand what "doing justice" might mean to a particular community. But the fact that people in a particular place expected a truth commission to address all of these needs, which most governments in poorer countries struggle to address, seems a failure on the part of the truth commission and its outreach efforts to explain what such an institution is capable of doing, even with a broad mandate and abundant resources (it may also be the case that a broad mandate to examine economic harms could raise such high expectations).

The recommendations of truth commissions often go ignored or unimplemented, as they inherently depend on the political will of the government,

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135 Gearoid Millar, "Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice," *Human Rights Review* 12 (2011): 529.

136 Ibid., 524.

137 Ibid., 525.

138 Ibid., 526, 531–532.

regardless of whether they address economic violence or development.[139] In South Africa, for example, the "bulk of the Commission's recommendations for the future"—recommendations issuing from what has been criticized as a commission with an overly narrow mandate—were "essentially ignored."[140] In Sierra Leone, despite being based on "a relatively sound analysis of many of the challenges facing education" in the country, the truth commission's recommendations regarding education reform "were not seen as a priority nor were they well known" within the ministry of education.[141] Collective reparations programs can in fact include the construction of schools and hospitals, but usually only for communities specifically targeted by violence, and they should be implemented alongside other transitional justice and development measures in order to be coherent; they are not intended to substitute for broader development projects.

Second, there is sometimes a tendency to overstate the differences between local and external conceptions of justice, because what is actually being compared is a conception of *transitional justice* with local but broader conceptions of *justice*. It may be that the conceptual distinctions between corrective justice and distributive justice and an acknowledgment that both are required for a broader notion of justice to be achieved are overlooked or ignored. It may also be that local communities often do not have distinct notions of or similar to transitional justice. While those who contend that transitional justice measures should not focus on attempting to achieve *distributive justice* do not necessarily hold a different conception of *justice*, transitional justice interventions may nevertheless create expectations around justice in the broader sense. The real challenge, it seems to me, is in determining in each case the mixture of transitional justice and development (and other) measures that is most likely to lead to the most just outcome for a society, including both its corrective and distributive elements.

We should not look at transitional justice measures that address economic and social wrongs as a substitute for development policy and programs. Transitional justice measures should not be expected to constitute a society's primary response to economic and social injustice in the way that they constitute a society's primary response to massive atrocities. As de Greiff has argued, the direct economic impact of transitional justice measures on a society in terms of growth or distribution, even if they were to engage economic violence, is likely to be "too small or too difficult to monitor or measure." This is true even for reparations, which often involve direct material transfers to individuals and communities, as the budgets of such programs are "simply too small to make much of a difference."[142]

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139 Ibid., 177; Carranza, "Plunder and Pain," 321.

140 Miller, "Effects of Invisibility," 282.

141 Paulson, "(Re)Creating Education in Postconflict Contexts," 18.

142 De Greiff, "Articulating the Links Between Transitional Justice and Development," 39.

Changing Narratives

What transitional justice can and should do, when appropriate, is address the links between economic and social injustice and massive atrocities, draw public attention to these links, and, where possible, suggest the types of broader reforms that are necessary for societal transformation and the establishment of just societies, in the broadest sense of the term. In other words, they can contribute to shaping the broader narrative in public discourse, which may have a long-term impact on development.[143]

A number of commentators have pointed out the risks involved if transitional justice measures skew a society's narrative by focusing only on certain elements of past injustice. As Severine Autesserre explains at a general level, "certain stories resonate more, and thus are more effective at influencing action, when they assign the cause of the problems to 'the deliberate actions of identifiable individuals'; when they include 'bodily harm to vulnerable individuals, especially when there is a short and clear causal chain assigning responsibility'; when they suggest a simple solution; and when they can latch on to pre-existing narratives."[144] These may be the types of stories that, as argued above, criminal justice efforts are most effective in addressing. However, they do only tell one part of the broader story and can lead to what critics call a "narrow legalism" or a "judicialization of the transition."[145] Such a narrow agenda has lead donors in Nepal, one critic claims, to ignore the economic priorities of victims "in favor of education of victims and advocacy, both devoted exclusively to a narrative of truth and justice."[146] Others have argued that this dynamic—of efforts to achieve corrective justice obscuring the need for development and distributive justice—can also apply in cases of reparations and restitution programs. "Debate over reparations can also preclude or obscure the larger political debates to be had over redistribution," suggests Waldorf.[147] Similarly, a focus on restitution of land may in some contexts have "obscured the need to consider other, more distributive approaches in settings where reform was more badly needed than corrective justice."[148]

Zinaida Miller has argued that transitional justice can serve to make certain issues invisible, that by avoiding development and distributive justice concerns it can "effectively bar or prohibit substantive discussion of the economic elements that arguably help to constitute both transition and justice." Focusing on truth,

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143 *See* David A. Crocker, "Reckoning with Past Wrongs: A Normative Framework," *Ethics and International Affairs* 13, no. 1 (1999): 43–64.

144 Severine Autesserre, "Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences," *African Affairs* 111 (2012): 207.

145 Robins, "Transitional Justice as an Elite Discourse," 21.

146 Ibid., 4, 16, 18, 19, 24.

147 Waldorf, "Anticipating the Past," 178.

148 Williams, "Protection in the Past Tense," 96.

justice, and reparation, she claims, obscures the importance of economic factors [149] "limiting knowledge of the economic underpinnings of conflict, narrowing the story of regime change and quelling discussion of development plans by quarantining them within the state and the executive rather than making them part of the transitional justice conversation." As discursive tools, justice measures "may frame the conflict in one dimension without providing an alternative vocabulary."[150] Whether or not transitional justice neglect of an issue would in fact "bar or prohibit" its discussion, justice measures are discursive tools that can frame the past in certain ways. Truth commissions, once again, seem to be the most appropriate such measure to directly address the economic and social underpinnings of conflict and abuse, as others have long acknowledged.[151]

Miller also contends that, because reparations by definition do not lead to any kind of significant redistribution, "if transition is a political story and its only economic implications are in the particularized realm of compensation, the lack of redistribution during transition will be lost amid discussions of victimhood and payment of reparations."[152] Reparations, Miller argues, may be "determinative" of society's priorities, thereby obscuring the causes of conflict.[153] This would seem, however, to overstate the likely impact of reparations and truth commission recommendations regarding reparations. Such recommendations usually take years to be implemented, and what is eventually implemented usually does not match what was recommended, so the risk of these recommendations unfairly determining society's priorities seems low. Moreover, the extent to which reparations shape priorities will depend on the particular context and the existence of other public forums for discussing development issues, as it cannot be assumed that transitional justice measures are the only such forums. Nevertheless, the general point that transitional justice processes shape the country's narrative and thereby can either emphasize or downplay the importance of economic and social issues is important.

Narratives, then, may be one significant way in which transitional justice measures that address economic and social issues can be thought to influence development, although it is likely that this influence will be indirect and in the long term. However, assuming the potential role that narratives play, it must be reiterated that transitional justice measures could also shape these narratives in unhelpful or even harmful ways by addressing economic violence. As suggested above, truth commissions that tackle complex development issues without the adequate resources and expertise may arrive at misleading and over-simplified conclusions and make recommendations that generate an inaccurate or one-dimensional picture, leading donors and policymakers to enact the wrong or incomplete set of measures. As Autesserre has argued, simple narratives can be harmful. In the Democratic

149 Miller, "Effects of Invisibility," 272, 275.

150 Ibid., 280.

151 Crocker, "Reckoning with Past Wrongs"; Hayner, *Unspeakable Truths*.

152 Miller, "Effects of Invisibility," 284.

153 Ibid., 286.

Republic of Congo, for example, "international actors' concentration on trafficking of mineral resources as a source of violence has led them to overlook the myriad other causes, such as land conflict, poverty, corruption, local political and social antagonisms, and hostile relationships between state officials, including security forces, and the general population." Simple, dominant narratives, in other words, focus attention on conflict resources at the expense of all other necessary measures.[154] In this case, it is not the result of a transitional justice program, and it cannot be assumed that transitional justice measures will have this kind of influence on development donors and practitioners, but, if they do shape narratives in important ways, they must first avoid making things worse.

A final cautionary point is that narratives, while important, are limited mechanisms of change. Even if they move us away from an overly narrow focus on retributive justice and open our eyes to economic and social injustice, narratives do not tell us *how* to achieve broader justice. Transitional justice measures are potential tools for pursuing primarily corrective justice and they can modestly contribute to the pursuit of distributive justice, but envisioning the path toward broader justice is a much longer and more complicated challenge, to which development experts among others can attest.

Conclusion

Transitional justice and development are related but distinct notions. Transitional justice measures are designed and implemented to provide redress and accountability for the legacies of massive human rights abuses that occur during armed conflict and under authoritarian regimes. Such measures are often implemented in poorer or developing countries, where often both national and international actors are engaged in development interventions and policy generally aimed at improving the social and economic conditions of the population. One way of framing the relationship between transitional justice and development is in terms of corrective justice and distributive justice: one seeks to repair specific harms to individuals or groups, while the other more generally seeks a fair distribution of goods, opportunities, and other outcomes. These are distinct objectives, but, as de Greiff has observed, related as well: for example, the absence of distributive justice often makes specific groups especially vulnerable to abuse, while widespread and serious abuse can often be a factor leading to unequal outcomes.

Transitional justice and development interventions, in seeking generally to respond to different types of injustice, interact in numerous ways. As developing country contexts can present significant institutional and resource constraints, efforts to strengthen and reform institutions can, in the long term, facilitate a country's capacity to pursue such measures as prosecutions and reparations. More direct support to and engagement with transitional justice measures can also make

[154] Autesserre, "Dangerous Tales," 205.

justice measures more feasible, fair, and effective in the shorter term. But transitional justice can also make important if modest contributions to the broader development process. At a general level, justice measures can act as mechanisms of social integration by recognizing victims of abuse both as victims and as citizens, by fostering civic trust among citizens and between citizens and state institutions, and by strengthening the rule of law—all of which are important to development. More specifically, transitional justice measures can have modest spillover effects on institutions, and likely more importantly, they can contribute to dismantling abusive security and justice institutions, catalyzing civil society, and reintegrating specific war-affected groups such as former combatants and displaced.

Responding directly to economic violence is another way in which transitional justice can relate to development. By addressing the economic and social elements of injustice, including economic crimes and violations of economic and social rights violations, transitional justice measures may have an impact on the economic and social well-being of populations. There are, I argue, good reasons for transitional justice to respond to economic violence in certain contexts: economic violence can rise to the level of serious international crime which leads to widespread harm; economic violence can be so intertwined with physical violence that redress and accountability for one cannot be sought without addressing both; and by engaging with economic violence, transitional justice may have an impact on development outcomes. Because of these and other reasons, transitional justice measures, particularly truth commissions, are increasingly responding to issues of economic violence. However, in doing so, these measures are facing different kinds of political, legal, and practical challenges and constraints; measures that were initially designed to deal with a narrow set of civil and political rights violations cannot necessarily deal as effectively with economic and social rights violations without being adapted, without changes in international and national law, and without a minimum level of coherence with broader development interventions. In this chapter, I therefore advocate for a relatively narrow approach to economic violence, one that has realistic expectations in terms of the impact that transitional justice measures can have on more structural problems such as poverty and inequality, but acknowledging that in the long run the shaping of narratives around the complex nature of injustice can make a positive contribution to development processes.

Reimagining Transitional Justice for an Enduring Peace: Accounting for Natural Resources in Conflict

Sandra S. Nichols

Introduction

The field of transitional justice is being reshaped. Intended to bring not only accountability and truth after a war, it is now conceived as one of a number of ways to make some of the profound societal changes needed for a more peaceful future. And for this reason, the types of topics investigated, the legal aspects considered, and the recommendations proposed are expanding. The new scope of transitional justice could be interpreted to be quite broad, and some argue that it should not lose sight of its original, more limited objectives.[1] But if it is anchored to some particular critical topics, with this broader vision, transitional justice can be deployed to a much greater effect. With careful calibration, transitional justice can reach beyond individual criminal acts to address the underlying causes of conflict and thus play a role in the kinds of change that may actually result in a long-term peace.

Natural resources are one such critical area of focus. While rarely the single, driving cause of conflict and even more rarely a focus in post-conflict policy making, linkages between conflict and natural resources are present in every conflict in varying ways. The environment and natural resources often serve to motivate support and prolong conflict, but they may also present opportunities for reconciliation and stability.

[1] Dustin Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond," in this volume; Dustin Sharp, "Conclusion: From Periphery to Foreground," in this volume; Roger Duthie, "Transitional Justice, Development, and Economic Violence," in this volume.

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Natural resources are also tied to human rights in many ways—particularly in ways that often become threatened during conflict. The rights to food, water, shelter, or to a healthy environment are violated with sad frequency. But beyond this first level of connection whereby protection of human rights depends directly on natural resources, there is also a secondary connection. In natural resource-dependent economies, much of the performance of the state is related to how it manages natural resources and their revenues. If natural resources revenues are being misdirected to meet the needs of one small group rather than the whole population, the government is failing to equitably distribute the resources and may also be failing to provide education, health care, livelihoods, or even to meet basic needs. Thus, failures in natural resources governance can result in institutionalized inequity and violations of human rights.

The chains of causation between natural resource use, rights violations, and conflict can be very hard to identify among the swirl of governance, economic, social, and cultural factors that play into—and change throughout—a conflict. But the frequency of the association of resources, particularly those of high value, with conflict suggests that understanding the dynamics underlying the association is essential for promoting peace.[2] When investigated, it becomes clear that the links between conflict and the way that natural resources are governed, managed, or maintained cannot be understood without considering violations of economic, social, and cultural rights. But natural resources, and economic, social, and cultural rights more broadly, have historically been shunted aside in justice and accountability efforts, as merely the context in which other activities took place. This is an error that leads to failure to identify a critical factor in many conflicts. Natural resources then are an important topic to be addressed by transitional justice mechanisms both as intimately associated with conflict and as required for the protection of human rights.

The current reconsideration and expansion of transitional justice is already paving the way for investigating and responding to the role of natural resources in conflicts. Transitional justice practitioners are in the process of expanding the types of rights it includes to better address economic, social, and cultural rights. These often include natural resources links. This refocusing is also creating opportunities to bring transitional justice into better coordination with other peacebuilding efforts by extending the human rights perspective to apply to activities beyond the standard set of transitional justice tools. Peacebuilding and transitional justice share the goal of preventing further conflict—but more than merely the absence of conflict, with a proper scope and design, they can help to restore relationships and create social systems that serve the needs of the whole population—bringing a "positive peace." Examining the role of natural resources in conflict through a justice lens can help to bring attention to the pivotal role that they play in conflicts

[2] Päivi Lujala, Siri Aas Rustad, and Phillipe le Billon, "Building or Spoiling the Peace? Lessons from the Management of High-Value Natural Resources in Post-Conflict Settings," in *High-Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012).

and to build the support necessary for making long-term structural changes needed to bring about the positive peace.

This chapter draws on the author's experience in post-conflict Liberia as well as examples from other transitional countries. It begins by describing insidious linkages between natural resources governance and conflict. It explains that while natural resources have historically been outside the scope of transitional justice efforts, they must be included in order to meet the objectives of transitional justice. Transitional justice is intended to redress human rights violations, and natural resources are commonly tied up with these rights violations. And transitional justice is increasingly deployed as part of an array of efforts to try to transform societies to break conflict cycles. To do this, root causes of conflict must be addressed, and transitional justice methodologies are especially well suited to doing this research and analysis.[3] This chapter describes how natural resources have been addressed in some transitional justice efforts. The final section describes how a robust understanding of the human rights aspects of natural resources issues and root causes of conflicts developed through the mechanisms of transitional justice can help to improve conventional post-conflict peacebuilding efforts.

Natural Resources and Conflict

The context of every war is different and changes over the course of the conflict. While wars are rarely fought explicitly over natural resources, time and again, it turns out that one natural resource or another has had a pivotal role in triggering or prolonging the conflict.[4] Any meaningful effort to prevent future conflict and promote a positive peace must therefore consider how natural resources played into conflict dynamics and identify how to address them. This section explores some of these linkages including how high-value natural resources in contexts with governance problems so often exacerbate those governance problems to the point of disaster and how natural resources have sustained or reignited conflict.

High-Value Natural Resources and Governance Failures

Many of the least developed countries depend heavily on exports of high-value natural resources. In Algeria, Angola, Chad, Iraq, Libya, South Sudan, and Nigeria, for example, oil and gas account for more than 70 % of government

[3] Susan Woodward, "Do the Root Causes of Civil War Matter? On Using Knowledge to Improve Peacebuilding Interventions," *Journal of Intervention and Statebuilding* 1, no. 2 (2007).

[4] Päivi Lujala and Siri Aas Rustad, "High-Value Natural Resources: A Blessing or a Curse for Peace?" in *High-Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 3–18.

revenues, over 80 % of all export revenues, and up to 70 % of GDP.[5] In Niger, uranium and gold are important revenue sources; diamonds are dominant in Sierra Leone's economy; timber and minerals are similarly dominant in the Central African Republic and Liberia; and in Burma, gas, timber, and gemstones are important exports.[6]

In impoverished countries, discoveries of high-value natural resources must seem like manna from heaven—an answer to poverty and overwhelming development challenges. In far too many cases, however, the results of resource discoveries are the exact opposite. Some of the countries rich in natural capital—such as Angola, Burma, and the Democratic Republic of the Congo (DRC)—are among the least developed in the world.[7] Not only has natural resource wealth failed to bring the anticipated prosperity, but instead it is again and again associated with violent conflict.

The bloody battle for oil that has resulted in the new nation of South Sudan is well known.[8] In Papua New Guinea, a struggle for possession of valuable mineral rights caused an enduring battle for succession by the minority population of the region where the minerals are found.[9] In Liberia, many argue that the root of the conflict was over disparate access to land and the revenues from the natural resources on that land.[10]

Attempts have been made to quantify the correlation between natural resources and conflicts. No statistic has been agreed upon, but the correlation has been

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[5] Ibid.

[6] Ibid., 3.

[7] Ibid., 4.

[8] Luke Patey, "Lurking Beneath the Surface: Oil, Environmental Degradation, and Armed Conflict in Sudan," in *High-Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 563–570.

[9] Volker Boege and Daniel Franks, "Reopening and Developing Mines in Post-Conflict Situations: The Challenge of Company-Community Relations," in *High-Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 87–120. In Papua New Guinea, the remote island of Bougainville has staggering copper resources. After a long series of political and contractual negotiations, Bougainvilleans were granted the right to decide when and under what circumstances mining can take place. As of this writing, the revenue sharing, although addressed in the peace agreement, is still to be negotiated.

[10] USAID, "Liberia Country Profile: Property Rights and Resource Governance," http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Liberia_Profile.pdf (accessed March 1, 2013). Regardless of causation, natural resources, most substantially timber, infamously funded and sustained the 14-year conflict. In addition, combatants destroyed infrastructure for basic services that rely directly on natural resources, including the sanitation system, telephone lines, community water pumps, and the hydroelectric dam that served the whole country. After the conflict, the largely displaced population relied on direct access to natural resources for shelter, fuel for cooking, and fresh water. Natural resources were pivotal in the fate of Liberia—as they have been historically and continue to be today, ten years after the signing of the peace accord.

firmly demonstrated.[11] One study showed that in the last 60 years, four out of ten intrastate conflicts have had a link to natural resources.[12] A study of 84 civil conflicts between 1960 and 2004 found a correlation between the portion of an economy represented by extractive industries and risk of conflict.[13] The higher the share of exports of unprocessed commodities as a proportion of GDP, the greater the risk of conflict. Another study of 285 armed conflicts demonstrated that when natural resources play a role, the period of post-conflict peace is 40 % shorter than when they do not.[14] Resource dependence in an economy is also correlated with the duration of a violent conflict as well as conflict recurrence, especially when prices for that commodity are high during that period of time.[15] This deadly mix of inequity, conflict, and poor governance often associated with high levels of dependency on natural resource extraction has come to be known as the "resource curse."[16]

Efforts to understand the association between natural resources wealth and conflict have yielded a number of explanations. First, some argue that these wars are brought on by greed.[17] The possibilities inspired by the lure of high-value natural resources—

[11] Particularly regarding conflict recurrence, the statistic that over 50 % of civil wars reignite within a period of five years of their conclusion is often repeated. Subsequent research, however, has shown this to likely be an exaggeration. *See,* e.g., Astri Suhrke and Ingrid Samset, "What's in a Figure? Estimating Recurrence of Civil War," *International Peacekeeping* 14, no. 2 (2007): 197–198.

[12] Siri Aas Rustad and Helga Malmin Binningsbo, "Rapid Recurrence: Natural Resources, Armed Conflict and Peace," Working Paper, Centre for the Study of Civil War, Peace Research Institute Oslo, 2010.

[13] Paul Collier and Anke Hoeffler, "Greed and Grievance in Civil War," *Oxford Economic Papers* 56 (2004): 563–595. Emily Harwell, "Building Momentum and Constituencies for Peace: The Role of Natural Resources in Transitional Justice and Peacebuilding," in *Rapid Recurrence: Natural Resources, Armed Conflict and Peace,* eds. Carl Bruch, William Carroll Muffett, and Sandra Nichols (Milton Park: Earthscan, forthcoming); *see also* Richard Milburn, "Mainstreaming the Environment into Post-War Recovery: The Case for Ecological Development," *International Affairs* 88, no. 5 (2012): 1073–1100. Conflicts also have a disproportionate impact on the environment. Between 1950 and 2000, 80 % of major armed conflicts occurred within biodiversity hot spots and 90 % occurred in countries with biodiversity hot spots.

[14] Rustad and Binningsbo, "Rapid Recurrence."

[15] Christian Webersik and Marc Levy, "Reducing the Risk of Conflict Recurrence: The Relevance of Natural Resource Management," in *Governance, Natural Resources, and Post-Conflict Peacebuilding,* eds. Carl Bruch, William Carroll Muffett, and Sandra Nichols (Milton Park: Earthscan, forthcoming 2013), 2; Paul Collier and Anke Hoeffler, "High-Value Natural Resources, Development and Conflict: Channels of Causation," in *High Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan 2011), 298.

[16] Collier and Hoeffler, "Channels of Causation".

[17] The debate about the relative roles of greed and grievance in conflict related to natural resources is a recurring theme. Collier and Hoeffler, "Greed and Grievance"; William Carroll Muffett and Carl Bruch, "Introductory Comments: The Pervasive, Persistent, and Profound Links between Conflict and the Environment," *Sustainable Development Law and Policy* 12, no. 1 (2011).

for public or private ends—can be staggering.[18] In an unstable political situation, this temptation may join with uncertainty and self-interest to result in using the resources or revenues for personal benefit and not for the general welfare. When corruption and patronage are already entrenched in a government, this self-serving, rent-seeking behavior in the natural resources sector may become the norm.[19] The combination of bad governance and valuable natural resources commonly results in the benefits of rich resource endowments being conferred on small groups rather than on the population as a whole. In poor countries, this means the elites get richer, while the poor get poorer—a dynamic apparent in every conflict that is associated with natural resources.

A second explanation of this phenomenon stems from management of the economy. In a weak, developing economy that is dependent on exports of high-value natural resources, governance failures can result in drastic financial problems. For one thing, natural resource production is not stable. Changes in production levels lead to abrupt changes in export prices unless appropriate controls are in place. If the state does not take economic measures to moderate these effects, complex challenges can ensue. For example, when the commodity sector of an economy expands, the vital manufacturing sector declines.[20] And then, after such a commodity boom, that commodity sector often declines as well, leaving the overall economy in tatters. This phenomenon is known as "Dutch Disease." The fallout from economic decline can result in loss of livelihoods and an overall decline in living conditions. The impacts of these economic dynamics are most keenly felt by those vulnerable due to poverty, or cultural or social factors.

Third, a lack of government accountability can also result in grievances. Accountability—the extent to which the government is answerable to its people for its actions, policies, and expenditures—has been shown to be inversely correlated with the volume of natural resources revenues. In diversified economies not dominated by natural resources revenue streams, taxes on property and commercial activities often play a substantial role in generating revenues for the state. In these cases, the population is more directly funding the government, and as a result, the population often demands more information about the use of those revenues and in turn demands accountability. On the other hand, when the government is being funded substantially by natural resources extraction, this connection with the population is lost.[21] In turn, the resulting distance between the government and its people further enables the obfuscation of natural resources activities and revenues. This can result in "information enclaves." Thus, relying on revenues that can be

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[18] Collier and Hoeffler, "Channels of Causation."

[19] Erwin Bulte and Richard Damania, "Resources for Sale: Corruption, Democracy and the Natural Resource Curse," *The B.E. Journal of Economic Analysis and Policy* 8, no. 1 (2008): 5; Philip R. Lane and Aaron Tornell, "The Voracity Effect," *American Economic Review* 89, no. 1 (2009): 22–46.

[20] Jeffery Sachs and Andrew Warner, "Natural Resource Abundance and Economic Growth," NBER Working Paper No. 5398, December 1995.

[21] Notable examples include diamonds in Angola and timber used by the Khmer Rouge in Cambodia. Even oil has been used in this way. Collier and Hoeffler, "Channels of Causation."

hidden from the population rather than those coming from the population contributes to a culture where authority is derived from control of resource revenues rather than political legitimacy. In such a dynamic, there is much less of a social check on an impulse to divert resources revenues to personal benefit and power through corruption or violence. Such lack of accountability was a critical factor in the civil war in Sierra Leone. The government and urban elites maintained and exploited the diamond sector, excluding the general population. The secrecy surrounding the sector and the application of benefits from the sector became a wedge to widen cleavages between those with power and the general population.[22]

A fourth explanation for the correlation between natural resources wealth and conflict is uneven distribution of the resources or their revenue streams. This can be a function of government structure or policy, or a function of nature and geography. When distribution is uneven, those not benefiting may attempt to seize the resource or to gain control of it, and conflict can ensue.[23] Thus, for example, the complete confiscation of revenues from oil and gas located in Aceh Province by the central government in Indonesia fueled the transformation of a nascent movement for independence into a full-blown war.[24] In Bougainville, the local indigenous population saw the great benefits from their rich gold and copper resources leaving the island, while they got only the impacts of pollution and land seizures. This led to violent conflict with Papua New Guinea erupting in 1988.[25] The conflicts in Iraq and Sudan are also prime examples of the results the chance distribution of resource deposits can have when combined with bad governance.

Ultimately, each of these explanations for the role of natural resources in conflict results from action or inaction by the government that limits the ability of certain groups to earn a living, to meet basic needs, or to benefit equitably. Thus, the nature of the resources themselves or their abundance or scarcity is not really the problem. Rather, the problems stem from governance structures that determine how the resources or their revenues are managed, who is able to access them, and for what purpose.[26]

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[22] Bocar Thiam and Andrew Keili, "Utilizing Alternative Livelihood Schemes to Solve Conflict Problems in Sierra Leone's Artisanal Diamond Mining Industry," in *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding*, eds. Helen Young and Lisa Goldman (London: Earthscan, forthcoming).

[23] Collier and Hoeffler, "Channels of Causation."

[24] Arthur Green, "Title Wave: Land Tenure Security and Peacebuilding in Aceh," in *Strengthening Post-Conflict Peacebuilding through Natural Resource Management: Livelihoods and Natural Resources in Post-Conflict Peacebuilding* (*v.*2), eds. Jon Unruh and Rhodri Williams (London: Earthscan, 2013), 293–320.

[25] Timothy Hammond, "Conflict Resolution in a Hybrid State: the Bougainville Story," *Foreign Policy Journal (*April 11, 2011): 1–2.

[26] *See,* e.g., Paul Collier and Ian Bannon, eds., *Natural Resources and Violent Conflict: Options and Actions* (World Bank, 2003). For perspectives on connections between natural resources and conflict, *see* Michael Ross, "What Do We Know About Natural Resources and Civil War?" *Journal of Peace Research* 41, no. 3 (2004); Surhke and Samset, "What's in a Figure."; David Malone and Heiko Nitschke, "Economic Agendas in Civil Wars, What We Know and What We Need to Know," Discussion Paper No. 2005/07, UNU WIDER, April 2005.

Inequitable natural resource governance structures prevent people from realizing the opportunities that are otherwise available in their society. The various types of dynamics that can result in people being prevented from achieving their potential have been characterized as types of violence.[27] This includes the standard definition of violence that refers to intentional, direct action that causes harm. But it also includes violence caused by a system or structure (such as a government system or a power structure), where no one is acting to cause the violence. This latter form is known as structural violence.[28] The uneven distribution of resources and uneven distribution of the power to decide how resources are distributed are prime examples of structural violence. Such structural violence or discrimination can also entail unjust economic structures, resulting in inequity in commercial relationships and negative consequences for workers and consumers.[29] Poverty, hunger, and lack of livelihoods—and a host of other human rights violations—all can be a result of structural violence.

Another category of violence is also relevant here. Latent violence occurs in a situation that is so unstable that any little challenge could result in people no longer being able to realize their potential.[30] The frequency of conflict recurrence—the renewal of direct violence—demonstrates that such latent violence is common in post-conflict countries.[31] The correlation between natural resources and conflict recurrence suggests that the structures governing natural resources can cause latent violence as well.

Direct, structural, and latent violence can all lead to armed conflict. Given the elements of poor governance and forms of violence that are so often associated with natural resources, it is perhaps not surprising that issues relating to natural resources often incite conflict. But it is also important to note that in many cases, natural resources are used to sustain the conflict and can be a barrier to ending it.[32] Lootable resources are easily used to raise revenues to support conflict. At least eighteen conflicts that have taken place since 1989 have been directly funded by the exploitation of natural resources.[33] Removing root causes of conflict in order to reach a positive peace requires addressing natural resources governance.

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[27] Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969): 168.

[28] Ibid., 170–171.

[29] Ibid., 171.

[30] Ibid., 172.

[31] War recurrence may have less to do with the legacies of previous wars than with post-conflict incentives for individuals to restart armed rebellions. Webersik and Levy, "Reducing the Risk," 6.

[32] Muffett and Bruch, "The Pervasive Persistent," 4; Collier and Hoeffler, "Greed and Grievance."

[33] Richard Matthew, Oli Brown, and David Jensen, *From Conflict to Peacebuilding—The Role of Natural Resources and the Environment* (United Nations Environment Programme, 2009).

Liberia is a classic example of the resource curse as well as a case where resources perpetuated the conflict and play into the risk of conflict recurrence. It serves as an illustration of many of the linkages between conflict and natural resources. Society in pre-war Liberia was extremely inequitable with almost all benefits of the country's mineral wealth going to the urban elites. When war erupted, hostilities were funded by revenues first from illegally extracted diamonds and then from anarchic harvesting of timber.[34] While the country is relatively stable 10 years after the end of the conflict, it cannot be said that post-conflict natural resources reforms have succeeded in meaningfully addressing the inequity in benefits from resources.

The Evolving Field of Transitional Justice Can and Should Recognize and Prioritize Natural Resources

There are a number of approaches employed in post-conflict peacebuilding. Natural resources are increasingly being recognized as a priority, and it is important that this extends to transitional justice. There are two reasons for this. First, transitional justice is intended to address human rights violations, and natural resources issues are commonly tied up with violations of human rights. Second, transitional justice is evolving and is increasingly recognized as a set of mechanisms that can accomplish more than accountability measures for individual acts. Some scholars now consider transitional justice as a part of a methodology for social transformation.[35] This means using transitional justice to address root causes of conflict. Given the frequent nexus between natural resources and conflict, this new conception of the role of transitional justice demands that questions relating to natural resources be incorporated. Viewing natural resources issues in conflict through a rights lens and considering how they relate to the root causes of the conflict will enable appropriate prioritization of these issues.

Natural resources are often related to economic, social, and cultural rights (ESCR). Because transitional justice grew out of the application of international criminal and human rights law, it historically focused only on civil and political rights. But the increasingly accepted conceptualization of human rights as

[34] Stephanie L. Altman, Sandra S. Nichols, and John T. Woods, "Leveraging High Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forestry Initiative in Liberia's Transition to Stability," in *High-Value Resources and Post-conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 337–366.

[35] Lisa J. LaPlante, "Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework," *The International Journal of Transitional Justice 2* (2008): 335.

indivisible states that all human rights are interdependent and interrelated.[36] This means that natural resources issues cannot be excluded from consideration in transitional justice efforts as outside the scope of transitional justice merely because they are bound up with ESCR.[37]

The logical necessity of including violations of ECSR within the ambit of transitional justice is evident in a number of ways. First, in many cases, political and civil rights are complemented by economic, social, and cultural rights. For example, the right to security of land tenure is a right derived from the right to housing and is considered to be an economic, social, and cultural right.[38] Similarly, it is clear that forced displacement, especially for a particular class or group such as indigenous people, undermines both the economic, social, and cultural rights to housing and security of tenure, while also violating the civil and political rights to life, safety, security, movement, and fairness. Courts have held that the right to life, for example, includes the right to livelihoods, health, health care, and shelter.[39] Thus, protection of civil and political rights often entails protection of economic and social rights.

Building upon this, violations of ESCR related to natural resources cannot be dismissed as not suitable to be addressed by transitional justice legal accountability efforts. Many activities related to natural resources and conflict are subject to legal prosecution. First, there are acts under the traditional conception of crime, such as looting or stealing to fund rebel movements, that involve natural resources, and are already within the range of behavior that has traditionally been targeted by transitional justice efforts as they are within the scope of activities under the jurisdiction of international criminal law.[40] But other actions that relate to ESCR can also be prosecuted in some cases.

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[36] World Conference on Human Rights, June 14–25, 1993, "Vienna Declaration and Programme of Action," UN Doc. A/CONF.157/23, July 12, 1993 (noting that "[A]ll human rights are universal, indivisible and interdependent and interrelated."); Lisa J. Laplante, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development," *Yale Human Rights and Development Law Journal* 10 (2007): 142–177; *see also* Chinkin, Christine, "The Protection of Economic, Social, and Cultural Rights Post-Conflict," paper series commissioned by the Office of the High Commissioner for Human Rights (2009); Shedrack Agbakwa, "A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa," *Journal of African Law* 47, no. 1 (2003) 38–64; Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Policy* 40, no. 1 (2007): 8.

[37] Mark Freeman, "Transitional Justice: Fundamental Goals and Unavoidable Consequences," *Manitoba Law Journal* 28, no. 2 (2000–2002): 114–116.

[38] United Nations High Commissioner for Human Rights, "General Comment No. 4 on the Right to Adequate Housing," December 31, 1991.

[39] Christine Chinkin, "The Protection of Economic," 42.

[40] It is true, however, that even when crimes are clearly within the historical conception of criminal law and violations of human rights, when they involve natural resources, they seem to be neglected. Harwell, "Building Momentum."

The conception of economic, social, and cultural rights as positive rights that can only be implemented incrementally has changed. In fact, some ESCR provide freedoms and some impose obligations on the state to take certain measures, while only some of them impose obligations on the state to third parties or to achieve a particular result.[41] In any case, a requirement of positive action to protect a given right cannot disqualify that right from requiring protection. Protection of civil and political rights can also require positive action. For example, in a country with very low capacity or bad governance, protection of the right to freedom from torture or the right to a fair trial in some cases may require investment in training and improving capacity, improving institutions, and providing oversight.[42]

While progressive realization continues to be a reality for many ESCR, the Covenant on ESCR also imposes obligations that are more immediate: Those that must be respected, protected, and fulfilled.[43] Thus, the state has a duty to (1) respect (refraining from actively or directly interfering with enjoyment of the right); (2) to protect (preventing third parties from interfering with enjoyment of the right); and (3) to fulfill (ensuring that enjoyment of the right is gradually advanced in correspondence with a state's available resources).[44] Many economic, social, and cultural rights are appropriate for enforcement in the legal system as full-fledged rights.[45] The presence of a system that can be expected to fairly address a rights violation can stem the desperation that often results when there is no perceived protection.[46]

Accountability can be claimed for any negative right, which as described above, includes many economic, social, and cultural rights as well as civil and political rights. In fact, corruption in many cases violates obligations to progressively realize ESCR and can be a basis for claims for accountability.[47] This is

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41 International Commission of Jurists (ICJ), "Courts and the Legal Enforcement of Economic, Social and Cultural Rights," in *Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2 (2008): 10, http://www.unhcr.org/refworld/docid/4a7840562.html(accessed February 5, 2013).

42 Chris Albin-Lackey, "Corruption, Human Rights, and Activism: Useful Connections and their Limits," in this volume.

43 International Covenant on Economic, Social, and Cultural Rights, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976.

44 Dustin N. Sharp, "The Significance of Human Rights for the Debt of Countries in Transition," in *Making Sovereign Financing and Human Rights Work*, eds. Juan Pablo Bohoslavsky and Jernej Cernic (Hart Publishing, forthcoming 2013).

45 ICJ, "Courts and Enforcement," 9. A right that is justiciable gives the right holder a course of action to enforce that right and receive reparation, whenever the duty bearer does not comply with his or her duties. Such enforcement can also happen outside of the formal judicial system, but in either case, justiciability simply means the *possibility* of that right being adjudicated and does not imply anything about the outcome of the process.

46 Agbakawa, "A Path Least Taken," 58.

47 Albin-Lackey, "Corruption, Human Rights," in this volume.

especially the case when governance is weakest and revenues from resources are spent in self-interest rather than in development. Patterns of corruption can result in patterns of human rights abuses such as when those who refuse to pay bribes do not receive basic services.[48] While in many cases of violations of ESCR, it is difficult to draw a line and say at what point the right is violated, in a case when funds needed to meet urgent needs such as for health services are misused, it can be quite easy to demonstrate.[49] For example, in Liberia, it has been reported that instead of the 6,000 public schools that are funded by the national budget, only 2,000 exist. In addition, the plague of "ghost" teachers is an ongoing scourge. In the meantime, illiteracy rates are astronomical.[50]

Non-judicial truth-seeking and sharing is certainly not limited to any particular set of rights, but to the broader actions and context that relate to the conflict, which as described above, almost always include economic, social, and cultural rights, as well as civil and political rights. And, very frequently, the rights violations are tied to natural resources.

Similarly, once it is acknowledged that economic, social, and cultural rights entail more than so-called positive obligations, it becomes clear that there can be identifiable victims of the violation of these rights. So the transitional justice objective of allowing victims to be heard and acknowledged extends to victims of violations of economic and social rights; the same logic applies to compensation for victims.

Reconciliation efforts are not tied to any particular set of rights and thus may well relate to economic, social, and cultural rights. For example, in some cases, natural resources can be a non-controversial issue that will allow various factions to come together to address a problem. In other cases, they can be of such importance that regardless of antipathy and controversy, they may be sufficiently compelling to bring groups to work together.

Thus, natural resources-related factors must not be relegated to the background in transitional justice efforts. ESCR are as inviolable as civil and political rights, and as a critical and common factor in violation of these rights, use of natural resources and their benefits must be given renewed focus.[51] Considering natural resources in justice and accountability efforts and providing information about and recommendations related to them is an important way to make transitional justice more effective in promoting the positive peace.

The historical objective of accountability in transitional justice has often neglected the underlying structural governance problems described in the first section of this

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[48] Ibid.

[49] Ibid.

[50] Literacy rates in Liberia in 2010 were estimated to be approximately 60 %. United Nations Children's Fund, "At a Glace: Liberia," http://www.unicef.org/infobycountry/liberia_statistics.html (accessed April 25, 2013).

[51] There is already some recognition of these linkages in international law. The UN Declaration on Human Rights, for example, describes the link between human rights and conflict, and the UN was established to prevent conflict. The Vienna Declaration says rights are "indivisible."

chapter. If, as some advocate, transitional justice is to play a role in social transformation to end the cycle of violence, it must also be applied to address these structural problems that are commonly at the root of conflict. In 1969, Johan Galtung wrote that addressing direct violence without addressing structural violence is "catching the small fry and letting the big fish loose."[52] Expanding the scope of transitional justice to include the natural resource governance and economic problems described here will more effectively address the structural problems that seem to contribute to the outbreak of war.

Expanding the scope and mandate of transitional justice to address questions of structural violence is not a straightforward change. The nature of structural violence makes it difficult to identify. The systems and structures causing the social injustice that prevents people from achieving their potential are part of the cultural, governance, and institutional structure of the country. They are the background against which actions taken by groups or institutions are considered. They are thus invisible and often accepted as just the way things are.

In addition, those most frequently affected by structural violence are those who generally have a weaker voice. Those with more power benefit from the inequities, while marginalized populations like minorities, indigenous people, and immigrants suffer from them. They may not understand that they are being victimized or be able to make the situation known. And when the victims are marginalized populations, the rest of society may not even be aware of what is happening to them.

Transitional justice mechanisms of truth-seeking and sharing can be useful in ferreting out these dynamics. Once they are identified, transitional justice mechanisms such as prosecutions, when available, restitution, or reconciliation can help to address these structural problems, and transitional justice efforts can be coordinated with other peacebuilding efforts to maximize benefits.

Applying a rights lens to the role of natural resources in the structural violence that is an underlying factor in so many conflicts can help bring attention to these governance issues to fully understand them. Without carefully identifying and addressing the role of natural resource governance, the tendency in a post-conflict situation will be to seek to return to the way things have always been. Unless the impacts of the governance systems and structures are identified as violations of human rights, they risk being ignored as context, allowing the pre-conflict social dynamics to recur, and the elites to continue to benefit, while the rest are left to scrabble for scraps. Delving into natural resources management in particular probes close to the self-interest of those who have historically benefited from whatever governance structure has been in place. Thus, recommendations to change that structure—or even efforts to investigate them—may meet particular resistance. Framing the invitation as one of human rights violations may help to bring to bear the pressure from external sources that can help to overcome this structural inertia and build the political momentum to begin to change the

[52] Galtung, "Violence, Peace," 172.

political structures.[53] Identifying and addressing the embedded inequities requires a rights lens.

Natural Resources in Transitional Justice Efforts

The proposal to use the instruments of transitional justice to help address the role of natural resources in conflict is not entirely novel. A small group of transitional justice initiatives have addressed natural resources and the governance structures related to them. Some of these efforts have had wide-reaching ramifications, while the impact of others has been more superficial. These efforts show the potential for using transitional justice approaches to more directly address the role of natural resources governance in conflict. They include prosecutions, truth-seeking efforts, and restitution.

An increasing number of international criminal prosecutions for wartime environmental damage have taken place.[54] International criminal liability is currently addressed primarily through the Rome Statute and the International Criminal Court (ICC).[55] Widespread, long-term, and severe environmental damage out of proportion with the benefit to be gained is prohibited.[56] In addition, if destruction of the environment leads to any other acts prohibited by the Statute, the ICC has jurisdiction. Beyond the ICC, the Special Court for Sudan found Sudanese President Omar al-Bashir guilty of the crime of genocide based in part on activities that destroyed the environment.[57] Similarly, the Special Court for Sierra Leone convicted war criminals of engaging in a joint criminal exercise to control the territory of Sierra Leone including its diamond territories.[58] Criminal liability has also been applied in domestic courts for activities harming natural resources

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[53] Emily Harwell, "Building Momentum."

[54] Anne Cecile Vialle et al., "Peace through Justice? International Tribunals and Accountability for Wartime Environmental Damage," in *Governance, Natural Resources, and Post-Conflict Peacebuilding,* eds. Carl Bruch, William Carroll Muffett, and Sandra Nichols (Milton Park: Earthscan, forthcoming) 1. The institutions that have addressed wartime environmental damage have arbitrated between states (the United Nations Compensation Commission and the International Court of Justice), between states and non-state groups (the Permanent Court of Arbitration), between states and individuals (the Special Court for Sierra Leone), and between numerous combinations of actors (the International Criminal Court). In the realm of domestic law, the United States Alien Tort Claims Act and a series of cases tried in European national courts have prosecuted individuals.

[55] While the ad hoc international criminal tribunals for Rwanda and Yugoslavia did not hear charges related to the environment, the Rome Statute of the ICC provides a basis for environmental claims. Ibid., 19.

[56] Ibid.

[57] Ibid., 21.

[58] Ibid., 25.

during armed conflicts such as in the Dutch litigation against the arms dealer Guus Van Kouwenhoven.[59]

Criminal prosecutions for socioeconomic and environmental harm committed during armed conflict can help to strengthen the rule of law, more fully expose the dynamics and impacts of such crimes, and restore social norms.[60] There are, however, some potential downsides to criminal prosecutions that may render this approach inappropriate for some contexts or even inconsistent with broader transitional justice objectives.[61] Such prosecutions may draw attention to the accused and away from others who may also have played a role in mass criminal atrocities. In addition, the adversarial process requires the application of standards of proof and evidence that may pose a challenge in cases of activities that took place under chaotic conditions of war or that may have had many different causes. Finally, such prosecutions can be extremely costly.[62]

In cases where no criminal liability can be found, there may be civil liability. Civil liability can be just as important or a mechanism for holding accountable those who damage the environment during armed conflict. Compensation for wartime environmental damage goes as far back as the Treaty of Versailles, which awarded compensation for damage to agricultural crops and reduction in land value. A broader view of environmental damage was taken during the Nuremburg Trials where scorched earth tactics used during World War II were addressed.[63] The United Nations Compensation Commission for wartime damage to the environment during the 1990–1991 Persian Gulf War was the first claims commission for war reparations that explicitly included compensation for environmental damage.[64] The Commission considered reparations for the depletion of oil resources and other resources (whether they were commodities or not) and related health impacts of the damage wrought by Iraq.[65] And in 1999, the International Court of Justice found Uganda responsible for failing to prevent looting, plundering, and

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[59] Emily Harwell, "Building Momentum."

[60] Mark Drumbl, *Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development* (New York: International Center for Transitional Justice, 2009), 21.

[61] Ibid., 22. These include unrealistic expectations about the transformative potential of trials and sanctions; an inability to actualize retributive and deterrent aspirations; frustration among victim communities with the pace of trials; defendants' ability to grandstand; the dehumanization of victims that can result from the defendants' deployment of due process entitlements; transplants of Western adversarial legalism into socio-legal contexts where such adversarial legalism is alien; the historical narrative being more scripted by the laws of evidence than what actually happened; and competition instead of synergy with other justice initiatives.

[62] Ibid., 22.

[63] Vialle, "Peace through Justice," 17.

[64] Cymie Payne, "The United Nations Compensation Commission and the 1990–1991 Gulf War: The Role of Natural Resources in International Reconciliation," in *Governance, Natural Resources, and Post-Conflict Peacebuilding,* eds. Carl Bruch, William Carroll Muffett, and Sandra Nichols (London: Earthscan, forthcoming), 2.

[65] Vialle, "Peace through Justice," 2.

the illegal exploitation of natural resources in the Democratic Republic of the Congo.[66]

A number of truth commissions have considered the roles of natural resources in conflict with differing results. In oil-rich Timor-Leste, a number of different transitional justice mechanisms were established. The Truth and Reconciliation Commission was established in 2001 with a mandate for truth-seeking, community reconciliation, and policy recommendation formulation.[67] An entire chapter of the TRC report was dedicated to violations of economic, social, and cultural rights.[68] Some of these involved natural resources, including forced resettlement to areas that posed health risks and manipulation of coffee prices that affected livelihoods.[69] Nonetheless, the Commission did not recommend reparations for any of the victims of violations of economic, social, and cultural rights. This was explained as being due to limited resources and by the argument that other victims were considered to have higher priority.[70]

In Liberia, the brutal civil war was substantially funded by revenues from illegal timber operations. The Truth and Reconciliation Commission mandate included investigation of economic crimes.[71] Liberia's TRC ultimately made recommendations to redress economic crimes,[72] but they were essentially disregarded. The truth and reconciliation process itself failed to build upon earlier efforts such as a 2004–2005 Timber Concession Review established to identify whether any of the existing concessions were operating legally (none were). The Review also documented details of human rights abuses by timber companies.[73] While the facts documented in the Concession Review were squarely within the mandate of the Truth and Reconciliation Commission, which was established in 2006, they were neither further investigated, nor documented, nor did they form the basis for any recommendations.[74] This lack of coordination also resulted in another missed opportunity. Details of the timber transactions uncovered by the concession review could have been useful in the trial of Charles Taylor for war crimes in Sierra Leone, but the information was not used.[75] In the end, none of the information uncovered about the human rights violations and criminal activity

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66 Ibid., 5.

67 Taina Jarvinen, "Human Rights and Post-Conflict Transitional Justice in East Timor," UPI Working Paper No. 47, The Finnish Institute of International Affairs, 2004, 57.

68 Arbour, "Economic and Social Justice," 15.

69 Ibid., 9.

70 Ibid., 13.

71 Paul James Allen, Aaron Weah and Lizzie Goodfriend, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia* (International Center for Transitional Justice, May 2010); Harwell, "Building Momentum," 9.

72 Allen et al., "Beyond the Truth."

73 Altman et al., "Leveraging High-Value Natural Resources."

74 Harwell, "Building Momentum," 10.

75 Ibid., 9.

carried out by timber companies during the war seems to have changed anything. Companies that illegally supported armed conflict during the war continued to operate as if nothing had happened. A much-lauded legal reform was carried out in the sector, but the reappearance of the patterns from the war demonstrates that the legal reform did not affect the cultural change that was needed.[76]

The results of Sierra Leone's investigation of the role of natural resources in its conflict are much more far reaching. The Sierra Leone TRC was mandated to consider the political economy of resource extraction. The report revealed the role that diamonds had played in propping up the chiefdoms and aligning them with the central government rather than with the population.[77] Before the war, 90 % of diamonds produced were smuggled out of the country.[78] By the late 1990s, the primary rebel factions were earning as much as $700 million per year and $125 million per year in rough diamonds.[79] TRC recommendations for reforms included the establishment of a rough diamond chain-of-custody system, which eventually developed into the Kimberley Process Certification Scheme, described in more detail below. It also resulted in the development of the tax revenue distribution scheme called the Diamond Area County Development Fund (DACDF).

In order to redistribute the power that comes from diamond revenues, the DACDF was established to channel 0.75 % of the export value of diamonds to communities.[80] In 2001, the post-war enthusiasm of the central government generated the political will to effectively implement the system. In the first five years of the program, $3.5 million was distributed to communities in amounts based on the number of licenses issued and diamonds recovered there.[81] Difficulties that arose from the use of the funds in some communities resulted in the distribution being

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[76] The links between these failures and the current poor state of the timber sector are very clear. Those who sought to be prequalified for timber concessions after the passage of the reformed forestry law in 2006 were required to offer statements to the TRC about activities during the war. This was a positive initiative intended to support truth-seeking about the nature of the timber sector's role in the conflict and its impacts on victims, as well as to hold the perpetrators accountable by gathering information that could be shared with the government for the debarment of those who committed rights abuses, but it was not applied effectively. Reports were pro forma and not verified, and no actions were taken as a response to these disclosures. Harwell, "Building Momentum," 10.

[77] Roy Maconachie, "The Diamond Area Community Development Fund: Micropolitics and Community-Led Development in Post-War Sierra Leone" in *High-Value Resources and Post-conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 264.

[78] J. Andrew Grant, "The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds," in *High-Value Resources and Post-conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan 2012), 168.

[79] Ibid., 162; Emily Harwell, "Building Momentum."

[80] Maconachie, "The Diamond Area Community." The fund receives a small percentage of the total value of diamond exports, which is then disbursed to diamond-producing chiefdoms and districts. Payments are earmarked for small-scale development projects such as education, health services, and community infrastructure.

[81] Ibid., 265.

halted so that the system could be restructured in 2006. Distribution has resumed, though challenges with transparency, community awareness of the purpose of the fund, and involvement of women and youth in the decision-making process persist.[82] While implementation has been imperfect, the DACDF is an example of a concrete response to inequity related to natural resources that arose out of a transitional justice truth-seeking effort. The response directly sought to address the structural violence of the inequity by redistributing wealth and power to communities directly.

The recommendations from the Sierra Leone Truth and Reconciliation report resulted in another model that has been influential industry- and worldwide and also serves as a model of an assurance initiative or a certification scheme for other sectors. The Kimberley Process Certification Scheme is a global regulatory framework for tracking the diamond trade to ensure that diamonds were not acquired illicitly.[83] The Kimberly Process has been widely adopted, though its results have been mixed.

These examples demonstrate the possibility of addressing natural resources in transitional justice efforts. In each of the three cases, the mandates of the TRCs were framed to include events and matters relating to natural resources. Liberia and Timor Leste explicitly considered economic crimes in human rights terms. The success of Sierra Leone's recommendations, and the counterexample of the failure of coordination in Liberia that has left the power structure essentially unmolested, illustrate the value of coordinating various accountability efforts to maximize outcomes. Failing to carefully use and build upon the analysis and information from one accountability initiative in other efforts can result in missed opportunities that risk a recurrence of the vicious conflict cycle.

Thus, transitional justice efforts have already addressed natural resources and conflict in a range of different ways. While these represent a starting place, future transitional justice mechanisms can be deployed even more effectively with appropriate mandates from the start and with a prioritization of natural resources issues in their efforts.

Broader Implications of a More Holistic Conception of the Role of Natural Resources for Post-Conflict Activities

As illustrated by the success of Sierra Leone, carefully crafted accountability measures harnessed effectively can result in meaningful changes to structural inequities in access to or benefits from natural resources. While this effort did result in objective improvements to natural resources governance in Sierra Leone, the TRC there could have gone further. Incorporating natural resources into the mandates

[82] Ibid., 269.

[83] Grant, "Kimberley Process at Ten."

of transitional justice initiatives and prioritizing them in recommendations both increases the power and possibility of reaching underlying causes and raises the stakes for initiatives designed to apply the recommendations.

If a human rights lens were applied by truth-seeking or accountability efforts and more information revealed about root causes of conflict, the findings could promote other peacebuilding efforts. This could include transitional justice initiatives involving compensation or reconciliation, but it could also translate into greater contributions to broader reform efforts. Expanding the set of efforts and initiatives addressing natural resources will require meaningful coordination and sequencing to avoid overlapping or conflicting efforts, or failures due to improper sequencing.[84] A number of these standard approaches and how they could be more effectively deployed in collaboration with natural resources transitional justice initiatives are described below.

Revenue Management and Allocation

One aspect of natural resources that is being recognized as tied to conflict is revenue management and allocation.[85] Many of the inequities associated with natural resources stem from how government uses the revenues that it collects from extractive and other natural resources industries. In cases when such inequitable use of revenues was a factor in a conflict, changing the system is necessary to redress the inequities and remove or at least reduce the potential for conflict due to that factor. Doing so, however, requires overcoming powerful incentives to maintain the status quo. Unless they are given a powerful motivation or no choice, those who controlled natural resources and their revenues prior to a conflict will often continue to do so.[86]

An array of strategies has been developed to try to shift power over resources and their revenues. One approach is to identify the *rights* that were affected by the pre-conflict system and to help people understand that they will be better off with a

[84] For example, in Liberia, substantial resources were invested in reforming the forest sector and implementing the new regime, but a now-underway land reform process will necessitate a whole new forestry reform process, as well as reform process related in any way to land rights.

[85] Achim Wennemann argues that focusing on economics issues in post-conflict peace processes opens a new opportunity for conflict resolution: (1) economic issues are quantifiable and may be less emotional than ethnic or cultural differences; (2) private sector investment is an opportunity to make more money than the kind of informal dealings that factions engage in during armed conflict; and (3) if the requirement to address wealth sharing is included in the peace agreement, this may foster the notion that revenue sharing is one of the components of reform that will lead to a better life. Achim Wennemann, "Sharing Natural Resource Wealth in War-to-Peace Transitions," in *High-Value Resources and Post-conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 228.

[86] In Liberia, Florence Chenoweth was Minister of Agriculture with authority over the lucrative rubber and palm oil plantations as well as the extraordinarily rich forests in 1979 when riots over a proposed hike in the price of rice sparked a *coup d'état* that brought Samuel Doe to power. Ten years after the end of the civil war that started in 1989, she is still Minister of Agriculture.

reformed system, thereby building support for meaningful changes.[87] This can be one tool in what can be a very sensitive process of changing these fundamental social and economic systems. A balance must be maintained between progress and peace, and sometimes this can require an iterative approach. In Sudan, the Comprehensive Peace Agreement of 2005 included the Agreement on Wealth Sharing (AWS). The AWS was designed to enable new investment in the rich oil wells in the border region that had not been exploited during the war. The AWS was a compromise for the transition period before the independence of South Sudan and not a lasting solution to resource allocation.[88] For example, it did not address ownership of the resources.

Revenue management and allocation have also been central themes in peacebuilding efforts in Iraq. They have been prioritized because the political and social ramifications that followed discovery of oil in the region took religious and ethnic dimensions that also translated into violent conflict. While the structure for management of the oil revenues is essential to future peace, thus far, efforts to address this problem have been disorderly and ineffective, as described below in the Legal Reforms section.

If they are to be effective, reforms must be based on a nuanced understanding of the existing system and accompanied by substantial support. Given the sensitivity and the balancing of considerations such as increasing revenues while building the capacity of individuals and institutions, this is an area where information revealed by truth-seeking mechanisms could be the key to effectively curbing corruption by reforming revenue allocation. Once the lay of the land in terms of rights has been established, it is common to discover that the unfair distribution of revenues is based not in national law, but in concession agreements. Concession reviews are another information-seeking tool that can lead to cancellation of agreements made by illegitimate governments. Commodity tracking, like the Kimberley Process described above, is a tool that can help identify the revenues that should be reaching the central government.

Transparency to Improve Accountability and Impede Corruption

To counteract the information enclaves that enable corruption in use of natural resources and their revenues, transparency is commonly prescribed. Making information public changes the incentives of those misusing resources by increasing the risk of exposure and the likelihood of being held accountable. Transparency can also help give credit when reforms are made. Post-conflict populations expect corruption and self-interest on the part of government employees, and the onus is on the government to *prove* that its role in society has changed.[89] Transparency could

[87] Wennemann, "Sharing Natural Resource," 229.

[88] Ibid.

[89] Collier and Hoeffler, "Greed and Grievances."

also help to avoid the common but unfortunate phenomenon of expectations of natural resources benefits far outstripping the reality.[90]

Transparency is not sufficient to counteract misuse of natural resources and their revenues, but it is a necessary component. For this reason, it has been recognized as a human right, enshrined in many international agreements, including several topic-specific multilateral environmental agreements,[91] Principle 10 of the Rio Declaration, and the European Aarhus Convention.[92] Thus, applying a rights lens to post-conflict reforms is in harmony with efforts to improve transparency. And transparency initiatives can be a logical next step to respond to information or dynamics revealed through truth-seeking efforts.

There are some international initiatives that have been developed explicitly to improve transparency in natural resources sectors. The Extractive Industries Transparency Initiative (EITI) is perhaps the best known and most extensive initiative attempting to increase transparency in the management of revenues from high-value natural resources. It is designed to monitor revenue flows from oil, gas, and mining companies to the government. It seeks to improve transparency and accountability by making company payments and government revenues from specified natural resources fully public.[93] In communities where extraction takes place, transparency gives citizens insight into the amount of revenues actually flowing out of their region to the government. NGOs such as Revenue Watch and networks such as Publish What You Pay also focus on revenues of extractive industries in different ways.

Much is made of these transparency initiatives, but their long-term efficacy has been questioned.[94] No case of significant improvement in governance can firmly be attributed to greater transparency alone. Demonstrating why the internal culture of a government changes, if it does, however, is not an easy task. So while it is self-evident that improved transparency can contribute to improved governance, it may not demonstrably or directly lead to change. Some of the international initia-

[90] Altman et al., "Leveraging High Value Natural Resources."

[91] Svitlanaka Kravchenko, "Is Access to Environmental Information a Fundamental Human Right?" *Oregon Review of International Law* 11 (2009): 233.

[92] The United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[93] Eddie Rich and Negbalee Warner, "Addressing the Roots of Liberia's Conflict through the Extractive Industries Transparency Initiative" in *High-Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 201–210.

[94] Alexandra Gillies and Antoine Heuty, "Does Transparency Work? The Challenges of Measurement and Effectiveness in Resources-Rich Countries," *Yale Journal of International Affairs* 6, no. 2 (2011).

tives may even be failing to accomplish their primary goal of improving transparency because their designs do not fit the country where they are operating.[95]

Of course, simply making information available is not enough to shift the incentives and to change behavior. To create accountability, information must not only be made available, but it must be understood and acted upon.[96] This is why detailed analyses of the roots of conflict and an understanding of the role that information availability can play in breaking the conflict cycle, which could be developed through a truth-seeking effort, could subsequently be used to develop more effective transparency initiatives.

Redressing Inequity Through Ownership or Benefit Sharing

In cases of inequitable distribution of benefits from natural resources, changing the ownership of the resources or their proceeds can change the calculus. This is known as benefit sharing, which involves transfer of resources from extractive industries or their government regulators to communities that are affected by the resource extraction. Benefit sharing can take myriad forms, including agreements negotiated between the community and the company conducting the extraction, preference in hiring, procurement opportunities, and financing of development projects through trust funds. Through these benefit-sharing trust funds, governance of revenues is devolved, at least in part, to regional or local bodies, which have access to funds held in a trust. One example of this approach is Sierra Leone's Diamond Area Community Development Fund (DACDF), described above.

Such mechanisms have been developed for a number of industries. For example, each of the countries in the Congo Basin has legal requirements for sharing forestry revenues with communities affected by logging. In its 2005 Mineral Development Agreement with the government of Liberia, ArcelorMittal made a social agreement to establish a public–private partnership called the County Social Development Fund. This arrangement provided the model for the social agreements and the benefit-sharing trust that were later developed in the forest sector.

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[95] Ibid. Some initiatives dictate the format for the information to be made public, and the format is designed for a donor audience, not for a post-conflict population in a developing country. It is easy to see why such a design may not result in increased popular demands for accountability. And, in other cases, programs require changes to improve transparency, but the changes are made only enough to meet donor demands. Once the project is over, there is a reversion back to old habits.

[96] Collier and Hoeffler, "Channels of Causation." For example, in Liberia, information about a substantial number of illegal logging permits began to surface in late 2011. Information was presented to the management of the forestry authority, passed to other forest sector stakeholders, and eventually publicized by civil society. It was the "secret" that everyone knew about by June 2012. But it was not until Global Witness made a major publicity effort that the President of Liberia took any action on the issue in August 2012.

As agreed in the MDA, the County Social Development Fund receives US $3 million each year to be shared between the three affected counties. Distribution of these funds, however, has been plagued with abuse.[97]

Benefit-sharing trust funds are relatively new, and approaches and specific objectives are still evolving. Should they simply aim at substantive improvements (i.e., making sure that monies are spent effectively and avoiding corruption) or should trust funds be seen as a way of improving the practice and procedures of local and national governance at large? This is an important consideration because it affects the nature and strategy of the fund. For example, in the first case, it may be desirable to utilize existing local institutions as fund administrators because they are already established, have preexisting perceived legitimacy, and are culturally and historically relevant to the local population. However, these same institutions may reflect inequitable social structures and practices that hinder development, lack transparency, and are more part of the problem than the solution.[98] Should benefit-sharing initiatives bypass existing power structures and attempt to bring about more direct democratic participation? Experience from Sierra Leone and Liberia suggests there are dangers to reinforcing preexisting social and political arrangements that can be a source of tensions.[99] These fundamental questions for the design of benefit-sharing mechanisms could be addressed, at least in part, through prior work done in transitional justice truth-seeking efforts.

Redistributing Governance Authority

Analysis of the root causes of conflict may reveal a flaw in the very nature of government structures for governing natural resources. In some cases, it may be appropriate to restructure the system entirely. Decentralization and federalism are two approaches that reshuffle the authority and distribute power more widely. Decentralization of authority means that the government system formally assigns a certain amount of authority and responsibility to a regional or local government, permitting subnational bodies to make certain executive, legislative, or judicial decisions.

In many cases, natural resources are more effectively and appropriately managed at the local level, particularly when communities rely directly on the

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[97] Friends of the Earth, "Government of Liberia and ArcelorMittal Complicit in the Misuse of Social Development Funds," Press Release, June 7, 2010, http://www.foeeurope.org/press/2010/Jun07_Government%20of%20Liberia%20and%20AM_complicit_in_misuse_of_county_development_funds.html.

[98] Jesse C. Ribot, "Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation," in *World Resources Institute Report* (2000).

[99] Roy Maconachie, "Diamonds, Governance and 'Local' Development in Post-Conflict Sierra Leone: Lessons for Artisanal and Small-Scale Mining in Sub-Saharan Africa?" *Resources Policy* 34, no. 1–2 (2009): 71–79.

resources.[100] Communities relying on local resources, such as fishing communities that depend on local fish stocks for food and their livelihoods, often better understand the constraints and opportunities of resource management than central government officials.[101] In addition, a governance approach that is understood and recognized as legitimate by the regulated community is more likely to lead to compliance and collaboration. Sometimes, taking a decentralized approach can offer a way to circumvent political inefficiencies or corruption at the national level. For example, in Afghanistan, interministerial disputes have slowed progress on governance and maintenance of essential irrigation infrastructure, while local irrigation institutions have continued to effectively administer the canal system.[102]

Federalism is another approach that can improve equity in governance of natural resources. It is the division of powers between the national government and the provinces, states, or other constituent units. Control over the access, use, and benefits of natural resources is a common focus of federalism debates. National governments often advocate for using natural resources for the benefit of the entire country, while local authorities prefer to allocate the benefits to the local population.

The balance of authority over natural resources between a central government and subnational entities has been a prominent source of debate and political discourse in several post-conflict federalist states: Iraq (oil), Nigeria (oil), Ethiopia (land), Mindanao/Philippines (land, minerals, and forests), Sudan (oil, water, and land), and Aceh/Indonesia (oil, gas, and forests).[103] Analysis of any relationship between governance of natural resources, human rights, and root causes of conflicts using transitional justice initiatives could inform efforts to make structural changes toward decentralization or federalism.

Legal Reforms

In some cases, when violations of human rights relating to natural resources are discovered in post-war analyses, it may also be discovered that there is no domestic legal framework in place to provide a system for protecting those rights.

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[100] Sandra S. Nichols, Paivi Lujala, and Carl Bruch, "When Peacebuilding Meets the Plan: Natural Resource Governance and Post-Conflict Recovery," *Whitehead Journal of Diplomacy and International Relations* (Feb. 2011).

[101] Blake Ratner, "Building Resilience in Rural Livelihood Systems as an Investment in Conflict Prevention," in *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding,* eds. Helen Young and Lisa Goldman (London: Earthscan, forthcoming).

[102] Allen Roe, "Swords into Ploughshares? Access to Natural Resources and Securing Agriculture Livelihoods in Rural Afghanistan," in *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding*, eds. Helen Young and Lisa Goldman (London: Earthscan, forthcoming).

[103] Sandra S. Nichols and Mishkat Al Moumin, "Process and Substance: Environmental Law in Post-Conflict Peacebuilding," in *Governance, Natural Resources, and Post-Conflict Peacebuilding,* eds. Carl Bruch, William Carroll Muffett, and Sandra Nichols (Milton Park: Earthscan, forthcoming 2013).

Because of this and other common gaps or failings in legal systems, legal reform processes are a standard aspect of post-conflict peacebuilding. It takes great care, however, to conduct legal reform in such a way that the process is accompanied by appropriate social and institutional change and that it results in substantive content appropriate for that given context. Building such reform efforts upon transitional justice accountability or truth-seeking efforts can maximize opportunities for conducting and calibrating legal reform appropriately. And using a rights lens in the investigation stage is necessary to identify why rights were ignored and thus how to improve their protection.

Constitutional reform is often proposed in post-conflict situations to publicly acknowledge past wrongs and conspicuously disable structures that may have contributed to the conflict. Such reforms could be used to address environmental issues. A variety of environmental principles and rights have been incorporated into constitutions, including provisions that establish: (1) a generic right to a healthy environment or a right to life[104]; (2) ownership of resources such as land[105]; (3) procedural rights, such as the right to information, participation, and accountability[106]; and (4) governance principles, such as wealth sharing or multilevel governance.[107] More technical issues can also be included in constitutions. For example, wealth-sharing arrangements are not commonly addressed during peace negotiations for a number of reasons. But by the time of the constitutional reform process, it may be more appropriate to address new arrangements and doing so will formalize the new arrangement and make it difficult to change.[108]

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[104] Under Article 49, the Constitution of Rwanda states "[e]very citizen is entitled to a healthy and satisfying environment." Similar rights are recognized in the constitutions of: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Burundi, Cambodia, Colombia, Congo, Croatia, Chad, Democratic Republic of the Congo, East Timor, Egypt, Mozambique, Myanmar, Nepal, Palestine, Panama, Senegal, Somalia, Sudan, Tajikistan, and Uganda; and the subnational constitutions of South Sudan and Chechnya. Under Article 5, the 1994 Constitution of Tajikistan states "Life, honor, dignity, and other natural human rights are inviolable. The rights and liberties of the person and citizen are recognized, observed, and protected by the state." Similar rights are recognized in the constitutions of: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Burundi, Cambodia, Chad, Colombia, Congo, Croatia, Democratic Republic of the Congo, East Timor, Kosovo, East Timor, Iraq, Mozambique, Nepal, Palestine, Panama, Rwanda, Senegal, Somalia, Sudan, and Uganda; and the subnational constitutions of Chechnya, and South Sudan.

[105] *See* 2009 Constitution of Bolivia, which includes indigenous people's rights to natural resources, such as "the autonomous indigenous territorial management, exclusive use and exploitation of renewable natural resources within their territories." The Constitution also provides for a duty for Bolivians to "[p]rotect and defend the natural resources and contribute to its sustainable use, to preserve the rights of future generations."

[106] For example, Article 2(4) under the Constitution of Peru states: "All persons have the right . . . [t]o request, without providing a reason, information that one needs, and to receive that information from any public entity within the period specified by law, at a reasonable cost." Under § 168(5), the 2011 Transitional Constitution of the Republic of South Sudan states "The sharing and allocation of resources and national wealth shall be based on the premise that all states, localities and communities are entitled to equitable development without discrimination."

[107] Ibid.

[108] Wennemann, "Reducing the Risk," 229.

Constitutional reform processes, however, can stall if they are not based on sufficient groundwork through advocacy or other information sharing that builds popular support for reforms.[109]

In Sudan, the oil in the border region between Sudan and South Sudan was a key factor in the conflict. Thus, allocation of the oil was an essential component of the 2005 Comprehensive Peace Agreement. But the arrangements in the peace agreement were temporary compromises meant only to last through the transitional period before the independence of South Sudan.[110] Efforts to begin making long-term decisions about allocation of oil revenues have not contributed to any longer-term progress. While environmental rights were prominent in constitutional development in South Sudan, the language in the interim constitution is very general and does not provide mechanism to balance or prioritize competing interests.[111]

In post-Sadaam Iraq, legal reform was initiated without the benefit of any transitional justice efforts. While truth-seeking and victim reparations were on the post-conflict agenda, only the retributive trials of former Ba'athist government officials were carried out.[112] This process itself has been criticized, but in addition, no information uncovered during the trials was used in designing reforms. The Special Tribunal established to seek accountability for human rights violations was established on October 18, 2005.[113] The 2005 Constitution was approved in a gen-

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[109] In Nepal, neither the proposed TRC nor the proposed reconciliation commission has been established since the formation of the new government in 2007. Karon Cochran-Budhathoki and Scott Worden, "Transitional Justice in Nepal: A Look at the International Experience of Truth Commissions," *USIP Peace Brief* (September 2007), http://www.usip.org/publications/transitional-justice-nepal-look-international-experience-truth-commissions (accessed April 30, 2013). Environmental provisions tied to the issues affecting communities and indigenous people have been introduced into drafts of the constitution but the process has stalled. Nichols and Al Moumin, "Process and Substance."

[110] Wennemann, "Sharing Natural Resource," 238.

[111] On July 7, 2011, the South Sudan Legislative Assembly passed the 2011 South Sudan Interim Constitution just two days before formally declaring its independence. The interim constitution affords strong support for broad environmental ideals, providing every citizen with the right to a clean and healthy environment and the right to have environmental protections through (1) prevention of pollution and ecological degradation; (2) conservation efforts; and (3) ecologically sustainable use of natural resources. While the Interim Constitution also strikes a balance between environmental protection and resource extraction by stating the government will "promote energy policies that will ensure that the basic needs of the people are met while protecting the preserving the environment," no mechanism to balance or prioritize these sometimes-competing interests is in place. The Interim Constitution also sets out several ministerial and advisory positions relating to the environment and resource extraction, including the Wildlife Service and the Petroleum and Gas Council.

[112] IRIN News, "Iraq: The Rocky Road to Transitional Justice," in *Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law*, June 2006, http://www.irinnews.org/InDepthMain.aspx?InDepthId=7&ReportId=27077 (accessed February 26, 2013).

[113] Statute of the Iraqi Special Tribunal, August 11 2005.

eral referendum that took place on October 15, 2005. Negotiation on the terms of the new constitution started well before the human rights trials. And, the agenda for reforms failed to address the role of natural resources in Iraq's conflict-ridden history.[114]

Entrenched religious and ethnic cleavages in Iraq have been exacerbated by failures of natural resources governance. Since the discovery of oil in the Middle East and well before the independence of Iraq in 1932, oil has had extreme repercussions for foreign and domestic politics there. Struggles over oil-rich regions such as Kirkuk have religious and ethnic dimensions. This history of governance failures and inequity has made Iraq a classic case of a country affected by the resource curse. After the fall of Sadaam Hussein, an attempt was made to use constitutional reform to adjust the historic power structures and redress wrongs. Some progress was made, but political will was not sufficient to adjust all of the power structures.

Natural resources, in particular oil, gas, and water, as well as the environment generally, were among the hotly contested issues in the constitutional drafting process led by the transitional government in 2005.[115] Under great pressure to get a legal framework in place, a compromise was made regarding oil ownership and management.[116]

The 2005 Constitution addresses oil but fails to provide a clear framework for ownership or management. It states that oil is *owned* by all Iraqis. It gives concurrent authority for management of oil resources between the central government and the regions and protectorates—without providing any guidance for how this power should be shared. It does not specify which institution within the federal government is responsible for management of oil. The parliament and the oil ministry have been struggling over this authority.[117]

Perhaps if constitutional reform had been based on rights-based analysis drawn from truth-seeking, it might have more effectively addressed the problems that underlie important conflict dynamics in Iraq. As it turns out, simultaneously with the adoption of the constitution, a reform process began in an effort to allow Sunni interests that had been excluded in the negotiation to be reflected in a future constitution. One of the reforms the Sunnis are seeking would change the allocation of

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[114] Recommendations for the interim constitution in the 2003 blueprint for reforms related to recognition of the multi-ethnic and religious society, protection of human rights in general terms, and prohibition of discrimination. Neil J. Kritz, Sermid al-Sarraf, and J. Alexander Thier, "Constitutional Reform in Iraq: Improving Prospects, Political Decisions Needed," *USIP Peace Brief* (September 2007), http://www.usip.org/publications/constitutional-reform-iraq-improving-prospects-political-decisions-needed (accessed February 26, 2013).

[115] Ashley Deeks and Mark Burton, "Iraq's Constitution: A Drafting History," *Cornell International Law Journal* (2007): 403–435.

[116] Mishkat Al Moumin, "The Legal Framework for Managing Oil in Post-Conflict Iraq: A Pattern of Abuse and Violence Over Natural Resources," in *High-Value Resources and Post-Conflict Peacebuilding*, eds. Päivi Lujala and Siri Aas Rustad (Milton Park: Earthscan, 2012), 419.

[117] Ibid., 421.

oil revenues to remove language about the source of the oil and the distinction between known and future discoveries.[118]

In the meantime, failure to resolve these issues fully has led to ongoing confusion and violence. Insurgencies have come from cities that have received less oil revenue.[119] Kurdistan took advantage of the uncertainty and simply passed a law enabling itself to grant contracts. The violence that erupted after Kurdistan in fact granted a contract (without informing the central government) forced a negotiation to allow the contract.[120] This example illustrates the critical importance of carefully identifying the rights issues at hand and the dynamics behind them and then laying the groundwork for change before simply layering a new program or meaningless paper law on top of them.

Constitutional reform is but one category of legal reform that should be informed by rights-based analysis and investigation of root causes of conflict in post-conflict efforts. Environmental or natural resources framework laws can play an important role in structuring the institutions for managing these sectors. A specific sector framework law can address rights of communities or distribution of revenues. Environmental impact legislation can support the right to information and the right to meaningful participation in decision-making. But any reform effort will result in the intended adjustments only when the changes are designed based on an understanding of the structures and dynamics that resulted in the inequity in the first place and when political will is sufficient to support true legal reform and its subsequent implementation.

Conclusion

This chapter has argued that as key pressure points related to conflict, natural resources should be addressed head on in transitional justice efforts. Viewing the management of natural resources and their revenues as rights issues helps to situate them within the scope of transitional justice, to give them appropriate priority, and provides the conceptual framework to identify the structures causing the problems and to propose solutions.

Transitional justice efforts can identify and reveal the links between natural resources and conflict—and build the popular support for reforms or legal action. If carefully calibrated for the circumstances, transitional justice efforts can help to prioritize key peacebuilding and development activities. Two roles that transitional justice efforts can play are in identifying the ways in which resource entitlements have contributed to the war or shifted during the war and in helping to avoid misguided initiatives for quick economic recovery. The push to restart a natural

[118] Kritz et al., “Constitutional Reform in Iraq”.

[119] Joost R. Hilterman, “Revenge of the Kurds,” *Foreign Policy* (Nov/Dec 2012): 16–22; Al Moumin, “Managing Oil in Iraq,” 425.

[120] Al Moumin, “Managing Oil in Iraq,” 423.

resources sector because of perceived economic urgency can have long-term consequences. As seen in Liberia, premature resumption of economic activity without sufficiently profound reforms can result in falling back into historic inequitable patterns. Allowing short-term economic considerations to be prioritized can eclipse good governance and human security initiatives and leave structural inequities in place. Transitional justice concepts must be applied in designing post-conflict peacebuilding reforms or the drive for political stability, which only reinforces the status quo, will eclipse any attempts at accountability.[121]

Integrating transitional justice with other efforts will require a weighing of various priorities in any particular set of circumstances. Some are likely to complement each other, such as accountability and institutional reform, while these may often run counter to efforts at reconciliation. In order to more effectively address natural resources and integrate peacebuilding and development efforts, transitional justice must be adjusted. A first step and a critical improvement would be to include natural resources from the outset of the design of transitional justice interventions. Natural resources issues crop up during the process so commonly and require an adjustment in focus and resources. Considering those factors in planning will ensure they get the appropriate attention and resources and thus do not end up directing resources away from other matters.

Peacebuilding and development programs must also do their part by designating efforts to address the causes and conditions of the conflict *in the light of* the findings of the transitional justice interventions. Peacebuilding efforts should use information acquired through TRC and trial investigations to improve reform efforts and to prevent human rights abusers and perpetrators of resource crimes from holding political or influential positions.

[121] Harwell, "Building Momentum," 21.

Financial Complicity: The Brazilian Dictatorship Under the "Macroscope"

Juan Pablo Bohoslavsky and Marcelo D. Torelly

Authoritarian Regimes, Finance, and Transitional Justice: The Relevance of the Brazilian Case

In order to make transitional justice measures effective, the economic context and roots of mass atrocities must not be left out of the picture.[1] However, in those few instances where truth commissions have dealt with questions of economic violence, they have done so in a sadly limited way.[2] Within this context, financial complicity, which we define here to mean "making possible," "facilitating," or

[1] See chapters by Sharp in this volume.

[2] Clara Sandoval, Leonardo Filippini, and Roberto Vidal, "Linking Transitional Justice and Corporate Accountability," in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (London: Routledge, 2013), forthcoming.

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"exacerbating" human rights abuses,[3] is one of the areas that has received the least amount of attention. Difficulties in understanding the causal link between sovereign financing and campaigns of massive human rights abuses have been at the center of this phenomenon. With this chapter, we try to address these difficulties by making two points. First, there is a rational explanation for the causal link between authoritarian regimes, their crimes, and the financial support they receive. Second, in-depth case studies, such as the Brazil case study explored in this chapter, help us to both improve our understanding of this causal connection and to adjust and create transitional justice mechanisms and policies to face the contemporary challenges posed by financial complicity.

In a context of human rights violations a micro connection between funds and human rights abuses can frequently be found, such as the one involving the private funding of the repressive "Operação Bandeirante" (OBAN), the multiagency military operation that was in charge of repressing people during the 1964–1985 Brazilian dictatorship, in cooperation with private actors.[4] However, as will be explored in this chapter, gross and massive violations of human rights are often linked to sovereign financing in less direct and obvious ways. Cases involving massive capital inflows and complex criminal systems that perpetrate gross human rights violations require nuanced and sophisticated techniques of interpretation to be fully appreciated.

In order to assess if and how such funding contributes to these massive crimes it is necessary to look at the interaction between the structures, processes, and dynamics of sovereign financing and human rights violations. Analyses must take into account not only the micro but also the macro economic data of the country and international markets; internal and external political and institutional processes; the social situation; monetary, budgetary, and industrial policies; the human rights situation, as well as every other relevant fact.[5] As part of this analysis, a rational choice approach is useful to better understand whether and how sovereign lending furthers a regime's consolidation (with the human suffering that this implies), by buying loyalties and/or reinforcing repression of the population.[6]

Authoritarian regimes not only torture and kill people but often impose economic models that violate fundamental social, economic, and cultural rights as well (economic violence). As will be discussed at greater length below, the ways

[3] International Commission of Jurists, *Corporate Complicity and Legal Accountability* (Geneva, ICJ, 2008), vol. 1, 9.

[4] Thomas Skidmore, *The Politics of Military Rule in Brazil, 1964–1985* (New York: Oxford University Press, 1988), 127–128; Marlon Weichert, "O financiamento de atos de violação de direitos humanos por empresas durante a ditadura brasileira," *Acervo* 21, no. 2 (2008): 186.

[5] Antonio Cassese, "Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile," UN Doc. E/CN.4/Sub.2/412 (1978), vols. I–IV.

[6] Ronald Wintrobe, *The Political Economy of Dictatorship* (New York: Cambridge University Press, 1998).

in which both groups of rights violations are interlinked is often at the core of the regime's plans. In this context, foreign investors can be invited to translate these transgressions of human rights into increased profitability. Economic assistance can contribute to the perpetuation of human rights abuses, and such abuses, in turn, might bring about the necessary conditions to attract and obtain economic assistance.[7] Here, again, it is clear that when it comes to understanding the linkages between financial complicity and human rights abuses, the social, economic, financial, and political situation of the country must all be taken into account.

This same analytical, holistic, and interdisciplinary exercise carried out in the current Brazilian context could have relevant implications for the development of its own transitional justice process. Brazil is pursuing forms of accountability for individuals and institutions that violated human rights or otherwise supported human rights violations during a period of military rule spanning a period of 21 years.[8] The clarification of—specifically—the links between sovereign financing and human rights violations may contribute, for example, to the work of the recently launched National Truth Commission (NTC),[9] while reinforcing the social struggle for other kinds of accountability in the country.[10]

This chapter will first analyze whether and how authoritarian regimes' success depends on their financial support. It will contrast this somewhat theoretical rational choice explanation with an analytical narrative embodied in a concrete case study that serves to illustrate some of the causal linkages between the foreign financial aid received by the Brazilian military government, its ability to remain in power for 21 years, and the crimes perpetrated by this regime. More specifically, it will analyze whether and how sovereign financing facilitated the ability of the Brazilian regime to buy key loyalties and/or maintain a complex and effective repressive apparatus by exploring the linkages between the macroeconomic indicators of the country, the role played by the external financial support, and the consolidation of the regime. Following this analysis, we examine the possible concrete implications that these findings could have in terms of transitional justice measures in the country, highlighting the challenges and opportunities that this presents for the Brazilian NTC. The final section briefly explores the prospects for an economic transitional agenda in Brazil.

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[7] Antonio Cassese, "Foreign Economic Assistance and Respect for Civil and Political Rights: Chile, A Case Study," *Texas International Law Journal* 14 (1979): 257.

[8] Paulo Abrão and Marcelo Torelly, "Resistance to Change: Brazil's persistent amnesty and its alternatives for Truth and Justice," in *Amnesty in the Age of Human Rights Accountability*, eds. Francesca Lessa and Leigh Payne (New York: Cambridge University Press, 2012), 152–180.

[9] Brazil, *Lei 12.528* (November 18th 2011).

[10] *See* this discussion in Dustin Sharp, "Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice," *Fordham International Law Journal* 35 (2012): 780.

Theoretical Explanation of the Link Between Authoritarian Regimes and Sovereign Financing

The economic and political literature has tried to rationalize the behavior of authoritarian regimes,[11] explaining that there is essentially a trade-off between loyalty and repression. Dictators will try to remain in power to secure privileges for the elites and/or the military by allocating economic benefits or political freedoms. To remain in power, a regime has to address economic constraints in ways that secure a minimum of political support and/or enable the bureaucratic (particularly military) machinery to function efficiently in order to control and repress. Financial resources are therefore essential to regime survival.[12]

The extent to which the regime tries to buy loyalty through granting economic benefits (subsidies, tariff protections, wages, access to consumer goods, etc.) or opts for repressing the population depends on a variety of factors. Firstly, it depends on the nature of the regime and its capacity to incorporate and respond to social demands and create institutions accordingly.[13] Secondly, poor economic performance, recession, inflation, and currency collapses diminish the bargaining power of dictators, eroding their ability to win public support through the provision of benefits.[14] An authoritarian government facing a serious fiscal challenge may try granting certain political and civil liberties in order to secure short-term political support. It could—instead, previously, or successively—increase repression to contain growing social protests. And thirdly, both welfare expenditure and political rights seem to decrease in response to an increase in the repressive capacity of the regime (generally reflected in military expenditure), suggesting that autocratic regimes with larger militaries will rely less on either economic benefits or political openings to secure political support.

It is reasonable to expect that financially contributing to the regular and efficient functioning of a regime that perpetrates gross human rights violations will help it to reach its principle characterizing feature: Committing certain crimes in line with the main economic and political objectives of the organization. Ultimately, the state budget must support an effective system to buy loyalties and/or repress.[15]

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[11] *See generally* Daron Acemoglu and James Robinson, *Economic Origins of Dictatorship and Democracy* (New York: Cambridge University Press, 2006); Ronald Wintrobe, *The Political Economy of Dictatorship* (New York: Cambridge University Press, 1998).

[12] This section heavily relies on: Juan Pablo Bohoslavsky, "Tracking Down the Missing Financial Link in Transitional Justice," *The International Human Rights Law Review* 1, no. 1 (2012): 63–71.

[13] Abel Escriba Folch and Joseph Wright, "Dealing with Tyranny: International Sanctions and the Survival of Authoritarian Rulers," *International Studies Quarterly* 54 (2010): 335.

[14] *See* generally Stephan Haggard and Robert Kaufman, *The Political Economy of Democratic Transitions* (Princeton: Princeton University Press, 1995), 7.

[15] *See* generally Bruce Bueno de la Mesquita and Alastair Smith, *The Dictator's Handbook: Why Bad Behavior is Almost Always Good Politics* (New York: Public Affairs, 2011).

While it must be acknowledged that considering the fungible nature of money any funds lent to a criminal regime might also have a beneficial effect for the population, this is a very rare case. Firstly, because in the case that a beneficial use of the money could be proved, this could also free up funds that are then spent for harmful purposes.[16] Secondly, when funds are effectively spent on social programs or other beneficial expenditure, this can help to contain social and political protest and resistance, thus prolonging the survival of the regime.[17] More funds may temporarily provide more *fiscal space* for dictators so they rely more on buying loyalties and less on repressing. In fact, when dictators take into consideration the preferences of outside groups who have their own financial and budgetary priorities, they will probably win some social and political support which at the same time will help them to reach their primary goal: To survive in power and carry out their plans.[18] This is the so-called *authoritarian bargain*, an implicit arrangement between ruling elites and citizens whereby citizens relinquish political freedom in exchange for public goods.

It is therefore perhaps unsurprising that more financial assistance usually makes dictatorships last longer[19] with all the suffering that this entails. But how can all these theoretical considerations be applied to the Brazilian case in which the dictatorial government received massive financial support? A holistic and empirical analysis of the situation in Brazil at that time is necessary. Such an analysis sheds light on the role played by foreign lenders in terms of helping the regime to remain in power and consequently to carrying out its campaign of human rights abuses.

The Economic Policy of the Brazilian Dictatorship

In order to study the Brazilian case, it is necessary to analyze who benefited and who lost from the economic policies applied by the dictatorship. This must include an understanding of how the government managed to finance these policies, whether the government bought loyalties among the elite groups, and whether this purchased political support was crucial for the regime's consolidation and survival.

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16 Robert Howse, "The Concept of Odious Debt in International Law," *UNCTAD discussion paper*, no. 185 (2007): 18.

17 Cassese, "Foreign Economic," 261.

18 Jennifer Gandhi, *Political Institutions Under Dictatorship* (New York: Cambridge University Press, 2008), 73.

19 Juan Pablo Bohoslavsky and Abel Escribà-Folch, "Rational Choice and Financial Complicity with Human Rights Abuses: Policy and Legal Implications," in *Making Sovereign Financing & Human Rights Work,* eds. Juan Pablo Bohoslavsky and Jernej Cernic (Oxford: Hart Publishing, 2013, forthcoming).

Benefiting the Elite and Buying Loyalties

This section will examine whether and how the performance of the Brazilian economy helped the military regime to remain in power, and therefore, facilitated the human rights abuses committed by the state during the dictatorship. As explained above, in order to remain in power authoritarian governments will try to buy loyalties and/or repress the population. The Brazilian military government tried to find a balance between these two strategies.

Juscelino Kubitschek de Oliveira became President of Brazil in 1956, and until 1961, his government's development policies focused largely on major infrastructure projects which all counted on the financial support from the United States (US) and the International Monetary Fund (IMF).[20] Between 1961 and 1964, the economic situation worsened. Briefly with President Janio Quadros and President Joao Goulart, annual inflation dramatically rose while the GDP growth rate decreased.

The poor performance of the economy and lack of unity in leftist parties led to the government's loss of its social support. Pressure on the President from the Brazilian elite, the military sector, and the alleged involvement of the US government[21] ended with a military coup in 1964 with a remarkable anticommunist philosophy.[22] As described below, many atrocities were committed after the military takeover.

In attempting to address Brazil's economic woes, after initially trying a *gradualist approach* for a few months, the new military government applied shock treatment measures.[23] The new military government aimed to control inflation, implement repressive wage policies, eliminate price distortion, give incentives to direct investment, and attract foreign capital.[24] It was only in 1966 that inflation went down and GDP grew by 6.7 %.[25]

During the period 1968–1974, Brazil experienced an economic boom: The so-called *economic miracle*.[26] From 1967, Brazil's Strategic Plan of Development aimed at expanding primary exports, maintaining affordable food prices, and

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[20] Michael Wallerstein, "The Collapse of Democracy in Brazil: Its Economic Determinants," *Latin American Research Review* 15, no. 3 (1980): 3–40.

[21] See Wolfgang Heinz and Hugo Fruhling, *Determinants of Gross Human Rights Violations by State and State-Sponsored Actors in Brazil, Uruguay, Chile, and Argentina (1960–1990)* (The Hague: Kluwer Law International, 1999), 29.

[22] Matias Spektor, *Kissinger e O Brasil* (Rio de Janeiro: Jorge Zahar, 2009).

[23] Skidmore, *The Politics of Military*, 30.

[24] Carolina Siqueira Conte, *The Interaction of Economics and Politics in Brazil During the Military Dictatorship* (Ohio University: Master thesis, 2001), 22.

[25] In 1964 it had only been 3.4 %.

[26] GDP growth went from 3.7 % (1962–1967) to 11.3 % (1968–1974), with the industrial sector playing a leading role during those years, Werner Baer, Richard Newfarmer, and Thomas Trebat, "On State Capitalism in Brazil: Some New Issues and Questions," *Inter-American Economic Affairs* 30 (1976): 75–77.

reducing the emigration of the rural population. A surge in exports resulted from the government's aggressive policy of tax and credit incentives to favor exports[27] and the economy continued to grow.[28] Interestingly, by 1969, the dictatorship showed its highest level of repression.[29]

This *economic miracle* helped the military government to create a sense of patriotic euphoria connected to the idea of growth and the destiny of Brazil, allowing the regime to gain support and some legitimacy from key stakeholders in the country's economic and political life. Particularly during the government of Medici (1969–1974), a period known for great economic performance and stability,[30] the Brazilian bourgeoisie[31] and middle-class seemed to have benefited from,[32] accepted, and legitimized the authoritarian regime.[33] Here, it is evident how the above-explained *authoritarian bargain* worked: Accepting diminished political freedoms in exchange for public goods.

The *economic miracle* also had another face: Growth never extended to the lower classes of the population.[34] Indeed, income concentration increased and quality of life remained unchanged for the great majority of Brazilians. Education and health were neither a real political nor economic priority for the military government: No significant part of the total government expenditure was focused on these needs. While the poorest 20 % of Brazil's population controlled 3.8 % of the country's national income in 1960, by 1970 that figure was 3.2 %, and by the end of the 1970s was only 2.8 % of the national income.[35] By 1969, Brazil had the highest degree of inequality in Latin America. While enterprises and banks reaped exceptionally high profits, this coincided with exploitation of those at lower salaried levels.[36] This marginalizing system needed to keep the masses repressed in order to accomplish its distributional goals. The costs of the Brazil's development strategy program were in particular borne by the poor that were not well organized politically[37] and whose collective power was otherwise diminished due to repression.

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[27] Skidmore, *The Politics of Military,* 140.

[28] Heinz and Fruhling, *Determinants of Gross Human Rights Violations*, 53.

[29] James Green, "Restless youth: The 1968 Brazilian Student Movement as Seen from Washington," in *1968–40 anos depois*, eds. Carlos Fico and Maria Paula Araújo (Rio de Janeiro: 7 Letras, 2011), 31–61.

[30] Skidmore, Thomas, *The Politics of Military,* 109.

[31] Bresser Pereira, Luiz, "Six Interpretations of the Brazilian Social Formation," *Latin American Perspectives* 11, no. 40 (1984): 61.

[32] Salaries among top professionals, technocrats, and managers dramatically increased. Skidmore, *The Politics of Military,* 107.

[33] Celso Lafer, *O Sistema Político Brasileiro* (São Paulo: Perspectiva, 1978), 65–66.

[34] Siqueira Conte, *The Interaction of Economics,* 9, 56.

[35] World Bank, *World Tables* (Baltimore: Johns Hopkins University Press, 1980), 48, 423, 426; *See also* Albert Fishlow, "Brazil's Economic Miracle," *The World Today*, no. 29 (1973): 474.

[36] Marco Aguiar et al., "Economic Dictatorship versus Democracy in Brazil," *Latin American Perspectives* 11, no. 1 (1984): 16.

[37] Alfred Stepan, *Authoritarian Brazil: Origins, Policies, and Future* (Hew Haven: Yale University Press, 1973), 70.

In a country that imported 80 % of its oil, the first oil crisis in 1973–1974 and the dramatic increase in petroleum prices dealt a serious fiscal blow to the regime. The current account surplus that in 1973 was US$ 1.7 billion turned in 1974 to a deficit of US$ 7.1 billion.[38] Inflation resurfaced and the country's external debt dramatically increased.

The military government believed that encouraging international lenders to finance the current account deficit and postpone external adjustment was the right policy.[39] However, the moderate growth of those years was not enough to pay the higher bills coming from the price of oil and the increasing debt. Indeed, while external debt was US$ 12.6 billion in 1973, in 1978 it reached US$ 43.5 billion.[40] Currency devaluation, elimination of export subsidies and tax incentives, increases in the prices of public services, import protection, and measures to encourage external lending to Brazil were implemented from 1979. As a result of declining trade, triple-digit inflation, stagnating GDP rates, and the increasing and more expensive foreign debt, between 1981 and 1983 Brazil had its worst recession ever. Financial markets essentially shut down for Latin American countries.

It was in this context that the Brazilian military started implementing its "exit strategy,"[41] accepting demands for amnesty for political prisoners in 1979,[42] but making the amnesty *bilateral* to also include members of the military. By the time the economic crises accelerated and legitimacy decreased, the military was already politically organizing its way out, which granted this sector a level of control over the transition that had not existed in other countries of the region.[43]

In 1982, Brazil and the IMF agreed and implemented an austerity program stipulating a reduction in the public deficit, a rise in the real exchange rate, reduced domestic demand, and increased tax rates.[44] In return, the IMF and commercial banks would renew their credit lines to Brazil.[45] All of these factors, particularly the impact of the real exchange rate, raised the Brazilian external debt by 30 %.[46]

The economic policies implemented by the military governments gave strict priority to the maintenance of authoritarian power rather than to long-term

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[38] Werner Baer et al., "On State Capitalism," 89.

[39] Criticizing the economic foundations of this reasoning, *see* Bresser-Pereira, "Structuralist Macroeconomics," 347–366.

[40] Baer et al., "On State Capitalism," 92.

[41] For more details on this exit strategy, *see* Paulo Abrão, "Fazer justiça no Brasil: A terceira fase da luta pela anistia," in *Os Direitos da Transição e a Democracia no Brasil,* eds. Paulo Abrão and Tarso Genro (Belo Horizonte: Fórum, 2012), 112–113, 118.

[42] Skidmore, *The Politics of Military,* 215.

[43] Samuel Huntington, *The Third Wave: Democratization in The Late Twentieth Century* (Normam: Oklahoma University Press, 1991), 124–126.

[44] Siqueira Conte, *The Interaction of Economics,* 47.

[45] Eul-Soo Pang and Laura Jarnagin, "Brazilian Democracy and the Foreign Debt," *Current History* (February 1984): 63.

[46] Ibid.

economic stability and growth.[47] This is reflected in strategies centered on construction projects and domestic goods unattainable by the large part of the population. For those who benefited from these policies, an authoritarian government was generally understood as the only effective way to bring development to Brazil.[48] However, as considered in the next section, the *economic boom*, a short-lived development with notable internal political and distributive consequences, was largely built upon foreign loans that increased not only the country's debt stock but also the deficit to an absurd point. The same loans also helped to finance, indirectly, a number of human rights violations.

Financial Assistance: Supporting the Regime

As authoritarian regimes are politically vulnerable because of their almost insurmountable problems of legitimation,[49] one way to cope with this political deficit is by justifying the regime in terms of economic success and being skillful at buying key loyalties through economic instruments. Here, sovereign financial resources can be politically meaningful. This is what happened in Brazil during the dictatorship.[50]

During the first months of the regime, foreign lenders were rather cautious and did not grant financial assistance to Brazil until the US announced a program loan in June 1964, soon followed by the World Bank, the IMF, and the Inter-American Development Bank. An estimated 80 % of the net inflow of long-term capital to the country between 1964 and 1967 was provided by USAID.[51] The renegotiation of the debt and this external financial assistance helped Brazil strengthen its balance of payments, thus giving policymakers more room for maneuver.[52]

The current account balance turned negative in 1967 and remained so. Brazil was able to finance its current account deficit through foreign loans.[53] This capital inflow also helped to finance the trade deficit as not only exports but also the imports needed to maintain rapid growth.

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47 Siqueira Conte, *The Interaction of Economics,* 50.

48 Ibid.

49 Juan Linz, "Totalitarian and Authoritarian Regimes," in *Handbook of Political Science,* vol. 3: *Macropolitical Theory*, eds. Fred Greenstein and Nelson Polsby (Reading, MA: Addison-Wesley, 1975), 175.

50 *See generally* Juan Linz, "The Future of and Authoritarian Situation or the Institutionalization of an Authoritarian Regime: The Case of Brazil," in *Authoritarian Brazil*, ed. Alfred Stepan (New Haven: Yale University Press, 1973), 233.

51 Skidmore, *The Politics of Military,* 36, 39, and 55. On the implications of the Cold War and the external debt contracted by the Brazilian regime, *see* Robert Bejesky, "Currency Cooperation and Sovereign Financial Obligations," *Florida Journal of International Law* 24, no. 1 (2012), 134–135.

52 Skidmore, *The Politics of Military,* 92.

53 Ibid, 36, 39, 55, and 141.

From 1968, while multilateral and bilateral lending gradually decreased, Brazil turned to foreign banks for credit to finance a myriad of public works and economic development projects.[54] The yearly rate of increase in long- and medium-term loans tripled between 1965 and 1969. Brazil was the fourth largest recipient of external resources between 1964 and 1967.[55] From 1965 to 1975, external debt rose more than 400 %.[56] Corrupt public officials in the government benefiting from these loans facilitated and accelerated this financial process.[57]

In 1969, external debt began to grow more rapidly. Foreign debt began to rise heavily from 1969 to 1973 at an average yearly rate of 25.1 %. From 1968 to 1973, over two-thirds of the increase in foreign debt was due to the growth of foreign exchange reserves ultimately linked to the need to cover the current account deficit.[58] The macroeconomic impact of this indebtedness can be seen in the evolution of the ratio GDP/external debt during those years.[59] The reasoning was that an expanding debt would be paid with greater exports from a more modern industrial sector in apparent perpetual growth.[60]

In the end, a foreign debt-led-growth approach worked in the short-term political arena (to buy loyalties and maintain a repressive apparatus) but failed as a long-term national strategy for economic development. What happened in reality was that the overwhelming majority of the borrowing went, directly or indirectly, to boost production of basic industrial products, fostering the growth rate. In order to pay for Brazil's ever mounting debt service, the industrial facilities were forced to export a considerable portion of their output. During the dictatorship, the country never generated sufficient internal revenue to pay for such undertakings.[61] The *economic miracle* germinated in a spending deficit and was fertilized heavily with borrowed funds from abroad.

Virtually, every major portion of the Brazilian economy came to rely on foreign finance, with state-owned industrial corporations and banks the biggest borrowers, followed by private banks, large local industrial firms, and affiliates of multinational corporations.[62] Underlying the economic system was foreign finance.

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[54] José Carvalho Pereira, *Financiamento Externo e Crescimento Econômico no Brasil: 1966/73* (Rio de Janeiro: IPEA/INPES, 1974), 96.

[55] Guilherme Binato Pedras, "History of Public Debt in Brazil: 1964 to The Present," in *Public Debt: The Brazilian Experience*, eds. Anderson Caputo Silva *et al*. (Brasília: National Treasury, 2010), 64.

[56] Ibid, 64.

[57] James Henry, *The Blood Bankers: Tales from the Global Underground Economy* (New York: Four Walls Eight Windows, 2003), 127–177.

[58] Baer et al, "On State Capitalism," 93.

[59] 1964: 15.75; 1965: 17.02; 1969: 12.47; 1972: 19.63; 1974: 18.25; 1976: 21; 1979: 25.10; 1982: 31.67; 1984: 54.09. Caputo Silva *et al*, *Public Debt*, 413.

[60] Aguiar et al., "Economic Dictatorship," 18.

[61] Pang and Jarnagin, "Brazilian Democracy," 64.

[62] Jeffry Frieden, "The Brazilian Borrowing Experience: From Miracle to Debacle and Back," *Latin American Research Review* 22, no. 1 (1987): 95–96, 100.

Brazil's augmented foreign debt arose from two sources: Skyrocketing public expenditure and petroleum imports after 1973. After a decade of such practice and the arrival of the world recession in the early 1980s, the accumulated debt was seen as a reckless liability.[63]

Even after the dramatic oil price shocks, the government kept on borrowing as its main priority was ensuring decent growth rates through increasing imports. It could have drawn down the exchange reserves or borrowed abroad; it did both.[64] Reducing the growth rate of the economy would have meant, in the eyes of the government (from 1978), a major political failure with unforeseeable consequences. The external (both public and private) financial aid was functional in supporting the regime. These funds helped the government to implement economic policies aimed at legitimizing a regime highly dependent on loans, thereby strengthening it politically. In the end, "[d]ebt-financed industrial growth helped to cement an alliance of the country's economic elites and ensure the passive support of large portions of the middle and working classes pulled upward by the industrialization drive."[65]

By 1981, foreign financing dried up.[66] Massive parastatal orders and easy funds were not available anymore: The miracle was over. In order to repay the foreign debt, the regime cut public spending, tightened monetary policies, raised interest rates, and devaluated the national currency. These measures were disastrous for the industrial sector and the economy sank into deep recession.[67] The coalition of economic interests that had supported the government from 1964 gradually defected to the opposition.[68] By 1984, the discontent with the regime was almost universal,[69] which accelerated political liberalization.

Some connections are clearer now. The limited legitimacy of the 1964 dictatorship was deeply connected with ensuring the *status quo* desired by economic elites, and promoting concentrated (selective) economic growth.[70] At the same time, the regime also needed funds for welfare and clientelistic policies that promoted some legitimation among the poor.[71] Economic growth and these clientelistic policies so effective in buying loyalties were deeply linked to the growth of sovereign debt. As discussed in the next section, however, the only

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63 Pang and Jarnagin, "Brazilian Democracy," 64.

64 Skidmore, *The Politics of Military,* 180.

65 Frieden, "Classes, Sectors," 97.

66 Ibid., 116.

67 Skidmore, *The Politics of Military,* 237.

68 *See generally* Luiz Carlos Bresser-Pereira, *O Colapso de uma Aliança de Classes* (São Paulo: Brasiliense, 1978), 125.

69 Frieden, "Classes, Sectors," 116.

70 James Petras, "Political Economy of State Terror: Chile, El Salvador, and Brazil," *Crime and Social Justice*, no. 27–28 (1987): 104.

71 Tony Addison, "The Political Economy of the Transition from Authoritarianism," in *Transitional Justice and Development*, eds. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009), 118.

way the military regime could ultimately stay in office was by strongly repressing dissidents, which led to a full range of human rights violations. Debt undertaken to pursue the regime's economic strategies was also related to the financing of a broad and complex repressive bureaucracy.

Repression: Organization and Resources Needed

While some loyalty could be bought, the dictatorship also needed means to repress dissidents and social actors that resisted.[72] Violence became important to regime survival in part because of the restructuring of the economy and society to foster capital accumulation *from above and from the outside*.[73] The new model of capital accumulation would re-concentrate income at the top and dismantle regulatory and social welfare machinery.[74] As previously suggested, an externally oriented economic model of capital-intensive industrialization that fails to fulfill the basic requirements of large portions of the population is most likely to succeed where the demands of the majority can be kept in check.[75] In this context, the major focus of state terror was the penetration of civil society, trade unions, and universities, and the demobilization of active urban movements.

Human Rights Abuses

Showing the volume, seriousness, effectiveness, and systematic nature of the human rights abuses perpetrated under the military regime is key to understanding the relevance of sovereign financing in not only maintaining the political project of the regime but also its criminal bureaucratic structures. Most of the violations committed in Brazil were not made public at the domestic level during the period of the military regime due to the absence of a free press. Before the creation of state mechanisms to address past political violence, official estimates suggested that around 10,000 people were directly affected by state violence.[76] However, as

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[72] Ivan Akselrud Seixas and Maurice Politi, "A resistência armada na luta contra a opressão," in *A Luta pela Anistia*, ed. Haike Silva (São Paulo: UNESP/Imprensa Oficial, 2009) 31–49.

[73] Petras, "Political Economy of State Terror," 103; Youssef Cohen, "Democracy from Above: The Political Origins of Military Dictatorship in Brazil," *World Politics* 40, no. 1 (1987): 30.

[74] Petras, "Political Economy," 104.

[75] Nicole Ball, "Military Expenditure, Economic Growth and Socio-Economic Development in the Third World," *Ibero-Americana—Nordic Journal of Latin American Studies 8*, no. 1–2 (1983): 19.

[76] *See* "exposição de motivos," Law no. 10.559 (Brasília, November 13, 2002).

will be shown below, more than 36,000 victims of political arrest, physical violence, or exile have been recognized to date. While official data show that around 400 people were killed, surveys carried out to support the work of the recently established truth commission suggest that more than 3,000 indigenous people and farmers may have been killed by the state but not included in the official data yet.[77] Every new investigation conducted through the years has revealed new forms of repression and state violence that were previously ignored, showing the massive (and many times hidden) profile of the military regime's repressive apparatus.

The truth has been gradually emerging. Brazil has no official systematic data on the violations of human rights committed during the dictatorship.[78] The NTC was created for this purpose in November 2011 and officially started its activities in May 2012. Yet, the work of three organizations has enabled the verification of some preliminary data. The unofficial report *Brazil: Never Again*, produced by the Archdiocese of São Paulo and published in 1985,[79] is a monumental collection on the period. Additionally, two specialized official commissions for investigation and reparation were created by the Brazilian government and produced important human rights documentation. Together, the documentation produced by these sources paints a grim portrait of the scope and seriousness of human rights abuses under the dictatorship.

The Special Commission on Political Killings and Disappearances (CEMDP) was established in 1995 with the objective of identifying those killed by the regime, as well as those disappeared for political reasons. It was also tasked with locating the remains of the persecuted. The law establishing this commission acknowledged 136 people dead or missing while instructing the CEMDP to carry out further investigations. After 12 years of work, in 2007, the CEMDP finalized its investigations[80] identifying 221 further cases, bringing the number of recognized deaths and disappearances up to 357.[81] A second commission with a slightly different task, the Amnesty Commission, was established in 2001. Today, its goal

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[77] *See* "1,2 mil camponeses mortos e desaparecidos entre 1961 e 1988," *Agência Brasil*, September 27, 2012, http://agenciabrasil.ebc.com.br/noticia/2012-09-27/sdh-identifica-cerca-de-12-mil-camponeses-mortos-e-desaparecidos-entre-1961-e-1988 (accessed November 18, 2012); *see also O Genocídio do Povo Waimiri Atroari: Primeiro relatório do Comitê Estadual da Verdade* (Manaus: Comitê Estadual da Verdade-Amazonas, 2012).

[78] For a broader historical, international, and constitutional analysis of the Brazilian dictatorship, *see* Juan Pablo Bohoslavsky and Marcelo Torelly, "Cumplicidade Financeira na Ditadura Brasileira: Implicações atuais," *Revista Anistia Política e Justiça de Transição* 6 (July–Dec. 2011).

[79] *See Brasil: Nunca Mais* (Petrópolis: Vozes, 37 ed., 2009).

[80] Brasil, *Direito à Memória e à Verdade* (Brasília: Secretaria de Direitos Humanos, 2007), www.sdh.gov.br.

[81] Brazil, *Direito à Memória e à Verdade*, 48.

is still the broad recognition of various forms of political persecution and injury to individual rights, and morally and economically redressing such violations.

The CEMDP's report categorizes disappearances by year or episode. From its analysis, it becomes clear that the period of greatest violence was, in fact, the 10 years of the Institutional Act no. 5 (AI-5, in the Portuguese acronym), the December 1968 regime act that suspended civil rights and political freedoms. In the 5 years between the beginning of the dictatorship and the promulgation of the AI-5, 39 people were victims of killing or forced disappearance. Approximately 90 % of the cases recognized by the Commission (320 people) were concentrated during the period of enforcement of the act (1968–1979). The report also presents a wide range of cases where, despite the existence of uncontested political persecution, there was not sufficient evidence to characterize the death or disappearance as a state responsibility.

The work of the Amnesty Commission is ongoing, and there are as yet no systematic and consolidated records with details of the violations it has identified. The 2010 report of the Commission nevertheless notes that the agency has received 68,219 applications for the recognition of violations, having considered 59,163 applications up to December 2010 and identified violations in 38,035 cases.[82] Unfortunately, such data cannot be further broken down by year to determine the concentration of violations for certain periods of time, but the empirical data on the age of the applicants, together with the conclusions of preliminary studies already carried out,[83] confirm that the vast majority of violations were concentrated in two periods of time: The AI-5 enactment years that coincide with the economic miracle and the general strikes of the 1980s, when several unions leaders were persecuted.

The integration of the CEMDP data together with that of the Amnesty Commission begins to provide a sense of the large scale of human rights violations perpetrated during the Brazilian dictatorship. While the initially poor data on the dead and missing could lead to a superficial reading that the Brazilian dictatorship had been milder than those of neighboring countries, data originating from the Amnesty Commission lead us to a different conclusion. To wit, the Brazilian dictatorship just used other methods that, even if not necessarily having the severity associated with killings and disappearances, are nonetheless highly detrimental to human rights, namely the systematic and widespread practice of torture. Recent studies carried out by the Ministry of Human Rights also show that a number of massacres against countryside peasants and indigenous populations may dramatically increase the total amount of deaths.[84]

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[82] Brazil, *Relatório Anual da Comissão de Anistia* (Brasília: Ministry of Justice, 2010), 118–119.

[83] Paulo Abrão and Marcelo Torelly, "The Reparations Program as the Lynchpin of Transitional Justice in Brazil," in *Transitional Justice—Handbook for Latin America*, ed. Felix Reátegui (Brasilia/New York: Ministry of Justice/ICTJ, 2011), 443–485.

[84] *See* "1,2 mil camponeses mortos e desaparecidos entre 1961 e 1988."

Military Expenditure: More Resources to Repress

As discussed, financial assistance helped the military government to remain in power by buying loyalties from the banking, industrial, and some middle-class sectors. It is now time to explore whether these same funds also contributed to reinforcing the state's repressive apparatus.

Military expenditures are determined by external (e.g., regional conflicts, arms races, super power alliances, and the like)[85] and internal factors,[86] such as the need to repress the population. Under a dictatorship, military rulers are often dominant in terms of their capacity to make decisions about allocating resources. If deemed necessary, the military sector can force social expenditures to be reduced in order to free up resources for defense and security. This phenomenon could be observed during the Brazilian dictatorship.[87] The functions served by military expenditure will typically evolve according to the role of the military sector in society.[88] Thus, a country in which the military sector focuses very much on domestic stability instead of defense against external attacks will spend more resources in line with this function. This was observed in the evolution of the military expenditure during the dictatorships in Argentina,[89] Chile,[90] and Uruguay.[91] In Brazil after 1964, this resulted in the reconfiguration of the fundamental functions of the military sector to focus more on internal security (internal war) than defense against potential external aggressors.[92]

Using data from the Stockholm International Peace Research Institute (SIPRI), a clear trend of increasing military expenditure right after the coup is seen. In 1963, the military expenditure of Brazil represented 1.6 % of the GDP, and 1.7 % in 1964. Interestingly, in 1965, this ratio dramatically rose to 2.5 % reaching its highest point in 1967 at 2.9 %. This trend in increasing spending lasted until 1973, consistently

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[85] Alfred Maizels and Machiko Nissanke, "The Causes of Military Expenditure in Developing Countries," in *Defense, Security and Development*, eds. Saadat Denger and Robert West (London: Frances Pinter, 1987), 129–130.

[86] Robert Looney, "Defense Budgetary Processes in The Third World: Does Regime Type Make a Difference?," *Arms Control* 9, no. 2 (1988): 187, 198.

[87] Wendy Hunter, *Eroding Military Influence in Brazil: Politicians Against Soldiers* (Chapel Hill: The University of North Carolina Press, 1997), 95.

[88] Samuel Soares and Suzeley Mathias, "Forças armadas, orçamento e autonomia militar," *Perspectiva* 24–25 (2001–2002): 85, 94.

[89] Thomaz Scheetz, "Gastos militares en Chile, Perú y la Argentina," *Desarrollo Económico* (October–December 1985): 319.

[90] Jorge Marshall, "El Gasto Público en Chile 1969-1979," *Colección Estudios CIEPLAN* 5, Estudio N°51 (1981).

[91] SIPRI, "World Armaments and Disarmament," SIPRI Yearbook (1983), 174; US Arms Control and Disarmament Agency, "World Military Expenditures and Arms Trade," 1969-78 (p. 155), 1972-82 (p. 91), 1985 (p. 127), 1987 (p. 123) and 1988 (p. 107).

[92] Skidmore, *The Politics of Military*, 4.

exceeding 2 %. From 1974 to 1985, this ratio was around 1 %.[93] Other sources affirm the dramatic increase right after the coup with this trend lasting several years.[94]

Looking at the national budget, the three military ministries (excluding the Estado-Maior das Forças Armadas) received 16.29 % of the overall national budget in 1964, reaching 23.41 % in 1965. In the years that followed, this budgetary line remained around 20 %, reaching 38.94 % in 1971.[95] As the Federal Police was actively involved in the repression,[96] and this organ was functionally under the direction of the ministry of Justice, it is worth mentioning that the budget of this ministry jumped from 1.31 % in 1964, to 3.44 % in 1965 and 2.39 % in 1966, and then decreased irregularly throughout the subsequent years.[97] These figures do not include the state budgets corresponding to the provincial police agencies also involved in serious human rights violations during the period.[98] The armed forces per capita ratio shows a moderate increase during the 15 years of the dictatorship. While there were 3.91 military per 1,000 people in 1963, there were 4.08 in 1973 and 4 in 1977. In 1983, this ratio dropped to 3.5.[99] Imports of light weapons—key for domestic repression—also increased during this same period.[100]

It is worth noting that this expansive budgetary policy of the military sector was made possible in a context of public account and commercial deficits. This financial gap was (temporarily) filled by the provision of foreign currency operationalized through massive loans. All of these figures help to illustrate the connection between the repressive apparatus, its financial support, and human rights abuses. The national security doctrine was intended to support, through an internal war frame, the attainment of the national project of the military regime. To this end, the police and

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93 SIPRI, "World Armaments and Disarmament," several years.

94 Carlos Wellington Leite de Almeida, "Transparência do orçamento de defesa. O caso brasileiro," *Papeles de investigación, RESDAL* (August 2005): 26, http://www.resdal.org/presupuestos/caso-brasil.pdf (accessed November 18, 2012). Statistics from the US Arms Control and Disarmament Agency also confirm the dramatic growth of Brazilian military expenditure right after the coup, remaining high until 1973–1974 when they began decreasing again. SIPRI, "World Military Expenditures and Arms Transfers," several years. Statistical data on military expenditure are not usually complete and this helps to explain why the statistical data from the Tribunal de Contas da União of Brazil are somehow different from those of SIPRI.

95 Instituto Brasileiro de Geografia e Estatística, "Anuário estatístico do Brasil: 1963-1990," (IBGE: Rio de Janeiro, 1992).

96 Carlos Fico, *Como eles agiam: Os subterrâneos da Ditadura Militar* (Rio de Janeiro: Record, 2001), 200.

97 IBGE, "Anuário estatístico."

98 For example, in São Paulo the "Departamento de Ordem Política e Social" (DEOPS) was in charge of coordinating the repression. See Maria Aparecida Aquino, *O DEOPS/SP em busca do crime político* (São Paulo: Imprensa Oficial, 2002).

99 US Arms Control and Disarmament Agency, *World Military Expenditures and Arms Transfers*, (1963-1983) (Washington, D.C.), 23; and (1985), 55.

100 Fernando Cordero, "Comercio Exterior e Industria de Armas Livianas en Argentina, Brasil, Colombia, Costa Rica, Chile, República Dominicana, Perú, México y Venezuela. 1970-1980," *Ibero-Americana - Nordic Journal of Latin American Studies* 7, no. 1–2 (1983): 170.

repressive structures were created, re-structured, and expanded, not only establishing a wide network of information and repression but also a network of actors and agencies that operated outside the legal system's own rules (resulting in, among other things, the torture and forced disappearance of political prisoners).[101] Yet even as the repression took place, the regime's economic polices helped to garner civil support, as many of the reforms in progress were of economic interest to the elites.[102]

Financial Complicity and Transitional Justice Mechanisms in Brazil

Transitional justice developments in Brazil have mostly focused on abstract forms of accountability in which the state as a whole (rather than individuals) has assumed responsibility for the repression carried out by state officials. Consequently, the state has assumed the responsibility of providing reparations through a program of moral and economic redress to the victims, without looking for specific kinds of individual or corporate accountability.[103] Economic factors fostering or contributing to human rights abuses have not been addressed in this context, even with reasonable public knowledge about the different kinds of economic cooperation given to the regime.[104] This section aims to analyze how, in this context, financial accomplices may be held accountable as part of the Brazilian transitional justice process, with special emphasis on the possibilities created by the new NTC, together with the challenges ahead.

Challenging the Abstract and Blood-Centered Accountability Model

As a part of its exit strategy,[105] the military regime tried to suggest an equivalency between state crimes and the crimes from the resistance, resulting in a de facto impunity that diminished chances for reparation, truth, memory, and justice. Nonetheless, between 1988 and the establishment of the NTC in 2012, several factors have served to challenge this strategy.

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[101] Tarso Genro, *Teoria da Democracia e Justiça de Transição* (Belo Horizonte: Ed. UFMG, 2009), 17.

[102] Skidmore, *The Politics of Military,* 56–58.

[103] For a broader overview on Brazilian Transitional Justice measures, *see* Abrão and Torelly, "Resistance to chance," 152–180.

[104] A considerable amount of information on those violations and the economic complicity dimension was collected during the "II Russell Tribunal." *See* Robyn Smith, "In the News," *Transitional Justice in Brazil* (November 12, 2012), http://transitionaljusticeinbrazil.com/2012/11/12/in-the-news-33/ (accessed November 18, 2012).

[105] Abrão, "Fazer justiça no Brasil," 112.

The commissions in charge of promoting reparation policies (the CEMDP and the Amnesty Commission) did not have the power identify the responsible parties for the violations they examined. However, they were able to break with the "state of denial"[106] that several sectors of the society had been living in and promote historical accountability for the violations by officially acknowledging the crimes that the military regime used to deny. This led to what has been described as an "abstract model"[107] of accountability where the state has officially recognized the crimes identified through the work of the reparatory commissions, assuming both moral economic consequences, while avoiding investigation or prosecution of the individual criminals and their accomplices.

The main challenge of the Brazilian transitional justice movement is to overturn the model of abstract accountability, making both individuals and institutions accountable for their participation in past human rights violations. This could be done in at least three (complementary) ways: Historical accountability, civil responsibility, and criminal justice. Our findings suggest the need to add the economic dimensions of the abuses in question to this general struggle. Bringing the economic accomplices that made many of the violations possible into the orbit of Brazilian transitional justice would provide for a more complete and holistic sense of justice. In order to analyze the challenges and opportunities that this proposal poses we will focus on four main areas from transitional justice (justice, truth and memory, institutional reforms, and reparations),[108] emphasizing both what has been done and what could be done in terms of responsibility for financial complicity.

Justice Measures

Even considering international rulings against the country, such as the judgment of *Julia Gomes Lund and other vs. Brazil* by the Inter-American Court on Human Rights,[109] no one has yet been charged for grave human rights violations committed under Brazil's dictatorship.[110] In 2011, federal prosecutors from the Public

[106] Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (London: Polity, 2001).

[107] Marcelo D. Torelly, *Estado Constitucional de Direito e Justiça de Transição* (Belo Horizonte: Fórum, 2012), 354–360.

[108] These categories are drawn purely for didactic reasons. Given that transitional justice measures tend to fulfill more than one transitional justice goal, it is important to not the porous and open-ended nature of these categories.

[109] Inter-American Court on Human Rights, *Julia Gomes Lund and other vs. Brazil*, November 24, 2010.

[110] In 2008, Carlos Brilhante Ustra was found guilty for torturing three members of the family Teles. However, this decision did not have economic or criminal legal consequences; it was a "cível declaratória." See information available at http://www.cartamaior.com.br/templates/materiaMostrar.cfm?materia_id=20717.

Ministry decided to file criminal cases against perpetrators by circumventing the Amnesty law and creating a special working group for that task.[111] They rely on an argument that considers some kinds of crimes (such as forced disappearance, kidnapping, and hiding a body) as permanent until the discovery of the body, resulting in the exclusion of such crimes under the 1979 Amnesty law.[112] It is difficult to say whether those efforts will be successful.[113] In terms of civil suits, some relatives of the dead and disappeared have filed claims asking the justice system to declare that several military officers were involved in torture, but only with moral and financial implications, not criminal.[114] To date, none of those claims have reached a final verdict.

Innovative perspectives of accountability for financial complicity can contribute to overcoming the obstacles that ordinary criminal claims are facing, especially with the rapidly increasing number of claims submitted by the Public Ministry. Some ideas on how to move forward in this regard have already been articulated inside the Public Ministry itself,[115] and the work of the NTC can supply important factual evidence not only about actions of individuals but also the involvement of corporate or institutional accomplices.

Civil claims against financial accomplices in order seek financial reparation are one possible avenue.[116] If seeking economic accountability through the courts is not possible, or is simply not desirable from a *realpolitik* (financial) perspective,[117] a claim whose objective is exclusively to know the details (truth)[118] on how the loans helped the regime could still be a possibility. In criminal trials against the very perpetrators of the crimes, it is also possible to incorporate investigations into the details related to the financial environment that made those crimes possible, as attempted by the prosecutors in the Military Tribunal of Nuremberg.[119]

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111 See: http://pfdc.pgr.mpf.gov.br/institucional/grupos-de-trabalho/direito-a-memoria-e-a-verdade/apresentacao (accessed November 18, 2012).

112 Brazil, Federal Prosecutors Second Chamber, *Act N° 21/2011*, October 3, 2011, http://2ccr.pgr.mpf.gov.br/diversos/justica-de-transicao/documento%202.pdf.

113 The Federal Supreme Court has accepted this thesis in the context of extradition of foreign criminals. *See* Brazil Extradition Process 974/2009, rapporteur Minister Ricardo Lewandowski.

114 Marcelo Godoy, "Ação responsabiliza 7 agentes do DOI pela morte de Fiel Filho," in *O Estado de S. Paulo*, November 29, 2009.

115 Weichert, "O financiamento de atos."

116 Bohoslavsky, "Tracking Down," 71.

117 On this scenario, *see* ibid., 91–92.

118 UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/2006/91, February 8, 2006.

119 Christopher Simpson, ed., *War Crimes of the Deutsche Bank and the Dresdner Bank*, (Teaneck: Holmes & Meyer, 2002), 1–34.

Finally, possibilities for corporate criminal responsibility can be considered. Brazilian legislation explicitly allows criminal actions against corporations,[120] though in practice this is rare. Brazilian legal doctrine tends to consider that no penalty should go beyond the person that committed the crime (even if that "person" is a legal entity). Yet this should not prevent those individuals administrating the legal entities that committed or collaborated with crimes from incurring responsibility. Recent changes in criminal law related to environmental protection have started to change this scenario, as specific legislation has strengthened the constitutional provision for criminal accountability against corporations that damage the natural resources of the country.[121] Moreover, criminal law scholars are advocating the improvement of the tools already available under Brazilian legislation, such as fines, compulsory community service, loss of properties, or even the closure of the corporation itself in order to strengthen accountability for crimes perpetrated by or with the support of corporations.[122] This criminal offense could be legally broadened to incorporate the notion of corporate complicity with human rights violations.

Truth and Memory Measures

If Brazil has seen relatively little justice for crimes committed by the military regime, truth and memory initiatives have fared comparatively better even when they only focus on physical violence, without including aspects of economic violence. Beyond the recent creation of the NTC in the country,[123] several projects have been implemented by the Federal and State governments, including the creation of two museums for the memory of victims: One by the São Paulo State,[124] and a national one in Belo Horizonte.[125]

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120 Brazilian constitution articles 173, 5th paragraph and 225, 3rd paragraph.

121 Marcia Elayne Moraes. *A (in)eficiência do Direito Penal moderno para a tutela do meio ambiente na sociedade de risco (Lei nº 9.605/98)* (Rio de Janeiro: Lumen Juris, 2004).

122 Sérgio Salomão Shecaira. *A responsabilidade penal da pessoa jurídica* (Rio de Janeiro: Elsevier, 2011), 191.

123 Brazil, Law no. 12.528, November 18, 2011.

124 Marcelo Mattos Araújo and Maria Cristina Oliveira Bruno, *Memorial da Resistência de São Paulo* (São Paulo: Pinacoteca do Estado, 2009).

125 Paulo Abrão and Marcelo Torelly, "Dictatorship Victims and Memorialization in Brazil," in *Museums and Difficult Heritage* eds. Jari Harju and Elisa Sarpo (Helsinki: Helsinki City Museum, forthcoming).

Specific memory projects can be implemented to remember and reflect on the role of economic actors in repression.[126] Public spaces such as the Labor Museum could add information on how private corporations and generally the financial system supported the regime, especially those repressive policies against labor unions and leaders. The role of lenders could also be featured in memorials, much as the "External Debt Museum" of Argentina[127] currently does with its permanent exhibition. Another possible measure would be to publicly identify factories and organizations that cooperated with repression, as recently took place in Argentina.[128] This measure does not demand a central role from the government, as it can actually be promoted by civil society.

The recently installed NTC could specifically contribute to the process of truth and memory regarding financial complicity,[129] by both investigating and officially exposing features of and inter-linkages between macroeconomics, financial and political features of the country during the dictatorship period, and economic crimes.[130] The NTC could also propose changes to the educational programs of history classes in order to incorporate this financial dimension of the dictatorial period.[131]

Given that the Brazilian dictatorship had remarkable redistributive consequences, fiscal secrecy could be lifted in order to assess whether and how the indebtedness policy deliberately benefited certain social and economic groups in the country and abroad and whether all these are correlated with the political support that these same groups could have provided to the regime (buying loyalties).

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126 One example of that is the project "Cinema for Truth" implemented by the Instituto Cultura em Movimento and sponsored by the Brazilian Ministry of Justice Amnesty Commission that shows movies and promotes debates in universities, including the 2009 documentary "Cidadão Boilisen" (Citizen Boilisen) on the role of private corporations in financing Bandeirantes Operation in São Paulo State. More information on this project is available at http://agenciabrasil.ebc.com.br/noticia/2012-06-02/festival-cinema-pela-verdade-leva-discussao-sobre-ditadura-para-universidades-de-todo-pais.

127 *See* details on the museum at http://www.museodeladeuda.com/index2.php.

128 "Señalizaron la planta de Ford como ex centro de clandestino de detención," *Tiempo Argentino*, March 21, 2012.

129 Article 3 of Law 12.528 establishes that the NTC has the power to "recommend the adoption of measures and public policies to prevent further human rights violations, assure its non-repetition and effectively reconcile society." On the power of the NTC to investigate the economic dimension of the authoritarian regimen *see* Inês Virginia Prado Soares and Lucia Bastos, "A Verdade ilumina o Direito ao Desenvolvimento?: Uma análise da potencialidade dos trabalhos da Comissão Nacional da Verdade no cenário brasileiro," *Revista Anistia Política e Justiça de Transição* 6 (July–December 2011).

130 Henry, *The Blood Bankers*, 127–177. On the economic crimes in contexts of transitional justice, *see* Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes," *International Journal of Transitional Justice* 2, no. 3 (2008): 310.

131 Elizabeth Cole, "Transitional Justice and the Reform of History Education," *International Journal of Transitional Justice* 1, no. 1, (2007): 115.

Institutional Reforms Measures

Post-dictatorship institutional reforms in Brazil took place in the governance field, such as democratic improvements in the electoral system after the 1988 constitution. The most important reforms to Brazil's security institutions were the submission of the military to civilian power[132] and the approval of a law of access to information.[133] While sometimes thought of as "backward looking," the institutional reform dimension of transitional justice clearly deals with the future. Considering the growing role Brazil is playing in the international arena and especially in South America, institutional reforms relating to financial complicity would likely have implications outside of Brazil's national borders. For example, considering the role of the National Bank of Economic and Social Development (BNDES) in financing investments in the entire region, specific regulations could be approved to prevent this bank from supporting any kind of project that is potentially harmful to human rights. Regulation—ideally at the constitutional level—is also needed at once to prevent the Brazilian government and agencies from borrowing from or lending money to perpetrators of human rights abuses. Brazil's key role in the context of the international community brings with it responsibilities, and there are indications that in the next few years Brazil will work to reform the international financial system.[134] This being the case, it would be desirable that these proposed reforms help to better protect human rights in several different ways.

The NTC has the power to recommend changes in the institutional design of financial institutions, both in terms of regulatory measures to be enforced over private actors and new standards and policies for state banks and enterprises. In light of the general progression of the goals of truth commissions in the past decades, and the specific mandate of the Brazilian NTC in terms of recommending structural changes, the challenge is to adopt a broader, more holistic approach that would go beyond the traditional, narrower goals of transitional justice. Moving forward will require a broad view of financial system as a whole, including the government's regulatory role, if the NTC is to make clear the patterns of complicity that allowed the perpetrators to remain in power for so long, and tailor meaningful recommendations to suit.

Another important measure that could be taken by a truth-seeking body would be to audit the sovereign debt. As discussed earlier in this chapter, during military rule sovereign debt grew dramatically. This fact led to inclusion of a provision in the Constitution Transitional Act requiring the national congress to investigate the reasons for that debt growth and to determine actions to be taken if any irregularity

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[132] By the Complementary Law no. 97, June 9, 1999.

[133] Law no. 12.527, November 18, 2011 (enforced together with the Truth Commission Law, no. 12.528).

[134] Nicholas Watt, "'Blue-eyed bankers' to blame for crash, Lula tells Brown," *The Guardian*, March 26 2009. Geoff Dyer & Joe Leahy, "Rousseff seeks US support on 'currency war'," *Financial Times*, April 9, 2011.

was found.[135] While such an investigation never actually happened, the importance of carrying it out has not diminished, and efforts to push for compliance with the law have continued. In 2004, the Brazilian Bar Association filed a claim in the Supreme Court asking it to immediately establish the investigative committee. This claim has not yet been decided.[136] In 2010, a special commission at the National Deputies Chamber published a report on the public debit emphasizing the importance of a debt audit, as required by the Constitution.[137] The NTC has the power to independently investigate questions relating to sovereign debt. At the least, considering the short time it has to produce its final report, it could do some preliminary investigation that takes into account preexisting information and recommend the continuation of its work by some other independent agency or working body.

Public discussion around the validity of debts contracted during the period in which the criminal regime was in power[138] can also contribute to attaining some of the goals of transitional justice. Emphasizing the connections between odious debts and past atrocities through their repudiation may provide moral and political redress,[139] enforcing historical accountability. It could also free up considerable resources that the state in transition might need to strengthen the new democracy[140] and promote the right to development.[141] On a more political level, elaborating on this argument could have helped to negotiate with creditors to reduce or reschedule debt,[142] as it happened in the recent Iraqi case.[143]

Finally, greater attention to questions of financial complicity in the transitional justice context would likely reinforce the importance of establishing vetting programs to bar those complicit in human rights crimes from occupying public

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135 Brazilian Constitution Transitional Act, art. 26.

136 "OAB quer auditoria da dívida externa," *Portal OAB*, October 5, 2011, http://www.oab.org.br/Noticia/22800/oab-quer-auditoria-da-divida-externa-adpf-adormece-no-stf-desde-2008 (accessed November 18, 2012).

137 See in particular para 72. The full report is available at: http://www2.camara.gov.br/atividade-legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/53a-legislatura-encerradas/cpidivi/relatorio-final-aprovado/relatorio-final-versao-autenticada.

138 Sabine Michalowski and Juan Pablo Bohoslavsky, "Ius Cogens, Transitional Justice and other Trends of the Debate on Odious Debts. A Response to the World Bank Discussion Paper on Odious Debts," *Columbia Journal of Transnational Law* 48, (2010): 95.

139 Anna Gelpern, "Sovereign Debt Restructuring: What Iraq and Argentina Might Learn From Each Other," *Chicago Journal of International Law* 6, no. 1 (2005): 407.

140 David Gray, "Devilry, Complicity, and Greed: Transitional Justice and Odious Debts," *Law & Contemporary Problems* 70 (2007): 164.

141 On the link between this right and transitional justice, *see* broadly Soares and Bastos, "A Verdade ilumina."

142 Dustin Sharp, "The Significance of Human Rights for Debt of Countries in Transition," in *Making Sovereign Financing and Human Rights Work*, eds. Juan Pablo Bohoslavsky and Jernej Cernic (Oxford: Hart Publishing, 2013), forthcoming.

143 Odette Lienau, *Rethinking Sovereign Debt: Debt and Reputation in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2013), forthcoming.

office.[144] Yet such an approach seems unlikely in the current Brazilian scenario. The NTC has the power to investigate and make public the names of perpetrators and accomplices, but not to create or enforce a vetting program.[145]

Reparatory Measures

Brazil has established one of the largest reparations programs in the world.[146] In addition to the most egregious violations (involving cases of death, disappearance, imprisonment for political reasons, and torture), many of the reparations were paid to workers that had to abandon their jobs due to political persecution in the labor arena, especially after the 1979 Amnesty law when the labor unions joined the struggle against the dictatorship.[147] Reparations are all paid with public monies as the state fully assumed responsibility for all the human rights abuses perpetrated by individuals in accordance with the model of abstract responsibility that Brazil has adopted.

In considering compensation for financial complicity in human rights violations, it is important to note that in Brazil[148]—as in Argentina, Chile, Uruguay, and many other countries[149]—legislation establishes broad responsibility for damages caused—negligently or willfully—by accomplices (and their administrators when the accomplice is a legal entity). This is actually the judicial path being followed by victims of the Argentinean dictatorship, who are suing the banks that financed their executioners.[150] Civil responsibility could attach to corporations that engaged in complicity. Besides being a justice measure itself, this form of

144 *See generally* Alexander Mayer-Rieckh and Pablo de Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007).

145 Currently there are only two ways of implementing a vetting program in Brazil: Either by individualized acts obtained through the courts after a claim from the prosecutors or civil society or throughout a legislative measure. In both cases, reliable evidence would be demanded and currently the NTC is the institution best positioned to move forward with broad investigations in order to obtain the needed information.

146 Abrão & Torelly, "The reparations program," 462.

147 Ibid., 446.

148 Art. 942, Civil Code. On the civil responsibility for complicity in the Brazilian civil code, *see* Silvio Rodrigues, *Direito Civil 4: Responsabilidade Civil* (São Paulo: Saraiva, 2002), 187.

149 Jernej Černič, *Human Rights Law and Business* (Amsterdam: Europa Law Publishing, 2010), 33, 179.

150 *Ibañez Manuel Leandro y otros casos/Diligencia Preliminar*, Juzgado Nacional de 1º Instancia en lo Civil 34, Buenos Aires, No. 95.019/2009; *Garramone, Andrés c. Citibank NA y otros*, 2010, Juzgado Nacional en lo Contencioso Administrativo Federal No. 8, Buenos Aires, No. 47736/10. The *amicus curiae* submitted in this case by the University of Essex and the Centro de Estudios Legales y Sociales (CELS) supporting the victims' arguments is available at http://www.essex.ac.uk/tjn/documents/Amicus%20Banks%20%28final-English%20version%29March24.pdf.

accountability would also serve the utilitarian purpose of getting back part of the funds spent on reparations. In this way, the state agencies in charge of transitional justice programs would have extra funds for other actions, such as promoting truth and memory. Lenders could also provide a kind of redress to the victims in the form of an apology.

In line with the "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,"[151] which explicitly contemplate the possibility of holding non-state actors liable, the reparatory commissions, the NTC, and the Brazilian justice system could also play an important role in terms of reparations: the reparatory commissions by advancing and improving the administrative reparation program; The NTC by collecting evidence for future judicial cases; and the courts by processing legal claims of victims against economic accomplices.

Reconciliation bonds, instruments specially issued by the state to be bought by the accomplices and beneficiaries of the older regime in order to contribute to fostering the country's development and financial compensations for the victims, are also a potential option.[152] Similarly, lenders could also be asked to contribute symbolically to reparation funds. However, unless these proposals are discussed and implemented during a period of massive social support for reconciliation and reparation, economic and strictly voluntary instruments would likely prove toothless, as the South African experience showed, where these same recommendations made by the TRC were blatantly ignored.[153]

The Truth Commission and Financial Complicity: Challenges and Opportunities

After analyzing the developments and opportunities presented by each of the various transitional justice modalities in Brazil, one thing remains clear: Confronting financial complicity would in some ways represent a departure from the work typically undertaken by a truth commission dealing mainly with historical accountability for more direct kinds of violations against human rights and physical integrity.

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[151] UN General Assembly, Resolution 60/147, December 16, 2005.

[152] On the experience of the *Reconciliation and Development Project (R&D Bonds)* in South Arica, *see* Daniel Bradlow, "An Experiment in Creative Financing to Promote Reconciliation and Development in South Africa," in *Africa's Finances: The Contribution of Remittances*, eds. Raj Bardouille et al. (Cambridge: Cambridge Scholars Publishing, 2008), 171.

[153] *See* Jaco Barnard-Naude, "For Justice and Reconciliation to Come: The TRC Archive, Big Business and the Demand for Material Reparations," in *Justice and Reconciliation in Post-Apartheid South Africa*, eds. François du Bois and Antje du Bois-Pedain (New York: Cambridge University Press, 2008), 176.

If the Brazilian NTC decided to address economic complicity as part of its agenda, something well within its power and discretion to do, it would face at least four challenges: (1) defining the kind of investigation required; (2) coping with the work of pressure groups that might rise up to resist such investigations; (3) working within the limited powers that truth commissions typically have to enforce accountability measures and; (4) finding integrated ways to move forward after the investigatory phase.

Most truth commissions are equipped to search through large numbers of documents and to hear victims, using these two sources as a primary means to establish a reliable version of controverted historical facts. Addressing questions of financial complicity would rely on some of these same techniques, but also would require interdisciplinary investigation of information from the state, international institutions, and private actors, such as banks and enterprises. This kind of investigation demands not only specialized personnel, but also a robust infrastructure that truth commissions do not usually have. While much of this information is already available, links need to be established to adequately connect that information with human rights violations.

Even were a truth commission to be properly equipped and staffed, this kind of investigation could be politically blocked by interest groups. A typical parliamentary negotiation for the establishment of a truth commission involves both victims and members of the former regime. Adding the interests of businessmen and international lenders to the mix could make it even harder to approve a truth commission in a democratic parliament, or to make it work after the approval. Even if such negotiations were successful and a truth commission was granted the power to address questions of financial complicity, a number of challenges in implementation could arise. In any case, a truth commission would need to design and implement a well thought out political strategy in which decisions about the scope of the measures (who is involved and how) to be applied and their timing and sequence have to be made with a sense of practical flexibility and feasibility in order to best serve the ultimate goals of transitional justice.

Most truth commissions—including the Brazilian one—have broad powers to compel the production of documents and testimony. However, in practice, these powers are circumscribed as commissions have little power outside of their own borders. Strong political will on the part of the government and an effective diplomatic strategy would be needed to enlarge a commission's reach.

Additional powers and immunities might also need to be considered. Truth commissions have as a main goal to promote historical accountability, but shedding light on the role of certain corporations and institutions could invite those affected by these investigations to claim against the commission or its commissioners. Even if merely exposing true and historical facts would not provide a reasonable basis for such a claim, it would be safer if the commission and its members were granted immunity to such claims as a matter of law.

Finally, integration with other institutions and agencies would be crucial in order to achieve actual accountability. The fact that most truth commissions do not have an appropriate structure to deal with financial complicity could be solved

by establishing partnerships with agencies in charge of monitoring the financial system or preventing financial criminality. But more importantly, before the end of the investigatory phase and the publication of the final report, a truth commission must have developed a strategy for the enforcement of its recommendations. Integration with prosecutors and parliamentary groups could be fundamental to guarantee that the truth commission's work will not be for historical purposes only, but will actually help avoid further violations in the future.

Despite these challenges, unique opportunities are created for the work of the NTC in this field. Recent investigations by the NTC and local truth commissions are shedding light on how public works made or supported by the regime led to human rights violations, including the death and disappearance of small farmers,[154] and the annihilation of indigenous people.[155] In both cases, there is a clear connection between the economic policy of the regime, private actors (lenders and businessmen) that were exploiting economic opportunities created by the regime, and human rights violations that include not only deaths and disappearances, but also corruption and destruction of natural resources.

Some of the challenges and opportunities presented by issues of financial complicity will soon come to the fore for the NTC. On October 17, 2011, the Brazilian Secretary of Justice stated that "the Truth Commission must investigate the corporations that financed the dictatorship."[156] Just a few months after this statement, the national newspaper *O Globo* reproduced another declaration from the same Secretary of Justice stating that the responsibility of private actors must be the second main goal of the NTC, after investigating deaths, disappearances, and torture.[157] A few months later, the NTC announced the creation of a task force to investigate the role of businessmen during the repression.[158] While the success of such efforts remains to be seen, what can be hoped is that in carrying out its investigations, even if in a preliminary manner, the NTC can work to open space for further developments by other agencies and specialized institutions down the line, while at the same time mobilizing civil society. In doing so, it should be able to fulfill not only its goals of historical accountability, but also to open new possibilities for civil and criminal accountability against perpetrators and their economic accomplices.

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154 See "1,2 mil camponeses mortos e desaparecidos entre 1961 e 1988."

155 See *O Genocídio do Povo Waimiri Atroari*.

156 "Paulo Abrão: Comissão da Verdade deve investigar empresas que financiaram a ditadura," *Viomundo*, October 17, 2011, http://www.viomundo.com.br/politica/paulo-abraocomissao-da-verdade-deve-investigar-empresas-que-financiaram-a-ditadura.html.

157 "Prioridade da Comissão da Verdade é localizar desaparecidos," *O Globo*, March 2, 2012, http://oglobo.globo.com/pais/prioridade-da-comissao-da-verdade-localizar-desaparecidos-4129759.

158 Monica Bergamo, "Empresários que apoiaram tortura serão investigados," *Folha de S.Paulo*, September 25, 2012, http://www1.folha.uol.com.br/fsp/poder/68206-empresarios-que-apoiaram-a-tortura-serao-investigados.shtml.

Concluding Remarks and Prospects

By examining the trade-offs between buying loyalties and repressing, this chapter has sought to understand whether sovereign financing during the Brazilian dictatorship contributed to this regime remaining in power, and therefore, to the perpetration of gross human rights abuses. For that purpose, a holistic and interdisciplinary methodology was used to examine the linkages between international and domestic politics, global and national economies, sovereign finance, and the human rights situation. From a purely macroeconomic and development perspective, the debt-fueled policies of the Brazilin military regime were unsound.[159] However, from the angle proposed in this chapter, the Brazilian regime appeared to adopt a rational (and successful) strategy in terms of balancing buying loyalties and/or repressing.

From the point of view of foreign lenders and investors, a country can be considered creditworthy if it shows some positive macroeconomic indicators even if this state of affairs has been reached thanks to redistribution of income unfavorable for the vast majority of the population, cheap labor, and suppression of visible social unrest. Without suppression of civil and political rights, authoritarian governments could barely impose and enforce economic and social policies that deeply and continuously disadvantage the interests and needs of the less privileged strata.[160] Granting financial assistance to such regimes can contribute to a vicious circle in which not only civil and political rights but also social, economic, and cultural rights fall victim. This happened during the dictatorship in Brazil.[161]

The idea of financial complicity with human rights violations relies on the assumption that lenders are capable of knowingly or negligently making possible, facilitating, or exacerbating human rights abuses.[162] Even considering that Brazilian diplomacy was very skilled in not allowing international missions to visit the country,[163] the human rights situation was very well-known internationally: Important organizations such as the World Council of Churches in Geneva and the Russell Tribunal in Rome denounced the abuses, and several US-based non-governmental organizations such as Human Rights Watch also warned about what was going on.[164]

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159 Bresser-Pereira, "Structuralist Macroeconomics."

160 Sylvain Aubry, "Advancing the Accountability of Corporations for Their Impact on Economic, Social and Cultural Rights: Reflections on The Use of The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (London: Routledge, 2013), forthcoming.

161 Heinz & Fruhling, *Determinants of Gross,* 57, 214.

162 *See generally* International Commission of Jurists, *Corporate Complicity & Legal Accountability* (ICJ: Geneva, 2008).

163 *See* "José Zalaquett answer to Marcelo D. Torelly," *Revista Anistia Política e Justiça de Transição* 4 (July–December 2010): 17.

164 *See generally* Green, "Restless youth."

At least since 1969, the US government was aware of public denunciations of human rights violations in Brazil made by Amnesty International and the International Commission of Jurists, while in 1971 Senator Frank Church conducted public hearings about US programs in Brazil and their possible connections with widespread violations of human rights.[165] 1969 is the exact moment when regime violence grew rapidly in volume and intensity. 1969 is also the beginning of the *economic miracle*. Lenders continued to lend to the Brazilian state in spite of being aware of the human rights situation and the crucial relevance of the loans in terms of the state capacity to buy loyalties and repress.

Most of the grave human rights violations occurred between 1968 and 1979, the year of the enactment of the Amnesty law. This period of time encompasses the *economic miracle* and also encompasses the cycle of dramatic debt growth. With a rigorous debt audit, it would be possible to investigate whether and how international funds flowed into the repressive apparatus and, if necessary, move forward with institutional accountability mechanisms.

Whether the role played by lenders during the Brazilian dictatorship can be considered technically complicit with the human rights abuses carried out during this period[166] is a question that needs further interdisciplinary and factual analysis. What can be done now in order to better understand the role of lenders during the dictatorship, as this chapter has proposed, is to assess the interplay of, among others, the following factors: Violations of human rights; the volume, date, frequency, duration, and specific conditions of each loan; human rights conditionalities attached to lending contracts; and the economic, social, and political situation of the country. This kind of cognitive and narrative task was already conducted by Professor Antonio Cassese in his report on the financial aid received by the Pinochet regime and its impact in terms of human rights abuses.[167] The Brazilian NTC could benefit from the sophisticated investigative methodology elaborated and applied by Cassese almost 35 years ago.

This kind of analysis is absent from almost every transitional process, including the Brazilian one. However, tackling financial complicity in Brazil is not only desirable in terms of attaining transitional justice goals, such as accountability and democratic stability, but also possible from an institutional and legal perspective.[168] This reasoning also applies to economic complicity generally.[169]

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165 Skidmore, *The Politics of Military,* 154–155.

166 On the legal basis of responsibility of private, bilateral, and multilateral lenders for complicity, *see* Bohoslavsky, "Tracking down," 71.

167 Cassese, "Study of the Impact."

168 For a broad range of transitional justice measures tailored to financial complicity, *see* Sharp, "The Significance of Human."

169 On new revelations of evidence of the involvement of corporations with the military and human rights violations, *see* Marco Aurélio Weissheimer, "Estudo analisa articulação de empresário pró golpe de 64," *Carta Maior*, April 14, 2012, http://www.cartamaior.com.br/templates/materiaMostrar.cfm?materia_id=19959&boletim_id=1168&componente_id=18699.

Recent civil lawsuits in Argentina based on responsibility for financing criminal regimes[170] have challenged the historical trend of giving little practical and legal relevance to the macro dimension of the financing of gross violations of human rights. Victims are demanding to know more about how lending can affect human rights and they propose new perspectives to understand this link. "I want to know who gave the money to the military junta that ruled a bankrupted country but could pay the salaries to the murders of my parents and buy the machines to torture them," said one the victims of the Argentinean dictatorship who is suing the banks that financed it.[171] This question could and should also be raised in the current Brazilian context. An adequate answer is owed to the victims. Several legal and institutional options are currently open for different kinds of accountability for economic complicity in Brazil for which the NTC could and should work as a catalyst.

[170] *See* Horacio Verbitsky, "Los prestamistas de la muerte," Página 12, June 21, 2009, http://www.pagina12.com.ar/diario/elpais/1-121607-2009-03-16.html.

[171] Ibid.

Land Policy and Transitional Justice After Armed Conflicts

Daniel Fitzpatrick and Akiva Fishman

Post-conflict land policy has received relatively little attention in the literature on transitional justice.[1] While it is clear that land policy plays a role in recovering from the effects of conflict, and ensuring that further conflict does not follow, there is a distinct empirical lacuna on the causal relationship between post-conflict land policy and the promotion of transitional justice objectives such as democratization or redress of human rights violations. Moreover, to the extent that there is a relationship between land policy and transitional justice, the modalities of post-conflict land policy are not necessarily self-evident from heuristic concepts of "transition" or "justice." This chapter focuses on dynamic changes in land governance systems as a result of armed conflicts and their effect on the modalities of land policy as an instrument of transitional justice. It suggests, in particular, the need for a contextualized "systems" approach to post-conflict land policy as an alternative to rights-based models of property restitution to dispossessed persons.

The analysis is limited to cases of armed conflict that gives rise to humanitarian emergencies and assumes a degree of international intervention through

[1] A notable exception is the work of Bernadette Atuahene on South Africa. *See,* e.g., Bernadette Atuahene, "Property Rights and the Demands of Transformation," *Michigan Journal of International Law* 31 (2010); Bernadette Atuahene, "Property and Transitional Justice," *UCLA Law Review Discourse* 58 (2010). For a useful discussion urging greater attention to land policy in post-crisis reconstruction efforts, *see* Michael Kitay, "Land Tenure Issues in Post Conflict Countries" (paper presented at the *International Conference on Land Tenure in the Developing World*, Capetown, South Africa, January 27–29, 1998), 5.

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D. N. Sharp (ed.), *Justice and Economic Violence in Transition*,
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humanitarian and development agencies.[2] Land is a cross-cutting issue after armed conflicts that involves related, if at times temporally distinct, processes of peacekeeping, humanitarian relief, and development assistance.[3] This chapter argues that standard division of post-conflict land programming into distinct humanitarian and development phases is not helpful in terms of understanding systemic processes of land governance after episodes of war and population displacement. It is well established that land policy should not involve separate issues of humanitarian responsibility for the safe return of displaced persons and development actor responsibility for their successful reintegration into society.[4] Post-conflict land policy involves a continuum from emergency relief to sustainable peace, which is often overlooked in the literature on land and transitional justice, particularly as a result of a focus on restitution as central to building the peace. This chapter traces, in particular, the way in which immediate post-conflict issues of displacement and occupation will affect the nature and resolution of long-term issues relating to property restitution and transitional justice.

Immediately after the cessation of armed conflict, there are urgent challenges posed by property destruction and population displacement. Displaced persons require shelter and access to livelihoods. Humanitarian and peacekeeping agencies require sites for their operations. Land records may require collection and repair. There will be secondary occupation of remaining housing stock. These issues require coordinated responses among international, national, and local actors, not simply to provide humanitarian relief but to prevent a new round of land conflicts causing further uncertainty to develop. After the emergency phase of post-conflict humanitarian assistance, there are then demands for institutions and laws to meet claims for property restitution, as a mechanism of redress for violations of human rights to property. Yet resolving property restitution claims presents a host of difficult issues. The state may lack the capacity or willingness to engage in expensive restitution programs. Secondary occupiers of land claimed by displaced persons may resist efforts at eviction. Displaced persons may prefer compensation to return to a hostile environment. In these types of circumstances, the design and effect of restitution programs will turn on the objectives of restitution and other context-specific issues such as state capacity and political will, the number and types of claimants, the degree and duration of displacement, and responses to land issues during the early phase of humanitarian assistance.

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[2] It follows that the chapter is more relevant to examples such as East Timor, Afghanistan, Sudan, and the former Yugoslavia than post-communist transitions in Eastern Europe or post-apartheid transition in South Africa.

[3] For a discussion of the need for a political actor to set priorities and coordinate humanitarian activities in conflict-affected countries, *see* Jonelle Lonergan, "The UNHCR as Lead Agency in the Former Yugoslavia," *Journal of Humanitarian Assistance* (blog post, April 1, 1996), http://sites.tufts.edu/jha/archives/99.

[4] *See* Joanna Macrae, "Aiding Peace and War: UNHCR, Returnee Reintegration, and the Relief-Development Debate," *UNHCR Working Paper No. 14*, December 1999, http://www.unhcr.ch/refworld/pubs/pubon.htm.

The first part of this chapter sets out the contextual issues of post-conflict land policy by describing how the effects of conflict can exacerbate the causes of conflict, including as a result of population displacement and land grabbing by political elites. Political leaders, in particular, have enhanced authority over and opportunities to appropriate land, which can exacerbate underlying conditions of "greed and grievance" relating to land. The analysis of land grabbing incentives draws on recent work by North, Wallis, and Weingast on correlations between state stabilization and property rules that favor a political elite.[5] An elite coalition stabilizes the state and solves the problem of violence, by co-opting "violence entrepreneurs" through inducements based on control over the mechanisms of the state, including the legal authority to grant privileged access to rights and resources. The imperatives of state stabilization tend to favor land policy measures that allow for elite control over land rather than responses to past episodes of corruption, plunder, or systematic property violations.[6]

The second part of this chapter identifies urgent land issues that arise in the immediate aftermath of a peace agreement. These issues include the location of sites for emergency or transitional shelter and ad hoc occupation of vacant land and housing by displaced victims of the conflict. The effects of displacement and return on land create policy challenges in terms of responsibility, assessments, and planning because they require coordinated responses at transnational, national, subnational, and community levels. The challenges include the structure of international humanitarian responses, which tends to separate assistance according to humanitarian sectors, including shelter, protection, and agriculture. The first two parts of this chapter argue that coordination problems and post-conflict incentives to engage in land grabbing and "races" for rights to land lend themselves to delayed policy responses, or no response at all, to land issues caused by armed conflicts. In other words, after armed conflicts, the systemic processes by which authority forms and individuals coordinate militate against early or effective adoption of land policies with transitional justice objectives such as careful location of temporary shelter for refugees that avoids reinflaming tensions.

The final part of this chapter analyzes restitution of land rights to displaced persons. It argues that there is no single normative basis for post-conflict restitution and no "one-size-fits-all" solution to problems of displacement, as the objects of restitution will affect the nature and effects of a restitution program. It is possible to characterize restitution as a right or remedy. Conceptualized as a right of return, restitution discounts the option of compensation as a remedy in lieu of returning

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[5] Douglass North, Joseph Wallis, and Barry Weingast, "Violence and the Rise of Open-Access Orders," *Journal of Democracy* 20 (2009): 59; Douglass North, Joseph Wallis, and Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York, NY: Cambridge University Press, 2009).

[6] North et al., "Violence and the Rise of Open-Access Orders," 77 ("Land is the primary asset in agrarian societies. Access, use, and the ability to derive income from land therefore provide a rich set of tools with which to structure a dominant coalition and its relationship to the wider economy").

displaced persons to the land they vacated. If restitution is characterized as a remedy for gross violations of human rights, or an instrument of post-conflict peacebuilding, there is greater design flexibility in a post-conflict land policy program. The final part of this chapter also sets out a typology of normative bases for restitution, including rights to adequate housing and rights to return home, in order to analyze the different contextual factors affecting the design, interpretation, and implementation of laws on restitution of land. It highlights, in particular, the significance of the nature, location, and duration of displacement, and the extent of secondary occupation, for the effectiveness of restitution as an instrument of transitional justice. The chapter concludes that a heuristic "toolkit"—encompassing systemic analysis of issues of displacement, occupation, coordination, and authority formation—is necessary to shape context-specific modalities for land policies with transitional justice objectives.

The Relationship Between Land and Armed Conflict

Scholars of armed conflict typically attribute the cause of civil war to greed or grievance.[7] "Greed" refers to the notion that violent uprisings against the government are driven by cost/benefit calculations that rebels stand to gain more than they would lose from acts of rebellion.[8] Benefits of rebellion include control over natural resources, particularly high-value resources.[9] "Grievance" theorists argue that war stems instead from conflict over aspects of identity—such as ethnicity, religion, and social class—rather than economic opportunity. Grievances include identity-based claims to land from which groups have been historically dispossessed. In both cases—greed and grievance—there is a causal relationship between armed conflicts and claims to land or natural resources.

Greed and grievance analysis suggests that land policy interventions should occur early in the post-conflict period. A failure to address the causes of conflict may create conditions for the return of conflict, either because grievances have not been redressed or because high-value resources continue to provide incentives for

[7] Daniel Buckles, ed., *Cultivating Peace: Conflict and Collaboration in Natural Resource Management* (Ottawa, Washington: International Development Research Center, 1999); Demetrios Christodoulou, *The Unpromised Land: Agrarian Reform and Conflict Worldwide* (London: Zed Books, 1990); Michael Renner, *The Anatomy of Resource Wars* (Worldwatch Institute, 2002); Annmarie M. Terraciano, "Contesting Land, Contesting Laws: Tenure Reform and Ethnic Conflict in Niger," *Columbia Human Rights Law Review* 29, no. 3 (1998): 723.

[8] Paul Collier and Anke Hoeffler, "On Economic Causes of Civil War," *Oxford Economic Papers* 50 (1998): 563.

[9] Ibid., 2. World Bank economists have even sought to model the causal relationship between armed conflict and resource wealth. *See generally* Ian Bannon and Paul Collier, eds., *Natural Resources and Violent Conflict: Options and Actions* (World Bank, 2003).

violent acts of "greed." Yet there are a number of cases where systemic land-related causes of armed conflicts were not addressed by international post-conflict interventions.[10] Moreover, in cases where post-conflict land policies were developed, their formulation and implementation tended to occur in later stages of post-conflict humanitarian and development programming.[11] Comparative experience suggests that land policy delay or inactivity may be a self-defeating strategy as the effects of conflict exacerbate the causes of conflict, particularly in terms of population displacement and the potential for land grabbing by political elites. Land policy delay allows uncertain chains of transactions and transfers of possession to develop from initial post-conflict conditions, and creates space for rent seeking by elites that accrue political authority after the cessation of conflict.

Armed conflict creates conditions for further conflict relating to land. Land and housing become newly available to claim as landowners are killed and violence forces mass displacement of civilian populations. Untended resources—especially land—are left up for grabs. At the same time, the supply of land and housing is put under increased pressure as damage and destruction reduce the housing stock, and those who are displaced compete for and congregate around areas of economic activity, water sources, arable land, and humanitarian relief services.[12] Taking these circumstances together, armed conflict increases the net value of land and housing notwithstanding the inevitable offsets provided by loss of life. The result is an incentive to "race" for rights, including by occupying land formerly held by another claimant.

Relative to international wars, internal conflicts tend to disproportionately impact civilians, many of whom are displaced either within the state or externally as refugees. Daniel Lewis identifies costly contests over the possession of land left vacant by displaced persons in Kosovo, Iraq, Afghanistan, and Somalia.[13] As already noted, these contests often involve secondary occupation of land and housing by persons other than the victims of displacement. They overlay or exacerbate grievances arising from competing claims to land and resources prior to the armed conflict. Generally, they take place in conjunction with breakdowns in government functioning and order, which creates further opportunities for competitive racing and resort to violent means for asserting property claims. In Rwanda, for example,

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[10] *See*, e.g., the case studies collected in Scott Leckie, "Introduction," in *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, ed. Scott Leckie (Ardsley, United States: Transnational Publishers, 2003).

[11] Ibid.

[12] Jon Unruh, "Post-Conflict Land Tenure: Using a Sustainable Livelihoods Approach" (LSP working paper 18, FAO Access to Natural Resources Sub-Programme, 2004), 12, 16, 20–21; Jon Unruh, "Humanitarian Approaches to Conflict and Post-Conflict Legal Pluralism in Land Tenure," in *Uncharted Territory: Land, Conflict, and Humanitarian Action*, ed. Sara Pantuliano (Rugby: Practical Action, 2009).

[13] Daniel Lewis, "Challenges to Sustainable Peace: Land Disputes Following Conflict," (paper presented at a *Symposium on Land Administration in Post Conflict Areas* organized by the Federation of International Surveyors, the Kosovo Cadastral Agency, and UN-HABITAT, Geneva, Switzerland, April 29–30, 2004), 6–7.

the post-war land tenure system was not functioning well enough to handle the influx of 2.3 million rapidly reentering refugees. Consequently, resettlement occurred with little state direction and produced violent land grabbing.[14]

In addition to incentivizing physical races to occupy vacated land and housing, armed conflict creates opportunities for political competition to obtain rights or authority relating to land.[15] The formation of a new government after armed conflict, or even after a process of state succession, provides opportunities for political coalitions to legislatively change land and property rights. While this may not be problematic when the new government represents the people, minoritarian rather than majoritarian governments tend to be the norm after armed conflicts because of the processes of elite formation described by North, Wallis, and Weingast. In conflict-affected circumstances, groups and individuals often continue to possess weapons or access to means of violence through non-state patrimonial networks.[16] Those with access to violent means may calculate that the net payoffs of political violence outweigh the net benefits of non-violent forms of competition for public authority.[17] The state stabilizes by co-opting individuals with access to group violence, by offering privileged access and rights to resources, through its control over land law and policy. The result is an elite-dominated state with incentives to develop and implement law in its own interests.

Land Issues and Humanitarian Assistance

After armed conflicts, the challenges for land policy not only include processes of authority formation but also include more prosaic issues of coordination, assessment, and information collection. Unless these issues receive early attention, they often act as substantial constraints on later adoption of effective land policy measures. Early attention to land issues created by armed conflicts is essential because land can be a time-critical barrier to early recovery. Victims of armed conflicts urgently require security of tenure to facilitate house reconstruction and access to land for livelihoods, infrastructure, and, where unavoidable, relocation. Humanitarian actors need tools to assess quickly whether (and what) land issues will be relevant to emergency relief operations. However, rapid land assessments

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[14] Unruh, "Post-Conflict Land Tenure," 16.

[15] Christian Lund, "Negotiating Property Institutions: On the Symbiosis of Property and Authority in Africa," in *Negotiating Property in Africa*, ed. Kristine Juul and Christopher Lund (Portsmouth: Heinmann, 2006); Unruh, "Post-Conflict Land Tenure," 8; I. William Zartman, "Introduction: Posing the Problem of State Collapse," in *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, ed. I. William. Zartman (Boulder, CO: L. Rienner Publishers, 1995), 108.

[16] Zartman, "Introduction."

[17] Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca, NY: Cornell University Press, 2004), 6–7; Derick Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies: Core Concepts and Cross-Cutting Themes," *Public Administration and Development* 25, no. 1 (February 2005): 1, 4.

commonly suffer from a lack of baseline land data—especially in countries with weak land administration systems or governments that are reluctant to work with international actors on land issues. A further challenge is that rapid land assessments should be completed within 5 days of an emergency so that pressing land-related needs (particularly concerning shelter, protection, and agriculture) may feed into emergency requests for humanitarian funding such as UN "Flash Appeals."[18] This rarely occurs because of competing demands on the time and resources of humanitarian actors, particularly in terms of saving lives, and the dangerous conditions that make it difficult to gather sensitive land data.

Assessments relating to land require coordination among a range of actors. The absence of a clear institutional lead for land data collection can cause delays, inaction, and a waste of resources as efforts are duplicated or work at cross-purposes. In some cases, a transitional government may have the capacity to carry out the assessment on its own, but may not be willing to do so because political elites are more intent on stabilizing their own authority. As a general rule, political elites will only expend resources on information collection or inter-agency coordination when those activities are in line with post-conflict imperatives to stabilize authority through privileged access to resources. Where present and active, the UN Inter-Agency Standing Committee (IASC) Country Team may attempt to take the lead under the coordination of the UN Humanitarian Coordinator or Resident Coordinator. However, humanitarian clusters or working groups involved in specific sectors such as protection, shelter, livelihoods, and agriculture may undertake separate forms of land assessment, as there are distinct humanitarian arenas that need land information.

A substantial amount of baseline quantitative data must be collected to develop land policies in the humanitarian and early recovery phases, particularly in relation to tenure status, land records, land status, and desire for return. For example, questions for household or individual surveys include the following: What type of right do you have (e.g., ownership, lease, occupation)? Do you have evidence documenting your land rights? Were your documents lost or destroyed in the conflict? Do you want to return to your land? These data allow decisionmakers to make certain estimations: The number of people potentially requiring relocation because they cannot or do not wish to return to their land; the number of tenants and informal land occupiers without access to land after armed conflict; the number of landholders who may require new forms of land documentation, including replacements for lost or destroyed documents; and the relative number of women, including widows, who may be especially vulnerable to landlessness. There should also be a land availability survey to identify suitable land for emergency shelter, durable shelter, and/or relocation. Identifying land availability is a process that also requires

[18] Flash Appeals are coordinated requests for urgent humanitarian funding formulated within 5–7 days of declaration of an emergency or disaster. They are directed at life-saving measures, but may also include urgent recovery responses that can be completed within a six-month period. Funding may be sought from external donors or from the internal UN Central Emergency Relief Fund (CERF).

coordination between affected communities and early recovery actors, including local government agencies, and may involve an audit of public or state land.

Land issues are cross-cutting in nature, and land data are essential for incorporating early recovery land policy responses into other areas of humanitarian planning. This includes both quantitative data from government agencies and household surveys and qualitative data from focus groups. Qualitative data collection involves meetings with stakeholders and community groups, as well as walkabout observations and informal individual interviews. Participatory methodologies for collecting data are especially needed to include the views of those most at risk, including women, children, indigenous groups, the disabled, the landless, tenants, informal or extralegal landholders, and holders of secondary rights to land. These groups should be interviewed and assessed separately, using local institutions that are best able to access and collect useful information. Needless to say, this type of quantitative data is expensive and time-consuming to collect. Vulnerable groups are more likely not to be included in early post-conflict land policy assessments, because of their weak or undocumented tenure status, which also militates against later adoption of pro-poor or broad-based policies to redress past human rights violations.

The rapid turnaround between the conclusion of armed conflict and the UN Flash Appeals process means that most UN-based land policy responses must be formulated as part of established humanitarian clusters. As a general rule, there is no coordinated land response in the emergency post-conflict phase of humanitarian assistance as there is no time to create a centralized institution responsible for land issues. The protection cluster can include programs that support the land rights of especially vulnerable victims of the conflict. Shelter programs can support rapid mechanisms to provide tenure security in shelter locations, participatory-community-based mechanisms of settlement planning, or housing solutions for people without legal documentation of rights to land. Agriculture programs can include support for the land rights of sharecroppers and other agricultural tenants, or community-based mechanisms for land use planning. Most of these land policy responses will involve programs that are limited to specific issues or locations. While these programs can provide greatly needed land responses, the need to seek funding for discrete programs impairs the ability of policymakers to pursue coordinated responses.

Emergency Shelter, Secondary Occupation, and Developing Land Markets

During and after the emergency phase of post-conflict humanitarian responses, a number of substantive land issues will arise that affect long-term land policy responses, particularly in terms of securing the peace and redressing historical forms of land-related injustice. First, the nature and location of sites for emergency or transitional shelter can lead to disputes or vulnerability to further conflict. Second, population displacement and property destruction often lead to widespread “unlawful” occupation of abandoned houses and substantial conflict over

remaining housing stock. Finally, a new round of land transactions, built on foundations of occupation rather than ownership, inevitably takes place after active conflict has ended. These transactions, in particular, create challenges for the design and implementation of land programs with transitional justice objectives.

Sites for Emergency and Transitional Shelter

Displacement occurs when people are forced to leave their homes to avoid the effects of conflict. Where persons affected by conflict have returned to their homes, or were not displaced from their homes, the most important land issue will be to provide them with tenure security in their pre-conflict locations. At times, the importance of tenure security as an instrument of redress for past property violations is overlooked by a post-conflict focus on restitution. Yet it is an important remedy for dispossession once people have returned to their homes or chosen to resettle elsewhere, in particular because it helps to avoid further rounds of dispossession and displacement. In humanitarian terms, tenure security is also essential to ensure that both transitional and durable shelter solutions are provided in the right places for the right people. Those who have not returned home require emergency[19] and transitional[20] forms of shelter during their period of displacement. Options for transitional shelter include grouped settlements—such as collective centers, self-settled camps, and planned camps—and dispersed settlements, including urban self-settlement, rural self-settlement, and host family accommodation. In transitional justice terms, the location of sites for emergency or transitional shelter is important because of the possibility of permanence—where displaced persons have nowhere else to go—and the risks that siting decisions will cause further land conflicts or unsustainable depletion of local resources.[21]

Safety and suitability of habitation are not the only criteria to determine whether particular land should be used to shelter displaced persons. Land that appears to be vacant may actually be owned by an absentee landholder or claimed as communal land by a particular group. Even if land is not otherwise claimed, it may serve important purposes such as conservation or ecotourism that would be undermined

[19] "Emergency shelter" is shelter that at minimum provides protection from wind, rain, freezing temperatures, and direct sunlight. The basic per-person space requirement is 3.5 square meters of shelter area and 30.0 square meters in the total site. UN Emergency Shelter Cluster, *Local Emergency Needs for Shelter and Settlement Tool Kit* (LENSS) (2009), http://www.humaitarian.org.

[20] "Transitional shelter" is shelter intended to house displaced or non-displaced persons during the period between a conflict or natural disaster and completion of restitution programs. The shelter must be appropriate for a family, including a habitable, covered living space and a secure, healthy living environment that provides privacy and dignity. The shelters are intended to be relocated, upgraded, or disassembled for materials when conditions permit. UN Emergency Shelter Cluster, *Local Emergency Needs.*

[21] For example, Principle 18 of the UN Guiding Principles on Internal Displacement directs competent authorities to ensure that displaced persons have access to basic housing and shelter.

by refugee settlements. For example, Rwanda's ecotourism economy may have suffered in the long term had refugees been settled in the national parkland that provides habitat for mountain gorillas.[22] Moreover, temporary camps may become permanent settlements if restitution is delayed or not achieved, which can in turn put unsustainable pressure on surrounding natural resources and create tensions with adjacent communities. The likelihood that temporary shelters will become permanent settlements is increased when displaced persons do not wish to return home, because of ongoing insecurity or local hostility, or when the restitution program lacks the capacity or funding to achieve its objectives. There is an inter-relationship between temporary shelter and remedies for property violations as the nature and locality of post-conflict shelter will affect both willingness to return and the general environment for sociopolitical stability and transitions to sustainable peace.

The primary responsibility for selecting official sites for transitional shelter lies with national and local governments. Governments may not have adequate information to pick the most suitable sites. Sometimes they may have their own agenda driving site selection and may choose to marginalize certain groups or support favored development and appropriation plans. Elite-controlled governments, in particular, may avoid sites with high-value natural resources. In addition, shelters are often created on sites without any planning where displaced persons have already clustered. Self-settlement, in particular, can lead to informal settlements when it occurs on land owned by others (including the state or private owners) and remains in place without recognition by law or the institutions of land administration. Long-term informality makes it difficult to provide access to services and infrastructure and frustrates urban planning and inward investment. When self-settlement occurs in urban areas, it can lead to land subdivisions as occupants attempt to create space and entitlements for extra housing. This process can contribute to overcrowding, inadequate access to services and infrastructure, and long-term vulnerability to conflict and displacement, particularly if it occurs outside the formal requirements of land administration.

Decommissioning transitional shelters brings different challenges from those associated with siting shelters. Because shelters cannot be decommissioned until land and housing solutions are found for all their inhabitants, they can become dominated by increasingly concentrated residual populations of vulnerable groups, as those with the easiest access to land for housing leave the camp most quickly. Transitional shelters can also become populated by victims of poverty or landlessness who are not necessarily victims of the armed conflict itself. Early attention needs to be given to eligibility criteria and verification mechanisms to ensure that only those who lost their land as a result of the conflict gain access to resources devoted to displaced persons. Yet the circumstances of conflict, and the urgency of post-conflict humanitarian aid, often militate against implementing effective programs to document all the victims

[22] *See* Miko Watanabe et al., "Mountain Gorilla Ecotourism: Supporting Macroeconomic Growth and Providing Local Livelihoods," in *Livelihoods, Natural Resources and Post-Conflict Peacebuilding*, ed. Helen Young and Lisa Goldman (New York: Earthscan Publications Limited, forthcoming 2013).

of conflict. Victims that are not documented may be unable to access formal mechanisms of land restitution, contributing to conditions of marginalization and grievance that undermines prospects for democratization and sustainable peacebuilding.

Secondary Occupation of Vacant Land and Housing

Where refugee return occurs rapidly and en masse, the likely result is conflict over land and available housing stock. In Kosovo, for example, more than 800,000 Kosovo Albanians, earlier expelled from Kosovo by Serb forces, returned in less than a month. As many as 500,000 who had been displaced internally also returned with great speed. Many returnees occupied houses abandoned by Kosovo Serbs. Others were allocated properties by the Kosovo Liberation Army (KLA) on the basis of their KLA contacts or affiliations or took possession of houses as part of organized criminal activity or simply moved into what intact housing was available. Not surprisingly, the United Nations Mission in Kosovo (UNMIK) had a difficult time minimizing disputes arising from this sudden and dramatic change in land occupation.[23]

It is almost inevitable that population displacement and property destruction in circumstances of mass return will lead to widespread ad hoc occupation of vacant houses and conflict over remaining housing stock. The more this occurs, the more difficult it will be to resolve past acts of systematic property violation. It is difficult for a post-conflict government to implement a restitution program when intact housing, particularly in urban areas, has been occupied without agreement from their pre-conflict owners. In fragile post-conflict circumstances, state agencies are unlikely to implement court determinations that require mass eviction. Moreover, the greater the extent of ad hoc housing occupation, the more likely there will be a new round of transactions built on the shaky foundations of opportunistic possession rather than legal ownership. This will also complicate efforts to resolve competing land claims or redress the historical causes of land-related conflict.

There is not much in land policy terms that can be done about refugees and internally displaced persons who return voluntarily using their own transport. In normal circumstances of conflict and war, it is extremely difficult to stop unassisted returnees from going where they want and occupying whatever abandoned housing they might find. This was certainly the case in Kosovo where, as noted, almost all refugees and internally displaced persons had returned before the UNMIK could begin effective operations. However, the circumstances were a little different in East Timor, where it was quite predictable that property destruction and mass population

[23] For a description, *see* United Nations Centre for Human Settlements, *Housing and Property Rights in Kosovo* (second edition, 2000), http://www.grid.unep.ch/btf/missions/habitat/. Although Kosovo provides the most extreme modern example, this phenomenon of rapid displacement and return has not been confined to the Balkans. As many as 700,000 East Timorese were displaced in late 1999, with most returning after security was established by the International Force for East Timor. *See* Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," *American Journal of International Law* 95 (2001): 58–59.

return would put great pressure on housing stock in the capital city of Dili and that the influx of large numbers of international personnel would cause hyper-inflation in housing markets. These events could have been significantly ameliorated if those planning the United Nations Transitional Administration in East Timor (UNTAET) had included housing policy as a priority.[24] UNTAET also failed to secure large areas of housing in Dili left vacant by Indonesian civil servants, which were occupied by returnees that were not originally from Dili. Notably, this ad hoc occupation by so-called Easterners was a primary cause of the outbreak of social conflict and forced evictions in 2006–2007, when East Timor reverted to conflict notwithstanding a multi-year period of UN administration.[25]

Restitution: Returning Home or Building the Peace?

The foregoing section identified a number of barriers to effective post-conflict land policies, including process issues of coordination and information, and substantive problems of authority formation and population displacement. These land policy challenges highlight the importance of contextual analysis for the design of land policy after armed conflicts. Yet neither international legal standards nor the international human rights literature provide much guidance on context-specific formation of post-conflict land policies that are aimed at redressing past property violations or promoting transitions to peace and democracy. With some notable exceptions, there is an overemphasis on restitution of rights to displaced persons and underdevelopment of tailored tools that link context with the legal design of land and transitional justice measures. The following part explores international legal standards on restitution as a response to displacement to illustrate this argument. In particular, it identifies a number of potential normative bases for restitution as an instrument of transitional justice and argues that because land policy is often a zero-sum game, choices may be required between competing demands imposed by international standards, including human rights to restitution and housing.

The 2005 United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the "Pinheiro Principles") provide that "states shall demonstrably prioritize the right to restitution as the preferred remedy for displacement, and as an essential element of restorative justice."[26] This right to

[24] In the event, however, the UNTAET budget did not include any provision for emergency housing or shelter. UNTAET ordered pre-fabricated housing in March 2000, but this was earmarked only for international staff and only to address the overcrowding and poor morale of the staff on the floating hotel that UNTAET had commissioned for Dili harbor. For a discussion, *see* Daniel Fitzpatrick, *Land Claims in East Timor* (Australia: Southwood Press, 2002).

[25] *See* Andrew Harrington, "Ethnicity, Violence, and Land and Property Dispute in Timor-Leste," *East Timor Law Journal* 2 (2007).

[26] *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17 (2005), Principles 2.1, 2.2.

restitution applies to displaced persons where they were "arbitrarily or unlawfully" deprived of housing, land, and/or property.[27] The Pinheiro Principles further provide that displaced persons may only receive compensation in lieu of restitution if it is factually impossible to restore their land as determined by an independent, impartial tribunal.[28] While states should provide alternative housing to secondary occupants of land, the lack of alternative housing "should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land, and property restitution."[29] Moreover, even though states should consider compensation for third-party interest holders that acted in good faith, the "egregiousness of the underlying displacement… may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases."[30]

There are a number of potential normative bases for the bright-line rule of restitution set out in the Pinheiro Principles. They include refugees' right of return,[31] the right to adequate housing,[32] and the right to protection of property left behind after displacement.[33] These rights should be interpreted in the broader context of rights to property[34] and to live in freedom, safety, and dignity, with sufficient access to information and assembly to make informed decisions about locations for shelter and livelihoods.[35] While human rights provide the universalized framework that

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[27] Ibid.

[28] Ibid., Principle 3.

[29] Ibid., Principle 17.3.

[30] Ibid., Principle 17.4.

[31] Ibid., art 10.1; *United Nations Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (1998), principle 28; *UNHCR Executive Committee Conclusion No. 18* (XXXI) "Voluntary Repatriation," UN Doc. A/AC.96/588 (1980), paras (d), (f), (i); *UNHCR Executive Committee Conclusion No. 40* (XXXVI) "Voluntary Repatriation," UN Doc. A/AC.96/673 (1985), paras (a), (b), (d), (h); *United Nations Comprehensive Human Rights Guidelines on Development-Based Displacement*, UN Doc. E/CN.4/Sub.2/1997/7 (1997), art. 25.

[32] *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17 (2005), art 8.1; *United Nations Comprehensive Human Rights Guidelines on Development-Based Displacement*, UN Doc. E/CN.4/Sub.2/1997/7 (1997), art. 18.

[33] *See* UN Guiding Principles on Internal Displacement, Principle 21 ("Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use").

[34] *See* Universal Declaration of Human Rights, UN General Assembly Resolution 217A (III), December 10, 1948, art. 17 ("Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property").

[35] For references concerning rights of access, *see, e.g.*, United Nations Food and Agriculture Organization, *Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural Development* (1981), principle viii, chapter II(e) (ii); United Nations Department of Economic and Social Affairs—Division for Sustainable Development, *Agenda 21* (1992), chapter 3.8(o).

informs many aspects of transitional justice, the right to restitution set out in the Pinheiro Principles does not necessarily provide a uniform design template for post-conflict restitution programs. In addition to contextual factors such as the nature, location, and duration of displacement, there are tensions between the different normative bases to restitution that also affect the design, effectiveness, and objects of restitution. In fact, properly conceived, restitution is not an end in itself, or a universalized human right arising from displacement, but is merely one of the several possible remedies for building peace and addressing violations of human rights.

Restitution and the Right to Return Home

A number of scholars of international law identify the right to return to one's country as a source of the right to restitution.[36] The right of return can be found in Article 13(2) of the Universal Declaration of Human Rights and Article 12(4) of the International Covenant on Civil and Political Rights. Traditionally, this right was interpreted as only encompassing the right to return to one's "country of citizenship or nationality" and did not include the right to retake control of

[36] *See* Rhodri C. Williams, "Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice," *N.Y.U Journal of International Law and Policy* 37 (2005): 448 (arguing that "[t]he first and most commonly cited source of the right to post-conflict property restitution derives from its status as an element of the broader right of refugees to return to their homes of origin"). *See also* Leckie "Introduction," 28 (explaining the "origins of the new emphasis on housing and property restitution rights" and describing how the "UNHCR has been increasingly active in its support for the broader right to return"); Giulia Paglione, "Individual Property Restitution: From Deng to Pinheiro – and the Challenges Ahead," *International Journal of Refugee Law* 20 (2008): 393 (arguing that the increased interpretation of the right to return to one's country as including the right to return to one's home "had an exceptional impact on the displaced" as "the right to return to one's former homes necessarily implies a consequent right to reoccupy and repossess the former properties"); Eric Rosand, "The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?," *Michigan Journal of International Law* 19 (1998): 1128–29 (Rosand cites the right to return to one's country as a source of "hard law" on the subject of whether displaced persons possess the right to return to their homes; however, he qualifies this by arguing that "[t]he dominant view maintains that, rather than falling under international human rights law, the issue of returns of masses of dislocated people is either a political problem or one of self-determination," although in Rosand's opinion "nothing in the text or *travaux préparatoires* of the relevant provisions of the UDHR, ICCPR, or ICERD limits the application of the right of return to individual instances of refusals to repatriate"); Sérgio Pinheiro, "The Return of Refugees' or Displaced Persons' Property," UN Economic and Social Council, Working Paper (2002), para 29 (arguing that "[h]ousing and property restitution must be seen as a necessary component of the implementation of the right to return to one's home").

one's home or land.[37] More recently, the right of return has been interpreted more broadly.[38] For example, General Assembly Resolution 35/124 of 1980 concerning "International co-operation to avert new flows of refugees" recognized "the right of refugees to return to their homes in their homelands."[39] This approach was affirmed by Security Council Resolution 820 of 1993, which stated with respect to Bosnia and Herzegovina that "all displaced persons have the right to return in peace to their former homes and should be assisted to do so."[40] According to Sergio Pinheiro, other Security Council resolutions that affirm the right to return to one's home include those concerning displacement in Abkhazia and the Republic of Georgia,[41] Azerbaijan,[42] Bosnia and

[37] *See* Williams, "Post-Conflict Property Restitution," 458. With respect to the traditionally narrow interpretation of the right to return, *see also* Paglione, "Individual Property Restitution," 392–393 (arguing that "[h]istorically the right of the displaced to repossess their housing and property upon return was essentially non-existent" and that "the 'right to leave and return to one's own country' was increasingly interpreted as encompassing not simply a right to return to one's country or area of origin, but to actually return to one's original homes and lands"). With respect to the traditional exclusion of groups from claiming the right to return *cf.* Rosand, "The Right to Return," 1095 (arguing that "[i]f the international community is to confront the problem adequately and effectively, the right to return must be more broadly defined to apply to all individuals, including members of an entire dislocated 'population'").

[38] *See* Paglione, "Individual Property Restitution," 393. *But cf.* Eyal Benvenisti and Eyal Zamir, "Private Claims to Property Rights in the Future Israeli-Palestinian Settlement," *American Journal of International Law* 89 (2008): 324–325 (arguing that "[i]nternational practice… does not support the claim that the right of return following mass relocation of populations is recognized under international law" and "current customary international law does not seem to recognize the refugees' claim to the right of repossession").

[39] United Nations General Assembly (GA), Resolution 35/124, Dec. 11, 1980.

[40] United Nations Security Council (SC), Resolution 820, Apr. 17, 1993.

[41] *See* SC, Resolution 1287, para 8, Jan. 31, 2000 ("Reaffirms the unacceptability of the demographic changes resulting from the conflict and the imprescriptible right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions, in accordance with international law and as set out in the Quadripartite Agreement of 4 April 1994 (S/1994/397, annex II), and calls upon the parties to address this issue urgently by agreeing and implementing effective measures to guarantee the security of those who exercise their unconditional right to return, including those who have already returned"); SC, Resolution 1036, Jan. 12, 1996 ("Reaffirming also the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law and as set out in the Quadripartite Agreement of 14 April 1994 on voluntary return of refugees and displaced persons (S/1994/397, annex II)"); SC, Resolution 971, Jan. 12, 1995 ("Reaffirming also the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law and as set out in the Quadripartite Agreement on voluntary return of refugees and displaced persons (S/1994/397, annex II), signed in Moscow on 4 April 1994"); SC, Resolution 876, Oct. 19, 1993 ("Affirms the right of refugees and displaced persons to return to their homes, and calls on the parties to facilitate this").

[42] *See* SC, Resolution 853, para 12, Jul. 29, 1993 ("*Requests* the Secretary-General and relevant international agencies to provide urgent humanitarian assistance to the affected civilian population and to assist displaced persons to return to their homes").

Herzegovina,[43] Cambodia,[44] Croatia,[45] Cyprus,[46] Kosovo,[47] Kuwait,[48] Namibia,[49] and Tajikistan.[50] In addition, there are General Assembly resolutions recog-

[43] *See* SC, Resolution 752, May 15, 1992 ("*Emphasizes* the urgent need for humanitarian assistance, material and financial, taking into account the large number of refugees and displaced persons and fully supports the current efforts to deliver humanitarian aid to all the victims of the conflict and to assist in the voluntary return of displaced persons to their homes").

[44] *See* SC, Resolution 745, para 9, Feb. 28, 1992 ("*Appeals* to all States to provide all voluntary assistance and support necessary to the United Nations and its programmes and specialized agencies for the preparations and operations to implement the agreements, including for rehabilitation and for the repatriation of refugees and displaced persons").

[45] *See* SC, Resolution 1009, Aug. 10, 1995 ("*Demands further* that the Government of the Republic of Croatia, in conformity with internationally recognized standards and in compliance with the agreement of 6 August 1995 between the Republic of Croatia and the United Nations Peace Forces (a) respectfully the rights of the local Serb population including their rights to remain, leave or return in safety, (b) allow access to this population by international humanitarian organizations, and (c) create conditions conducive to the return of those persons who have left their homes").

[46] *See* SC, Resolution 361, para 4, Aug. 30, 1974. ("*Expresses* its grave concern at the plight of the refugees and other persons displaced as a result of the situation in Cyprus and urges the parties concerned, in conjunction with the Secretary-General, to search for peaceful solutions of the problems of refugees, and take appropriate measures to provide for their relief and welfare and to permit persons who wish to do so to return to their homes in safety").

[47] *See* SC, Resolution 1244, June 10, 1999 ("*Reaffirming* the right of all refugees and displaced persons to return to their homes in safety"); SC, Resolution 1199, Sept. 23, 1998 ("*Reaffirming* the right of all refugees and displaced persons to return to their homes in safety, and *underlining* the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so").

[48] *See* SC, Resolution 687, Apr. 3, 1991 ("*Noting also* that despite the progress being made in fulfilling the obligations of resolution 686 (Mar. 2, 1991), many Kuwaiti and third-State nationals are still not accounted for and property remains unreturned"; "*Decides* that, in furtherance of its commitment to facilitate the repatriation of all Kuwaiti and third-State nationals, Iraq shall extend all necessary cooperation to the International Committee of the Red Cross by providing lists of such persons, facilitating the access of the International Committee to all such persons wherever located or detained and facilitating the search by the International Committee for those Kuwaiti and third-State nationals still unaccounted for").

[49] *See* SC, Resolution 385, Jan. 30, 1976 ("Demands again that South Africa… (d) Accord unconditionally to all Namibians currently in exile for political reasons full facilities for return to their country without risk of arrest, detention, intimidation or imprisonment").

[50] *See* SC, Resolution 999, June 16, 1995 ("Calls upon the parties to agree to the early convening of a further round of inter-Tajik talks and to implement without delay all confidence-building measures agreed at the fourth round of these talks, inter alia, on the exchange of detainees and prisoners of war and on intensification of the efforts by the parties to ensure the voluntary return, in dignity and safety, of all refugees and displaced persons to their homes").

nize the right to return to one's home in relation to Algeria,[51] Cyprus,[52] Palestine/Israel,[53] and Rwanda.[54]

Pinheiro himself argues in a 2002 working paper that "[h]ousing and property restitution must be seen as a necessary component of the implementation of the right to return to one's home" and that "housing restitution is an indispensable component of any strategy aiming at promoting, protecting, and implementing the right to return."[55] Restitution plays a "unique role" in "securing the voluntary, safe, and dignified return of refugees and other displaced persons to their homes and places of original residence."[56] This is due to the fact that "[h]ousing and property restitution are often essential in order to facilitate the durable solution of repatriation," a solution that can be contrasted with the alternatives of integrating displaced persons or refugees into countries of asylum or resettling them in third countries.[57] Pinheiro bases this argument on the acknowledgment by the United Nations High Commission for Refugees (UNHCR) that voluntary repatriations are less likely to be successful if housing and property issues are not resolved promptly and especially if refugees will not be able to return to their houses or property in their home country.[58]

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[51] *See* GA, Resolution 1672 (XVI), Dec. 18, 1961 ("*Requests* the United Nations High Commissioner for Refugees to: (a) Continue his present action jointly with the League of the Red Cross Societies until those refugees return to their homes; (b) Use the means at his disposal to assist the orderly return of those refugees to their homes and consider the possibility, when necessary, of facilitating their resettlement in their homeland as soon as circumstances permit").

[52] *See* GA, Resolution. 3212 (XXIX), para 5, Nov. 1, 1974 ("*Considers* that all the refugees should return to their homes in safety and calls upon the parties concerned to undertake urgent measures to that end").

[53] *See* GA, Resolution 51/126, para 1, Feb. 4, 1997 ("Reaffirms the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967"); GA, Resolution 194 (III), Dec. 11, 1948 ("*Resolves* that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible").

[54] *See* GA, Resolution 51/114, Mar. 7, 1997 ("Welcoming also the commitment of the Government of Rwanda to protect and promote respect for human rights and fundamental freedoms, to eliminate impunity and to facilitate the process of the voluntary and safe return, resettlement and reintegration of refugees, as reaffirmed in the agreements reached at Nairobi, Bujumbura and Cairo in 1995 and at Tunis and Arusha in 1996, and urging Governments in the region to work, in cooperation with the international community, to find durable solutions to the refugee crisis").

[55] Sérgio Pinheiro, "The Return of Refugees' or Displaced Persons' Property," paras 29, 61.

[56] Ibid., para 9.

[57] Ibid., para 16.

[58] Ibid., para 21 and UNHCR Global Consultations on International Protection, "Voluntary repatriation," UN Doc. EC/GC/02/5, April 25, 2002, para 23.

The right to return home appears several times in the Dayton Peace Agreement that ended the war in Bosnia and Herzegovina, "and constitutes one of the foundational principles of the peace process."[59] Negotiators of the Agreement felt that "as long as resentment and grudges over lost property remained, peace would be impossible to secure."[60] Cox cites the Office of the High Representative in Bosnia:

> We cannot produce sustainable peace and stability in Bosnia and Herzegovina against the background of unfulfilled desires for return; they will remain destabilizing factors for generations to come. We cannot betray the right to return to homes of origin… [The OHR] prioritizes support of minority return movements and discourages at this stage potential grant aid to relocation.[61]

Rosand agrees, suggesting that the right to return home "was a cornerstone of the international community's efforts to bring peace to the region and recreate a unified, multi-ethnic Bosnia."[62]

The UN Sub-Commission on Human Rights emphasized the relationship between restitution and repatriation in Annex 7 of the Dayton Peace Agreement, which "requires not only that people can return to their homes, but that they can do so safely with equal expectations of employment, education, and social services."[63] Various scholars have described the right to return home in Bosnia-Herzegovina as "the gateway to the restoration of a multi-ethnic society,"[64]—a "crucial part of the political solution,"[65] and a "foundational principle"[66] of the peace process.

Bosnia-Herzegovina provides an example of restitution as an adjunct of the right of return. The association with the right of return discounts the possibility of compensation in lieu of restitution. Although the Dayton Peace Accords made provision for compensation where properties "cannot be restored,"[67] the Bosnian authorities

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[59] Marcus Cox, "The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina," *International and Comparative Law Quarterly* 47 (1998): 603.

[60] Hans van Houtte, "The Property Claims Commission in Bosnia-Herzegovina—a New Path to Restore Real Estate Rights in Post-War Societies?," in *International Law: Theory and Practice*, ed. Karel Wellens (The Hague, The Netherlands: Kluwer Law International, 1998).

[61] Cox, "The Right to Return Home," 629.

[62] Rosand, "The Right to Return," 1111. *See further,* Cox, "The Right to Return Home." (In this article, Cox sets out to describe "the evolution of the key principle in response to ethnic cleansing: The right of refugees and displaced persons to return to their homes" (*see* p. 601). In doing so, Cox argues that the "right of return is… foundational to the Dayton Agreement." This agreement provides in Annex 7 that "All refugees and displaced persons have the right freely to return to their homes of origin." However, Cox also notes his agreement that the right to return "is weakened at the outset by being coupled with the possibility of compensation").

[63] Sub-Commission on the Promotion and Protection of Human Rights, "Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Preliminary Report," UN Doc. E/CN.4/Sub.2/2003/11, June 16, 2003, 8.

[64] van Houtte, "Property Claims Commission," 557.

[65] Rosand, "The Right to Return," 1107.

[66] Cox, "The Right to Return Home," 603.

[67] Annex 7, ch. 1, art. I(1) (providing for compensation for those whose property cannot be restored); *see also* Annex 7, ch. 2, art. XI (allowing claims for compensation as an alternative to restitution).

did not establish a fund for the payment of compensation, and international donors preferred to fund reconstruction of destroyed housing in exchange for a promise that the beneficiary would return to the house.[68] In the event, however, many displaced persons in Bosnia-Herzegovina did not return home, and most of those that succeeded in a claim of restitution sold their property rather than reestablish homes at their former place of residence.[69] It seems that the conditions of return, including the presence of secondary occupiers and the hostility of neighbors and local communities, militated against decisions to return. As a result, the restitution program provided redress for displaced persons, but did not meet its objective of reversing ethnic cleansing. This suggests that a direct compensation package for displaced victims may have involved less expense and delay than a program of restitution.

Restitution and the Right to Housing

Some restitution proponents base the right of displaced persons to property restitution on rights to housing in international law. The displaced have a right to housing, and the best means to provide housing is to allow them to return home. Yet the right to adequate housing may also conflict with the notion of restitution. Armed conflicts usually damage or destroy housing stock, and displacement commonly leads to secondary occupation of vacant housing by other groups of displaced persons. As Cox notes, post-conflict housing and restitution requirements can resemble a game of musical chairs: There is not enough housing for all those that require shelter.[70] In these circumstances, restitution would favor the original owners, while rights to housing under international law would disallow restitution if it meant depriving secondary occupiers of a home.

The experience in East Timor illustrates this tension. By April 2000, six months after UNTAET took administrative control over the country, a significant proportion of intact housing in the capital city of Dili was occupied by persons other than their former owners. All these houses were extremely overcrowded. Conflict—sometimes violent—over housing began to cause social unrest. Further uncertainty developed as those occupying houses sought to lease them to whoever was willing to take the risk. Not surprisingly, the market for housing in Dili quickly experienced hyperinflation as employees of international agencies poured into Dili and rushed to enter into rental agreements with anyone appearing to own or control a habitable house.[71]

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[68] Williams, "Post-Conflict Property Restitution," 448; Eric Rosand, "The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law," *Cornell International Law Journal* 33 (2000): 129–31 (compensation provisions in Annex 7 not implemented).

[69] Williams, "Post-Conflict Property Restitution."

[70] Cox, "The Right to Return Home," 624.

[71] Fitzpatrick, *Land Claims in East Timor*.

Restitution in this context would have required eviction of large numbers of secondary occupants of land formerly held by displaced persons. Those who were evicted would have had a challenging time finding housing because the conflict had destroyed housing stock on a large scale. The combined effect would have substantially increased social tensions in an already sensitive transitional justice context. The East Timor example suggests that it is important to know when a right to adequate housing is *not* best served by housing and property restitution programs, and in these circumstances, what the alternatives may be. Whether restitution is appropriate will depend in part on the specific return process at play in a particular context. For example, spontaneous refugee return will demand a different approach than organized return; the same is true for a rapid versus a gradual return. In cases of lengthy conflict—where land claimed by a displaced person may have been the subject of multiple transfers, including acts of sale, gift, lease, mortgage, or inheritance—laws that mandate restitution to displaced persons may do more harm than laws that prefer other categories of claimants, including persons in long-term possession, purchasers of value, lessees in possession, or others who have acquired interests in good faith.

Restitution as a Strategy for Peacebuilding

The preamble to the Pinheiro Principles states that "the right to housing, land, and property restitution is essential to the resolution of conflict and to post-conflict peacebuilding." Further, "the implementation of successful housing, land, and property restitution programs, as a key element of restorative justice, contributes to effectively deterring future situations of displacement and building sustainable peace." In his 2002 working paper, Pinheiro describes restitution as an "increasingly prominent component of efforts to… prevent future conflict in countries."[72] Paglione develops this point, arguing that restitution "enables [the] rebuilding [of] livelihoods" as a "means of achieving social reconciliation and stability."[73] Cordial and Rosandhaug argue that the property restitution process in Kosovo "indicates a recognition of the fact that the resolution of property rights issues is a central component of peacebuilding efforts and indispensable to economic revitalization and the stability of peacebuilding and democratization efforts." Leckie argues that the economic and social stability of states is linked with housing and property restitution and that consequently programs implementing restitution can be seen as "part of a larger process of development, [that] contribute greatly to the rule of law and overall stability."[74]

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[72] *See* Sérgio Pinheiro, "The Return of Refugees' or Displaced Persons' Property," para 21; UNHCR Global Consultations on International Protection, "Voluntary repatriation," UN Doc. EC/GC/02/5, April 25, 2002, para 14.

[73] Paglione, "Individual Property Restitution," 395. Paglione subsequently states in relation to the Pinheiro principles that "[t]he question of whether property restitution is the best solution in providing an effective remedy at individual level and in reconstructing the social fabric is never asked."

[74] Leckie, "Introduction," 39.

The proposition that restitution is essential to peacebuilding is often asserted as a matter of a priori reasoning,[75] rather than a conclusion of causation derived from a representative sample of conflict case studies. In fact, there is no empirical evidence to support the assertion, and the case that restitution contributes to peacebuilding is not so clear. After conflicts such as those in Afghanistan and Rwanda that involve complex histories of dispossession, restitution of land to one category of claimant runs the risk of inflaming the grievances of other claimants. In such cases, restitution may be used as a tool to further territorial strategies rather than to build peace. For example, an emergent regime or state may use restitution as a means to extend its authority or to assert ethnic or tribal authority in a longstanding conflict over control of frontier land.[76] In "simpler" cases such as Bosnia-Herzegovina and Kosovo that involved "one-off" acts of ethnic cleansing, it is tempting to reason that restitution necessarily contributes to peacebuilding because it is simply a reversal of recent discriminatory practices. But Cox questions this logic in relation to Bosnia:

> Th[e] wholehearted embrace by the parties to the Dayton Agreement of the rights of refugees and displaced persons to return seems rather incongruous, being committed to paper so soon after the cessation of five years of bitter conflict waged explicitly for the purpose of dividing the population…. The war in Bosnia and Herzegovina, and by extension the campaigns of ethnic cleansing… were suppressed by international intervention with the underlying issues and tensions far from resolved.[77]

Restitution as a Remedy

Some international instruments identify restitution as a preferred remedy in cases of gross violations of generally applicable human rights.[78] The Geneva Convention relative to the Protection of Civilian Persons in Time of War states that "[p]ersons… evacuated shall be transferred back to their homes as soon as hostilities in the area in

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[75] Paglione, "Individual Property Restitution"; Pinheiro, "The Return of Refugees' or Displaced Persons' Property."

[76] Liz Wily, "Land Rights in Crisis: Restoring Tenure Security in Afghanistan," Afghanistan Research and Evaluation Unit Issue Paper Series, March 2003.

[77] Cox, "The Right to Return Home," 609.

[78] *See* Williams, "Post-Conflict Property Restitution," 448. Williams views this as one of "two autonomous grounds" on which the emerging right of post-conflict property restitution is supported, the other being the "right of refugees to return to their homes of origin." Due to Williams' separation of these factors, Williams perceives two ways of justifying the right to property restitution. First, "as a measure necessary to create the conditions for refugee return" and second, "as a remedy, obligatory in its own right for serious human rights violations." Ibid., 451. *See also* Leckie, "Introduction," 4–6. Leckie argues that there is "clear preference for restitution as a favored remedy for violations of international law, in particular those violations involving the illegal confiscation of housing, land or property" as can be found in The International Law Commission's *Articles on State Responsibility* and the ruling of the Permanent Court of International Justice in the *Chorzów Factory (Indemnity Case)* of 1928 (which Leckie argues prefers restitution as the remedy for illegal taking of property by governments).

question have ceased." Similarly, the Rome Statute of the International Criminal Court provides that "[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[79] The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the "van Boven/Bassiouni Principles") confirm the remedial characteristics of restitution. Principal 18 states that:

> In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation… which include[s] the following forms: Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The characterization of restitution as a remedy allows a degree of context-specific variation in program design. The recent case of Demopoulos v. Turkey in the European Court of Human Rights provides an example. A number of cases arising out of the Turkish occupation of Northern Cyprus in 1974 resulted in rulings that the government of Northern Cyprus had violated the rights to property[80] and to the home[81] of displaced Greek Cypriots. The Northern Cyprus government then sought to provide redress to the displaced through a "Law for the Compensation, Exchange and Restitution of Immovable Properties."[82] In *Demopoulos*, the court denied the claims of seventeen Greek Cypriots for failing to first seek redress under the Immovable Property Commission that the new law had created.[83] It further stated that restitution is not the only, or even a primary, means of redress for displacement from land, as compensation or other remedies may be applied even when restitution is not materially impossible.[84]

The Problem of Secondary Occupation

Secondary occupation is particularly challenging to restitution programs because addressing it is often more complicated than simply replacing secondary occupants with the previous owners. The extent of secondary occupation will not only

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[79] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, e*ntered into force*, July 1, 2002, art. 75, para 1.

[80] *See*, e.g., Loizidou v. Turkey, App. No. 40/1993/435/514., paras 63–64 (Eur. Ct. H.R. 1996).

[81] *See*, e.g., Cyprus v. Turkey, App. No. 25781/94., paras 172–75 (Eur. Ct. H.R. 2001).

[82] Rhodri C. Williams, "Introductory Note to the European Court of Human Rights: Demopoulos v. Turkey," edited draft, http://terra0nullius.wordpress.com/2010/10/20/note-on-ecthr-decision-in-demopoulos-v-turkey/ (final version published in *International Legal Materials* 49, no. 3 (2010)).

[83] Demopoulos v. Turkey, App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04. para 128 (Eur. Ct. H.R. 2010).

[84] Ibid., paras 59, 106.

affect the likelihood of restitution, but also affect the relative advantages of compensation as an alternative to restoration of rights. The UN Sub-Commission on the Promotion and Protection of Human Rights described secondary occupation as impeding refugee return, among other places, in Armenia, Azerbaijan, Bhutan, Bosnia and Herzegovina, Croatia, Georgia, and Kosovo.[85] In relation to Rwanda, the Sub-Commission stated:

> [Many] secondary occupiers are themselves displaced persons. They themselves may have fled conflict, leaving behind their own homes and communities. In many cases, secondary occupation is enforced, encouraged, and/or facilitated by the forces that caused the initial displacement, and the secondary occupiers themselves may have had little or no choice in relocating to their housing in question.[86]

Secondary occupation is an obstacle to return, and consequently to housing and property restitution, because it results in several practical difficulties. First, secondary occupation raises complex questions with regard to legal ownership and often necessitates judicial consideration in order to establish property rights and original residency. The problem may be further exacerbated by the lack of legal documents which establish property ownership, due to loss during flight or to destruction. From a purely logistical perspective, documenting and verifying property ownership in these cases may be ineffective and slow and likely to exclude poor and vulnerable groups that lack documentation or even formally recognized rights to land. This is especially the case where domestic institutions do not have the capacity and resources to deal with the heavy caseload resulting from widespread secondary occupation.

The UNHCR, in a report on the problems of access to land in repatriation operations, summarized the difficult choice that governments face between restitution and other remedies:

> Returning refugees may claim the right to restitution of occupied land, which may lead to conflicts with those who have occupied it. Governments must decide whether it is preferable to devolve the land to its earlier owners or assignees, or to maintain tenure for the new occupants, while compensating either in kind or financially those who have been deprived of their land. The choice must be justified in the light of political, legal and economic imperatives, as well as ethical considerations. It must also be measured against the requirements of national reconciliation. It is clear, for example, that the choice between restitution and compensation must be based on the legal systems governing land ownership, in order to ensure that the rights of individuals are guaranteed. If a systematic policy of restitution could gravely jeopardise national reconciliation, it is also clear that a refusal to devolve the land could be perceived as a denial of justice, no matter how generous the

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[85] Sub-Commission on the Promotion and Protection of Human Rights, "Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Working Paper," UN Doc. E/CN.4/Sub.2/2002/17, 9.

[86] "It is… often innocent persons, acting in good faith, who occupy homes belonging to refugees or other displaced persons." Sub-Commission on the Promotion and Protection of Human Rights, "Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Working Paper," UN Doc. E/CN.4/Sub.2/2002/17, 10.

> compensation offered. The interests of the various groups concerned, as well as the economic and cultural consequences, must therefore be taken into account in an effort to ensure their peaceful coexistence.[87]

Conclusion

Post-conflict land policy must generally deal with competing claims between returning refugees, those who acquired title under previous regimes, those who lost land under previous regimes, and those in current occupation without "lawful" title and/or alternative place of residence. These issues are not directly related to, nor as immediately pressing as provision of security and food, so post-conflict responses have tended to delay their consideration until after completion of humanitarian interventions. However, immediate needs of shelter and tenure security do require attention in the immediate aftermath of conflict. Poor planning in these areas or a lack of planning altogether can have serious consequences not only for the short-term success of emergency and temporary camps at meeting urgent needs, but for the success of longer-term restitution programs. Post-conflict interests can become entrenched, temporary measures taken for the benefit of displaced persons can produce conflict with other individuals and communities, and mass influxes of refugees can strain the natural resources that sustained them prior to the conflict.

Beyond questions of short-term planning that may affect a later restitution program, planners of restitution itself must consider the question: Restitution for whom? While in some cases, including Bosnia-Herzegovina and Kosovo, restitution programs may be relatively straightforward because they are directed at reversing "ethnic cleansing," and in other cases, they will be greatly complicated by multiple categories of dispossessed claimants and large numbers of current occupiers with no alternative place of residence. Unfortunately for policymakers who must balance diverse needs, effective property programming is a zero-sum game. Careful choices may be required between competing demands imposed by international human rights standards. Demands for restitution, for example, may need to be balanced with requirements for housing, tenure security, access to natural resources, and non-discrimination. While restitution of land and housing may be an appropriate policy response in circumstances of one-off displacement or ethnic cleansing, a focus on restitution alone in cyclical cases of displacement may entrench patterns of grievance that are underlying causes of conflict. Moreover, programs of restitution or compensation for displaced persons have a high degree of institutional difficulty, which means that restitution may not provide the rapid responses required to avoid escalating claims that inflame tensions and induce further forms of grievance.

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[87] UNHCR, "The Problem of Access to Land and Ownership in Repatriation Operations," May 1998, 5, http://www.unhcr.org/3ae6bd490.html.

International standards on land and transitional justice must allow sufficient flexibility to meet context-specific challenges. In some cases, providing displaced persons immediate access to their abandoned homes and land may be appropriate. In those cases, a rights-based approach can help justify restitution programs that may seem to favor certain conflict-affected persons over others. In other cases, restitution will cause more problems than it solves. Insistence that restitution is a right to be guaranteed regardless of the circumstances risks sacrificing other, more fundamental post-conflict objectives. It would seem odd, for example, to restore land to a displaced family in the name of protecting their human rights if the result is likely to be more serious human rights violations, either because those evicted are deprived of any form of shelter or because the evictions stoke renewed violent conflict. Instead of being treated as an inalienable right in all cases, restitution should be deemed one of the several remedies to the problem of displacement that may be applied when the circumstances so dictate. Restitution is not a "one-size-fits-all" end in itself, but, depending on the context, it is a potential tool for furthering some of the aims of peacebuilding and transitional justice after armed conflict.

In addition to resolving tensions between the right to property and the right to housing, international frameworks for land and transitional justice must develop context-specific tools to link policy design with on-the-ground realities. Rigid focus on universalized rights or "best practice" models may lead to the adoption of ill-suited and less than optimally effective land policy, because of resistance from political elites, or challenges posed by coordination and institutional capacity. This chapter identifies a number of contextual factors that require analysis for improved policy design, including the temporal inter-connection of post-conflict land issues, the effects of incentives for authority formation and inter-agency coordination, and the nature and extent of population displacement and dispossession.

Conclusion: From Periphery to Foreground

Dustin N. Sharp

What does it mean to do "justice" in times of transition? Attempts to answer this question have often aroused debate, from the transitions associated with the so-called third wave of democratic transitions in the 1980s and 1990s up through the present day.[1] Even though a global norm of accountability for egregious atrocities has now gained a toehold,[2] and the practices and institutions associated with transitional justice have in some respects moved from the exception to the norm, the moral, legal, and policy dilemmas generated by transitional justice practice have not always become easier with the passage of time. If these controversies persist, it is at least in part because "justice" remains an elusive and essentially contested concept.[3] And while transitional justice must necessarily remain a far narrower concept than justice itself,[4] the extent to which there can or should be greater overlap between the two remains a topic of enduring debate.

[1] The "third wave" refers to a period of global democratization beginning in the mid-1970s that touched more than sixty countries in Europe, Latin America, Asia, and Africa. *See generally* Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

[2] *See generally* Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011).

[3] Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field,'" *International Journal of Transitional Justice* 3 (2009): 27.

[4] *See* Roger Duthie, "Transitional Justice, Development, and Economic Violence," in this volume.

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In recent years, transitional justice has become more mainstream,[5] and yet at the same time, its boundaries and blindspots are increasingly questioned.[6] It has been pushed to the nerve centers of international policymaking, while other voices push outward, arguing the need for locally grown approaches and solutions to the fundamental questions transitional justice poses. While the mainstreaming of transitional justice raises many concerns, one can hope that these centripetal and centrifugal forces will be a source of creative energy and tension, moving transitional justice practice and policy into new and at times uncharted waters in an attempt to find more holistic and balanced approaches to questions of justice in transition.[7]

As part of the push and pull of this process of contestation, the various chapters of this volume have called upon policymakers, activists, and academics to step back from the *field* of transitional justice that has evolved over the last three decades and to ask, as if for the first time, some fundamental questions: *When we talk of doing justice in times of transition, what exactly do we mean? Justice for what, justice for whom, and to what ends?*[8] *How will justice as we have defined it help to lay the predicate for long-term positive peace?* These questions are not meant to be merely rhetorical, but to serve as tools for thinking through some of the limitations of transitional justice policy and practice as they have evolved up to the present day.

Examining Emerging Practice and Norms

As many of the chapters in this volume have indicated, for much of the short history of transitional justice as a field of policy, practice, and study, "doing justice" has largely centered on some kind of truth telling and accountability for physical atrocities. For the most part, questions of economic violence—including plunder of natural resources, corruption and other economic crimes, and violations of economic and social rights more generally—have sat at the periphery. This state of affairs is, however, slowly beginning to change. Increasingly, the constructed boundaries and peripheries of the field, including what Zinaida Miller has called

[5] *See* Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34 (2007): 412 (observing that "transitional justice has emerged from its historically exceptionalist origins to become something which is normal, institutionalized and mainstreamed"). This is perhaps best exemplified in high-level reports by the UN Secretary General. *See*, e.g., United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, UN Doc. S/2011/634, October 12, 2011.

[6] *See* Dustin Sharp, "Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice," *Harvard Human Rights Journal* 26 (2013): 149–78.

[7] Ibid.

[8] *See* Rosemary Nagy, "Transitional Justice as a Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008): 280–86.

the constructed "invisibility" of the economic,[9] are being challenged by activists and academics, even if the debate is still a lively one.[10] Though it has perhaps been underappreciated, transitional justice practice itself is also slowly changing. An increasing number of truth commissions in Africa and elsewhere, including Chad, Ghana, Sierra Leone, Liberia, Kenya, and East Timor, have started to rewrite the relatively narrow and dominant script of the early years of transitional justice, bringing questions of economic violence into the foreground of their work.[11] As described by Naomi Roht-Arriaza in her contribution to this volume, in Colombia, the government has recently embarked upon an ambitious restitution and reparations program aimed at "integral reparations" that encompass facets of economic violence as well as physical integrity violations.[12]

Building upon these evolutions in practice, there are signs of high-level normative and policy change within the United Nations, which has over the years become a deep repository of transitional justice experience. For example, according to the 2010 *Guidance Note of the Secretary-General on the UN's Approach to Transitional Justice*, "Successful strategic approaches to transitional justice necessitate taking account of the root causes of conflict or repressive rule, and must seek to address the related violations of all rights, including economic, social, and cultural rights."[13] Similarly, the 2011 *UN Secretary General's Report on the Rule of Law and Transitional Justice* observes "a growing recognition" that truth commissions should address the economic, social, and cultural rights dimensions of conflict and notes that "the United Nations must promote dialogue on the realization of economic and social rights, and provide concrete results *through transitional*

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[9] Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008). I have argued elsewhere that the challenge to the invisibility of the economic is part of a larger trend in transitional justice scholarship and practice of an increasing willingness to question the peripheries of the field. Similar challenges are being made to the role of the "local" in transitional justice policy and practice, and to the notion that justice and the rule of law can be (re)established via a repertoire of apolitical, value-neutral techniques without considering their connection to the distribution of political, economic, social, and cultural power. *See* Dustin Sharp, "Interrogating the Peripheries."

[10] In addition to the contributions to this volume, *see*, e.g., Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Politics* 40, no. 1 (2007); The entire volume of *International Journal of Transitional Justice* 2 (2008); Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Resource Council, 2009). For a thoughtful but skeptical take on calls to broaden the mandates of transitional justice institutions, *see* Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social and Legal Studies* 21 (2012): 171–86.

[11] Dustin Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond," in this volume.

[12] Naomi Roht-Arriaza, "Reparations and Economic, Social, and Cultural Rights," in this volume.

[13] United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010, 7.

justice mechanisms, legal reform, capacity-building, and land and identity registration efforts, among other initiatives."[14]

The question, therefore, is no longer *whether* questions of economic violence should be taken up by transitional justice mechanisms and institutions as a general policy matter. Norms and practice in this regard are nascent, but appear to be building momentum. Even so, resolving the threshold question of *whether* opens a veritable Pandora's box of thorny moral, legal, and policy issues, many of which have been evoked in the various contributions to this volume. In particular, *how* should transitional justice mechanisms and institutions engage with questions of economic violence where context-specific factors—e.g., the nature of past harms, conflict drivers, and future needs—suggest that it would be important and prudent to do so? Ultimately, the answer to this and other "post-threshold" questions will have to be worked out through years of further practice and study, but this volume has sought to frame a few questions to guide that process going forward.

Where Does Policy Go from Here?

If indeed questions of economic violence are moving from the transitional justice periphery to foreground, the question "where does policy goes from here?" is necessary, but perhaps also somewhat dangerous to the extent that it suggests the possibility of a universal, one-size-fits-all policy or solution. There can be no global transitional justice policy in that sense. Solutions must remain context-specific and locally driven. One can therefore only speak of transitional justice policies in the broadest and loosest terms. With this caveat in mind, activists, scholars, and policymakers need to give careful thought to (1) whether engagement with questions of economic violence should be relatively broad or narrow and (2) the extent to which transitional justice efforts should be coordinated with wider efforts related to peacebuilding and development in the post-conflict context.

Broad and Narrow Approaches to Economic Violence

Many of the concerns relating to the embrace of economic issues by transitional justice institutions—questions of over-breadth, dilution of efforts, lack of available time and financial resources—seem to assume that engagement with questions of economic violence must be broad, involving fundamental and deep questions of radical resource redistribution, development, and a wide range of historical socioeconomic wrongs and concerns. Yet the practice of a handful of pioneering truth commissions

[14] United Nations Secretary General, "The Rule of Law and Transitional Justice in Post-Conflict Societies," UN Doc. S/2011/634, October 12, 2011, 7, 15. Emphasis added.

to date suggests that this need not be so,[15] and indeed many of the chapters in this volume advocate some caution in broadening the field of transitional justice beyond the violations of physical integrity that have been its traditional focus. Roger Duthie, for example, argues for an approach that focuses "on only the most serious and widespread crimes, which are likely to have the greatest negative impact on economic and social rights."[16] Similarly, in my own chapter looking at the work of African truth commissions, I have proposed that in many cases transitional justice institutions should focus on an "economic violence-human rights nexus," which would involve looking primarily at those aspects of economic violence that most directly and egregiously impact economic and social rights recognized under national and international law.[17] It is useful to note in this regard that the most serious violations of economic and social rights can in fact amount to war crimes.[18]

In many ways, approaches on the narrower end of the spectrum would not be so different from the approaches often taken in the past to violations of physical integrity, where, to take the example of the Special Court for Sierra Leone, only those who "bear the greatest responsibility" were to be prosecuted.[19] While many of those who in fact bear the greatest responsibility have historically avoided accountability in Sierra Leone and elsewhere, the key point is that human rights prosecutions are invariably *limited and selective* due to the sheer number of abuses and perpetrators involved. Similarly, for most truth commissions, only a portion of the most egregious harms can ever be heard or find their way into the final report.

To be sure, a narrower approach would likely exclude some forms of economic violence from the purview of transitional justice institutions because they would not fit within a tight "economic violence-human rights nexus." For example, as Chris Albin-Lackey has noted in his contribution to this volume, it cannot always be demonstrated that certain acts of corruption have had a significant impact on economic and social rights, yet when corruption rises to a certain level, human rights impacts become easier to identify.[20] Narrower approaches along the lines I have proposed would leave transitional justice institutions to focus largely on the latter, easier case. Of course, the funneling effect of narrower approaches to questions of economic violence illustrated here would come with costs. Deep injustices that cannot easily be articulated in terms of human rights may indeed warrant greater recognition by transitional justice institutions. At the same time, narrower approaches would have the virtue of requiring truth commissions to remain disciplined and rigorous in their documentation and analysis of questions relating to

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15 *See* Sharp, "Economic Violence in the Practice of African Truth Commissions."

16 *See* Duthie, "Transitional Justice, Development, and Economic Violence."

17 *See* Sharp, "Economic Violence in the Practice of African Truth Commissions."

18 *See* Evelyne Schmid, "War Crimes Related to Violations of Economic, Social, and Cultural Rights," *Heidelberg Journal of International Law* 71, no. 3 (2011): 3, 5, 9–17.

19 Statute of the Special Court for Sierra Leone, art. 1.

20 *See* Chris Albin-Lackey, "Corruption, Human Rights, and Activism: Useful Connections and their Limits," in this volume.

economic violence, something essential given the reality of time and resource constraints. As with so many other questions of transitional justice policy, there are no easy answers, only trade-offs that must be carefully analyzed.

While future transitional justice institutions might use a number of other ways to circumscribe their inquires to varying degrees, the point is that engagement with economic violence need not of itself set transitional justice institutions on a course to attempt to address all of the socioeconomic wrongs in a society, or to more broadly engage in matters better left to long-term development and political processes, whatever those issues might be deemed to be. Caution may be especially warranted as new ground is opened, new methodologies tested, and new boundaries pushed. Such work will at times, for example, require new forms of expertise and evidence beyond the victim testimony and forensic data upon which truth commissions have traditionally relied. Leaping headlong into new areas without the requisite expertise may result in shoddy work that can only serve to reinforce doubts as to whether transitional justice institutions are equipped to engage with questions of economic violence.[21] As Roger Duthie points out, however, many of the grounds for caution that have been raised by skeptics are things that can easily be remedied, because they reflect not fundamental or structural shortcomings, but practical and methodological difficulties.[22] Careful thought and planning can go a long way in this regard.

In the end, some transitional justice institutions will take a broader approach than others. In some contexts, addressing legacies of economic violence may appear to key constituencies as having *more* relevance than other more traditional transitional justice concerns.[23] In yet other contexts, there will be less of a need to address questions of economic violence altogether.

Expectations and ideals about justice will always be broader than the issues that transitional justice institutions can actually address. Yet in practice lines must be drawn and some questions of social justice will invariably be excluded. This dilemma may have the effect of leaving few fully satisfied with transitional justice mechanisms and institutions. The key point, however, is that whatever is to be the dividing line between what is included or not included within transitional justice mandates, it should not be drawn upon lines of civil and political and economic and social rights. Besides being simplistic and unnecessary, to do so where economic violence has been intimately associated with the logic of a conflict or the abuses suffered would be to stymie the ability of transitional justice institutions to lay at least some of the groundwork for long-term positive peace.

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[21] For example, though pioneering, some of the work of the Liberian Truth and Reconciliation Commission with regards to questions of economic violence appeared to lack a certain rigor. *See* Dustin Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond."

[22] *See* Duthie, "Transitional Justice, Development, and Economic Violence."

[23] Consider in this regard the example of Kenya where it has been argued that economic issues actually have a longer pedigree and are more central to most victimization accounts than civil and political rights, which "were late entrants to the Kenyan debate." Godfrey Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *International Journal of Transitional Justice* 3 (2009): 460.

Making Connections with Peacebuilding and Development

As many of the chapters in this volume suggest, addressing legacies of economic violence in times of transition will necessarily involve the work of many actors, only some of whom will be formally doing the work of "transitional justice," as that term has been traditionally conceived. Over the long term, actors involved in broader development and social service delivery efforts, anti-corruption initiatives, land-tenure reform, and work relating to transparency in the corporate, financial, and natural resources sectors will necessarily need to do the lion's share of the work when it comes to addressing the ripple effects of economic violence. Yet in addressing questions of economic violence, even if only narrowly and for a limited time, formal transitional justice institutions may increase the likelihood that these questions will in fact come to be seen as social priorities that must be carried out *as a matter of justice*, rather than mere wishful policy goals.

Whether the approach taken is a relatively broad or narrow one, most engagement with questions of economic violence will ultimately represent a broadening of the parameters of transitional justice from the standpoint of history. This broadening raises a number of questions about how transitional justice work should relate to larger aspects of post-conflict peacebuilding and development policy more generally. It seems natural to suggest that the various actors involved in peacebuilding, development, and transitional justice work should develop policies and practices that would help to build mutually reinforcing synergies, and at the same time avoid potential duplication of efforts and conflict.[24] At the same time, in grappling with this and other similar questions raised by the blurring of the boundaries of transitional justice, a note of caution is in order.

As I have noted elsewhere, peacebuilding, development, and transitional justice initiatives have long been subject to powerful, parallel critiques: That they are too often externally driven; that they give too little attention to local or indigenous traditions; that they are presented as technocratic, neutral, and apolitical solutions to highly contested political issues and choices; and that they ultimately reflect a dominant liberal international paradigm that seeks to foster Western, market-oriented democracy.[25] There are reasons to fear that coordination between these various sectors arising out of a greater embrace of economic issues on the part of transitional justice institutions, while arguably necessary, will also carry with it the potential to exacerbate some of these tendencies, rather than reduce them.[26] This is

[24] *See,* e.g., Johanna Herman et al., "Beyond Justice Versus Peace: Transitional Justice and Peacebuilding Strategies," in *Rethinking Peacebuilding; The Quest for Just Peace in the Middle East and the Western Balkans*, eds. Karin Aggestam and Annika Björkdahl (New York: Routledge, 2012) (observing the "importance to find commonalities between the transitional justice and peacebuilding processes, particularly since activities in the field often overlap").

[25] Dustin Sharp, "Beyond the Post-Conflict Checklist; Linking Peacebuilding and Transitional Justice Through the Lens of Critique," *Chicago Journal of International Law* 14 (2013): 165–196.

[26] Ibid.

particularly so given the tendency of global institutions to operate through standardized templates and "best practices."[27] For these and other reasons, attempts to coordinate or build synergies between peacebuilding, development, and transitional justice should be made with an awareness of the parallel critiques that have dogged all three fields.

Beyond the danger of centripetal forces in policymaking that arise out of efforts at coordination, it is also important to consider that post-conflict peacebuilding, development, and transitional justice are all heavily associated with what has been called "liberal international peacebuilding," an approach to questions of post-conflict peace and development policy that tends to see markets and liberal democracy as the unique pathways to peace.[28] Writing for this volume, Chandra Sriram notes that the close association between transitional justice and liberal international peacebuilding casts doubt on the possibility for radical change when it comes to greater engagement with questions of economic violence in transitional justice work.[29] If this is so, then greater coordination with development and post-conflict peacebuilding more generally might cast even further doubt. Yet it might also be true that greater embrace of questions of economic violence by transitional justice institutions, an emerging trend in practice, could serve as one form of resistance to this association, playing a subversive role that would serve to distance transitional justice from some of the more simplistic notions that have come to undergird much of liberal international peacebuilding.[30]

A Journey Without Maps

Looking forward, transitional justice practice and policy—including the extent to which they will relate to or be coordinated with peacebuilding and development policy and initiatives—will likely evolve by feeling their way along in the dark, much as they have done for the past three decades. There is no articulable set of policy prescriptions that can serve as a detailed roadmap for addressing what will inevitably be heavily contested questions concerning how to bring about greater truth and accountability in matters of economic violence in times of transition. As Topher McDougal has noted in his contribution to this volume, there are simply

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[27] As Roman Paris has argued, efforts at coordination often give impetus to centripetal forces in policymaking. *See* Roland Paris, "Understanding the 'Coordination Problem' in Postwar Statebuiliding," in *The Dilemmas of Statebuilding; Confronting the Contradictions of Postwar Peace Operations*, eds. Roland Paris and Timothy Sisk (New York: Routledge, 2009), 62.

[28] *See generally* Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004); Chandra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21, no. 4 (2007): 580–81.

[29] *See* Chandra Sriram, "Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?," in this volume.

[30] *See generally*, Roland Paris, *At War's End.*

too many unanswered questions about the linkages between conflict, peace, and economic violence to pretend otherwise.[31] What can be hoped, however, is that as practice evolves, new experiments in transitional justice attempt to draw lessons from old ones without at the same time hewing too closely to a historically dominant script and set of methodologies that may be less relevant to new contexts, assuming they were ever fully relevant to the conflicts of old.[32]

While transitional justice practices have accomplished much in a very short time, changing in some respects the institutional and normative post-conflict landscape, the development of new approaches will be important to building positive peace in the wake of widespread atrocities and injustice in the future. In considering the need to rethink traditional approaches to questions of justice in transition, it is useful to note that a recent study reviewing empirical work on the state-level effects of transitional justice, including effects on levels of political violence, adherence to the rule of law, democratization, and a political culture of human rights and pluralism, observes a "prevailing ambiguity surrounding TJ impacts."[33] In other words, despite some three decades of transitional justice advocacy, practice, policy, and research, very few questions have been answered. The field remains young, and a willingness to question boundaries and blindspots must continue, perhaps especially given the mainstreaming of the field. Moving forward, it is hoped that the contributions to this volume can play a useful role in this process by helping to generate some much-needed questions and conversations as issues of economic violence slowly move from the periphery to the foreground of transitional justice concern.

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[31] *See* Topher McDougal, "The Trilemma of Promoting Economic Justice at War's End," in this volume.

[32] It has been argued that as transitional justice practices have spread around the world, they have done so not necessarily by adapting themselves to each new context, but through a process of "acculturation" whereby a dominant script or practice is replicated again and again as a result of repeated information exchanges and consultations. James Cavallaro and Sebastián Albuja, "The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond," in *Transitional Justice from Below, Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford and Portland, Oregon: Hart Publishing, 2008), 125.

[33] Oskar Thoms et al., "State-Level Effects of Transitional Justice: What Do We Know?," *International Journal of Transitional Justice* 4 (2010): 332.

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