

ECONOMIC AND SOCIAL JUSTICE FOR SOCIETIES
IN TRANSITION

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I. INTRODUCTION: THE ROOTS OF TRANSITIONAL JUSTICE

As a longtime aficionado of transitional justice—in fact, as one who became an accidental practitioner of the discipline before I even knew it had a name—I was tempted to succumb to an indulgent nostalgia in this Essay and entertain readers with a celebration of our many collective accomplishments. There is indeed cause to celebrate. However, rather than commemorate our achievements, I have chosen to seize the opportunity that has been given to me to reflect on whether we really are where we can and should be.

Let me recall briefly the intellectual and political roots of transitional justice as a field of law. Anchored in the Nuremberg Trials, contemporary understandings of transitional jus-

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tice have emerged from the erstwhile revolutionary proposition of individual criminal responsibility for international crimes. These crimes, in turn, originate in the law of war and, increasingly, in international human rights law. Therefore, transitional justice is at its root modeled on criminal justice systems,¹ although it quickly became apparent that analogies to national criminal law were necessary but insufficient to deal with the range of grievances and remedial actions required in societies emerging from conflict. Today, transitional justice has outgrown its early framework, and we have seen in recent years the emergence of creative efforts to expand the discipline.²

I believe that transitional justice, without losing its *raison d'être*, is poised to make the significant leap that would allow justice, in its full sense, to contribute as it should to societies in transition. We should work on the basis of what Alexander Boraine has called a “holistic interpretation” of transitional justice. While not detracting from criminal justice, this approach “offers a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and

1. See, e.g., Juan E. Méndez, *Accountability for Past Abuses*, 25 HUM. RTS. Q. 255, 255-82 (1997); CHERIF BASSOUINI, *POST-CONFLICT JUSTICE* (2002). For an appraisal of criminal justice as a fundamental element of transitional justice, see RUTI G. TIETEL, *TRANSNATIONAL JUSTICE* 27-67 (2000).

2. According to Alexander Boraine:

Some prominent scholars have rejected the term itself, preferring instead to speak of post-conflict justice. But post-conflict justice doesn't address the complexities and processes of political transitions, whether through conflict, negotiation, or state collapse. . . . Others define transitional justice as an extension of regular criminal justice systems that rely exclusively on legal remedies to rectify grievances. This fails to account for the limits of law, particularly in cases of mass crimes such as genocide, ethnic cleansing, and crimes against humanity. In trying to come to terms these [sic] types of crimes, not only does our moral discourse appear to reach its limit, but it also emphasizes the inadequacy of ordinary measures that usually apply in the field of criminal justice.

Alexander L. Boraine, President, Int'l Ctr. for Transitional Just., Address on Transitional Justice as an Emerging Field 2 (Mar. 11, 2004) (transcript available at <http://www.idrc.ca/uploads/user-S/10829975041revised-boraine-ot-tawa-2004.pdf>).

transformation.”³ Transitional justice must have the ambition to assist 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 that led to the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it. With these aims so broadly defined, transitional justice practitioners will very likely expose a great number of discriminatory practices and violations of economic, social, and cultural rights.

The gravity of conflict situations and the resulting violations of economic, social, and cultural rights emphasize the fundamental importance of this claim.⁴ As governments, together with the international community, pursue the establishment of democratic institutions in post-conflict societies, they should not neglect these rights. Most importantly, governments should not assume that vulnerable groups will fare better in pursuing their economic, social, and cultural rights than such groups do in ensuring respect for their civil and political rights.⁵ I would argue that not actively protecting and promot-

3. Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFF. 17, 18 (2006) [hereinafter Boraine, *Transitional Justice*].

4. As discussed further *infra*, the vindication of economic, social, and cultural rights in transitional justice is not only a matter of principle but also one of effectiveness: Arguably, the protection of these rights is indispensable in realizing the goals of peace-building and transitional justice. See *infra* notes 23-26 and accompanying text. As Shedrack Agbakwa noted: “The non-recognition . . . of economic and social rights potentials and/or possible role in triggering many conflicts . . . makes these conflicts more pervasive and intractable than they would have otherwise been.” Shedrack C. Agbakwa, *A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peace Building in Africa*, 47 J. AFR. L. 38, 40 (2003).

5. The Committee on Economic, Social, and Cultural Rights (CESCR) stated in its often-quoted submission to the Vienna Conference on Human Rights: “Just as carefully targeted policies and unremitting vigilance are necessary to ensure that respect for civil and political rights will follow from, for example, the holding of free and fair elections or from the introduction or restoration of an essentially democratic system of government, so too is it essential that specific policies and programmes be devised and implemented by any Government which aims to ensure the respect of the economic, social, and cultural rights of its citizens. . . .” World Conference on Human Rights, Preparatory Committee, Apr. 19-30, 1993, *Status of Preparation of Publications, Studies and Documents for the World Conference*, ¶ 4, U.N. Doc A/CONF.157/PC/62/Add.5, (Mar. 26, 1993) [hereinafter *Status of Preparation*].

ing economic, social, and cultural rights reflects the hidden assumption that these rights are not entitlements but aspirational expectations to be fulfilled by market-driven or political processes alone.

II. THE NEGLECT OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN MAINSTREAM JUSTICE

It is necessary to examine why economic, social, and cultural rights have not traditionally been a central part of transitional justice initiatives and whether there are real impediments to the pursuit of such a comprehensive ideal of justice in societies in transition. Arguably, the reality of the marginalization of these rights is reflected in our general understanding of the concept of justice itself.

From the perspective of this Essay, current definitions of justice and transitional justice fail to meet the real need of addressing abuses during conflict situations. Take, for instance, the definition of justice in the former United Nations (UN) Secretary-General's report on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies":⁶

For the United Nations, "justice" is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.⁷

The first sentence, "fairness in the vindication of rights," liberally construed, may imply the need to guarantee economic, social, and cultural rights. However, the language of "the victim" and "the accused" in the second sentence appears to circumscribe the concept of justice within a more traditional dispute resolution framework that primarily focuses on violations of civil and political rights.

To the extent that this characterization is accurate, it reflects a narrow approach to justice that informs the entirety of

6. The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc S/2004/616 (Aug. 23, 2004) [hereinafter *Rule of Law Report*].

7. *Id.* ¶ 7.

the Secretary-General's report.⁸ For example, transitional justice is defined in the following terms: "The notion of '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."⁹ By focusing on "large-scale past abuses," the dominant understanding of which is generally limited to civil and political rights violations amounting to crimes under international law, this definition of transitional justice obscures the need to address gross violations of economic, social, and cultural rights associated with conflict.

None of this should come as a surprise. As transitional justice is heavily inspired by mainstream justice and criminal law, its neglect of economic, social, and cultural rights is merely symptomatic of a deep ambivalence within justice systems about social justice.¹⁰ I suggest that, in order to expose the choices that are being made and to advocate for a different vision of justice that would include social justice, there is a need to look more deeply into the carving out of social justice from mainstream justice. Many strategies at international and national levels have been based on what is quite clearly an un-

8. Economic, social, and cultural rights are, in fact, not mentioned at all in the rest of the report. *See generally id.*

9. *Id.* ¶ 8. The definition goes on to say: "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." *Id.*

10. For the purpose of this essay, 'social justice' refers to minimum legal standards guaranteeing substantive equality (as reflected in international human rights instruments prohibiting discrimination and protecting economic, social, and cultural rights) in the fulfillment of the idea of freedom from want. Substantive equality is important to social justice, as equality with no qualification may be misinterpreted as formal equality or equality of opportunities only. There are, of course, many understandings of social justice, sometimes conflated with ideas of distributive justice. *See, e.g.,* JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). For an interesting application to political geography, *see* DAVID HARVEY, *NATURE AND THE GEOGRAPHY OF DIFFERENCE* (1996). For a critique of the concept of social justice itself, *see* 2 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* (1978). The purpose here is not to critique these various theories but simply to highlight the role human rights can play.

helpful categorization of rights divided between civil and political rights on the one hand and economic, social, and cultural rights on the other. This division stems principally from Cold War ideological differences and was compounded by other debates on the nature, status, and implementation of economic, social, and cultural rights.¹¹ The adoption in 1966 of two Covenants—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights—rather than of a single treaty guaranteeing *all* human rights epitomized the depth of these differences.¹² This categorization is particularly problematic when considering the well-recognized links between human rights, security, and development¹³ that transitional justice must address.

11. The division of human rights into two separate instruments, as affirmed by the U.N. General Assembly decision in 1951, was hotly debated at the time. Ideological or political reasons were at the forefront of the debate, with the West generally promoting civil and political freedoms and disagreeing with the East over the value of economic rights and their place in a covenant. There were other reasons as well. As Craig Scott notes, there were “implementation-based reasons,” which claimed that because of the rights’ different natures (and, in particular, the alleged non-justiciability of economic, social, and cultural rights), their implementation differed and warranted the drafting of two covenants. States also voiced “pragmatic reasons,” such as the concern that debates over economic rights would delay the adoption of any potential unified covenant. Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L. J., 769, 791-98 (1989). See also OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS at 681-748, U.N. Sales No. 02.XIV.3 (2005). For an appraisal of the Western States’ position, see Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight* (Human Rights & Human Welfare Working Papers, Paper No. 40, 2007), available at http://www.du.edu/gsis/hrhw/working/2006/40-whelan_donnelly-2006-rev.pdf.

12. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2 (1978); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, S. EXEC. DOC. D, 95-2 (1978).

13. See generally The Secretary-General, *Report of the Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc A/59/2005 (Mar. 21, 2005); see also G.A. Res 60/1, ¶ 9, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (“We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.”).

Contrary to this mindset of “categorization,” the story of the Universal Declaration of Human Rights¹⁴ and the place of economic, social, and cultural rights within it reflected a fully integrated vision of human rights as key for ensuring real security in a post-conflict setting.¹⁵ The principles of the indivisibility and interdependence of all human rights have been reaffirmed unanimously and repeatedly by the international community since the end of the Cold War, most notably at the Vienna World Conference on Human Rights in 1993¹⁶ and at the Summits of Heads of State and Government in 2000¹⁷ and 2005.¹⁸ Along with civil and political rights, economic, social, and cultural rights now have the status of binding law in numerous human rights treaties, regional human rights systems, and constitutions.¹⁹

14. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

15. Whelan & Donnelly, *supra* note 11, at 3-9. Also pertinent is President Roosevelt’s articulation in 1941 of four inter-related ‘Freedoms’—freedom of speech and expression, freedom of religious worship, freedom from war, and freedom from fear—necessary to sustain peace in a post-World War II context. Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941) (transcript available at <http://www.ourdocuments.gov/doc.php?doc=70>).

16. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF.157/23 (July 12, 1993).

17. U.N. Millennium Declaration, G.A. Res. 55/2, U.N. Doc A/RES/55/2 (Sept. 13, 2000).

18. G.A. Res. 60/1, *supra* note 13, ¶¶ 13, 119-56.

19. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women art. 13, Dec. 18, 1979, 1249 U.N.T.S. 20378; Convention on the Rights of the Child art. 4, Nov. 20, 1989, 1577 U.N.T.S. 43; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/Res/45/158 (Dec. 18, 1990); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/Res/61/106 (Dec. 13, 2006); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. 69; Council of Europe, European Social Charter, Rev. 1996, E.T.S. 163; African Charter on Human and Peoples’ Rights, O.A.U. Doc. CAB/LEG/67/3 (June 27, 1981). Around 100 constitutions refer to a right to health care and over 110 refer to a right to education. Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 66 (Philip Alston & Mary Robinson eds., 2005). Twenty constitutions recognize the right to food. Food and Agriculture Organization of the U.N., *The Right to Food in National Constitutions*, in THE RIGHT TO FOOD IN THEORY AND PRACTICE (1998), available at <http://www.fao.org/docrep/w9990e/w9990e12.htm>.

Arguments concerning the historical and conceptual origins of international human rights law are not all that should persuade transitional justice practitioners to address economic, social, and cultural rights and their infringement in order to provide justice and redress to victims of all gross human rights abuses—a clear objective of transitional justice efforts.²⁰ There are also instrumental reasons to expand our view of transitional justice. A critical appraisal of past and present conflicts and crisis situations reaffirms the importance of dealing with all human rights violations in an integrated and interdependent manner. If transitional justice's broader objectives of social transformation and the prevention of conflict are to be achieved, it is not only important to build dispute resolution institutions and ensure accountability for abuses but also—and perhaps even more importantly—to attack the sources of the legitimate grievances that, if unaddressed, are likely to fuel the next conflagration.

Violations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights, whether they are causes or consequences of the latter. In many instances, such as in Northern Ireland²¹ or Guatemala,²² systematic discrimination and inequality in access to resources,

20. While there is no commonly agreed on definition of transitional justice, there nevertheless seems to be a consensus that transitional justice is two-fold: on the one hand backward looking—pursuing accountability for human rights abuses—and on the other hand forward looking—restoring societies torn apart by conflicts and preventing the future recurrence of abuses. See, e.g., TEITEL, *supra* note 1, at 7; BASSOUINI, *supra* note 1, at xv; International Center for Transitional Justice, What is Transitional Justice?, <http://www.ictj.org/en/tj/> (last visited Oct. 8, 2007) (defining transitional justice).

21. Frances Stewart, *Policies towards Horizontal Inequalities in Post-Conflict Reconstruction* 15-17 (Ctr. for Research on Inequality, Human Sec. and Ethnicity, Working Paper No. 7, 2005), available at <http://www.crise.ox.ac.uk/pubs/workingpaper7.pdf>.

22. The Commission for Historical Clarification in Guatemala (CEH) noted that “[p]olitical violence was . . . a direct expression of structural violence.” Inter-Am. C.H.R., *Fifth Report on the Situation of Human Rights in Guatemala, Ch. III: Economic, Social, and Cultural Rights*, OEA/Ser.L/V/II.111, doc. 21 rev. ¶ 3 (Apr. 6, 2001) (citing COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO: V GUATEMALA: MEMORIA DEL SILENCIO 21-22 (1999), available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/ [hereinafter MEMORIA DEL SILENCIO]).

land, work, and housing have led to conflict or exacerbated the social tensions behind it.

In crises such as the one continuing to unfold in Darfur, the systematic burning of houses and villages, the forced displacement of the population, and the starvation caused by restrictions on the delivery of humanitarian assistance and the destruction of food crops are deliberately used alongside other gross human rights violations—such as murder or rape—as instruments of war.²³ Moreover, no transition to a just peace will be possible in Sudan without putting into place an equitable, non-discriminatory framework of access to land and oil. A further example is Timor-Leste: The Truth Commission in Timor Leste found evidence of direct violations of economic and social rights caused by military operations, security concerns, and the political agenda of the government at the time. The Commission noted, among other violations, the explicit use of education as a propaganda tool, thereby restricting children's educational development and infringing on their right to education; forced displacement and the resettlement of entire villages in areas that had previously been avoided on the basis of health risks including poor soil and malarial conditions; and the manipulation of coffee prices to fund military operations, thus limiting farmers' chances of making an adequate living.²⁴

Such evidence calls into question the bias towards civil and political rights in many areas of law and practice, includ-

23. See, e.g., Human Rights Council, *Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/10*, U.N. Doc A/HRC/4/80 (Mar. 9, 2007), available at [http://daccessdds.un.org/doc/UNDOC/GEN/G07/116/20/PDF/G0711620.pdf](http://daccessdds.un.org/doc/UNDOC/GEN/G07/116/20/PDF/G0711620.pdf?U.N. Country Team in Sudan, Joint Statement on Darfur (Jan. 17, 2007), available at http://www.unmis.org/english/2007Docs/Joint%20statement%20Darfur-17Jan07.pdf); U.N. Country Team in Sudan, *Joint Statement on Darfur* (Jan. 17, 2007), available at <http://www.unmis.org/english/2007Docs/Joint%20statement%20Darfur-17Jan07.pdf>.

24. TIMOR-LESTE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION, FINAL REPORT 3 (2006), <http://www.ictj.org/en/news/features/846.html> (last visited Oct. 8, 2007) [hereinafter TIMOR-LESTE COMMISSION REPORT]. The Timor-Leste Commission indicated that “[a]s its work in the area of truth seeking progressed, the Commission increasingly found evidence of both direct violations of social and economic rights and of the close inter-relationship between the violation of those rights and the abuses of civil and political rights that had been the chief focus of its work. It decided that this reality should be recognized in its Final Report.” *Id.* at 5. The achievements of truth commissions and their potential for expansion will be further discussed below.

ing in the rebuilding of conflict-torn societies. It is often claimed that the realization of economic, social, and cultural rights will automatically flow from the enjoyment of civil and political rights; and it is often assumed that certain rights can be realized in isolation from others. Yet those arguments are supported by neither law nor observed experience. As the Committee on Economic, Social, and Cultural Rights (CESCR) noted in its much-quoted statement to the World Conference on Human Rights, “full realization of human rights can never be achieved as a mere by-product, or fortuitous consequence, of some other developments, no matter how positive.”²⁵ I believe that this lesson is extremely relevant to transitional justice, which has shown itself vulnerable to the propositions that human rights can be “sequenced” and that some should systematically be accorded greater priority over others.²⁶

Are we thus falling into an unjustifiable assumption that violations of economic, social, and cultural rights are of a less egregious nature than violations of civil and political rights? Or are we reluctant to address economic, social, and cultural rights when discussing gross or massive human rights violations because economic, social, and cultural rights are only—as some would argue—of a “programmatically” nature and thus cannot truly be “violated”?

III. JUSTICIABILITY OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Even among those who concede that egregious violations of economic, social, and cultural rights occur, a last hurdle often remains: Such rights, it is contended, do not lend them-

25. *Status of Preparation*, *supra* note 5, ¶ 3.

26. In general terms, transitional justice is predicated on accountability for past abuses of civil and political rights as a way to achieve peace and the rule of law. The assumption here might be that once the transition is set in motion, and if successful, it will automatically yield to the desired economic and social benefits. This may explain why less attention is paid to economic, social, and cultural rights. See, e.g., Boraïne, *Transitional Justice*, *supra* note 3, at 26 (“The overall aim [of transitional justice] should be to ensure a sustainable peace, which will encourage and make possible social and economic development.”). See also discussion on justiciability *infra* note 27 and accompanying text.

selves to judicial or quasi-judicial action.²⁷ Old misconceptions die hard. Therefore, it is critical to examine the issue of legal protection and remedies for economic, social, and cultural rights violations as well as ways they could and should be assured by transitional justice mechanisms and processes.

The prevailing understanding of justice tends to assume that civil and political rights are freedoms in relation to which violations can be found, while economic, social, and cultural rights are entitlements, which depend on available resources and are provided by states over time, subject to priorities established in the political arena. These rights are even seen by some not as entitlements but merely as aspirational goals whose achievement no one can be held accountable for.²⁸ That argument assumes that protection of economic, social, and cultural rights is, by definition, expensive and burdensome, while the realization of other human rights—or freedoms—is essentially resource-free. As a result, economic, social, and cultural rights are often not understood to be rights imposing legally-binding obligations on states, and there has been resistance to the judicial enforcement of these rights and their consideration by transitional justice mechanisms.

Many aspects of economic, social, and cultural rights are, nevertheless, as immediately realizable as many civil and political rights. For example, “forced” eviction (that is, eviction that is arbitrary or does not respect minimum guarantees)²⁹ requires the same type of immediate action and redress as does the prohibition of torture. Other aspects of economic, social, and cultural rights call for long-term investment; yet, contrary to widespread misconceptions, the same is true for many aspects of civil and political rights. In developing countries, or

27. See, e.g., Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L 462 (2004).

28. See, e.g., Helle C. Dale, *Economic and Political Rights at the U.N.: A Guide for U.S. Policymakers*, BACKGROUND (Heritage Found., Wash., D.C.), Aug. 30, 2006, at 1, available at http://www.heritage.org/research/worldwidefreedom/upload/bg_1964.pdf.

29. U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 7: The Right to Adequate Housing (Art. 11.1 of the Covenant): Forced Evictions*, annex IV, U.N. Doc E/1998/22 (June 20, 1998).

in countries emerging from devastating conflict, the construction of a free and universal primary education system or basic universal health care infrastructure makes no more demands on the state than would the establishment of an even rudimentary criminal justice system capable of providing legal aid, court interpretation, bail supervision, timely and fair trials, and humane conditions of detention. All these require the state to act rather than refrain from acting, and all can be very costly. One need only look at the resources required for the establishment of international, hybrid, and national tribunals in the transitional justice context to realize that protection of civil and political rights demands an equally large resource investment.³⁰

The work of national and regional courts provides increasing evidence that there is no legal or conceptual impediment to identifying and adjudicating violations of economic, social, and cultural rights. If violations can be established, then judicial protection and enforcement are possible. Courts are currently developing jurisprudence that does not focus solely on protection against discrimination—long the central focus of judicial protection of economic, social, and cultural rights—but also on a wider range and additional substantive aspects of these rights.³¹ Moreover, judicial protection can be effective, as recent court cases have shown. To name one example, the Treatment Action Campaign decision of the South African Constitutional Court led to the establishment in South

30. *Rule of Law Report*, *supra* note 6, ¶ 42. For 2006-2007, the budgets of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda are, respectively, \$276,474,100 and \$269,758,400. ICTY at a Glance: General Information, Feb. 7, 2007, <http://www.un.org/icty/glance-e/index.htm> (last visited Sept. 20, 2007); International Criminal Tribunal for Rwanda: General Information, <http://69.94.11.53/default.htm> (last visited Sept. 20, 2007).

31. *See, e.g., Background Paper Prepared by the Secretariat: Selection of Case Law on Economic, Social, and Cultural Rights*, U.N. Doc E/CN.4/2004/WG.23/CRP.1 (Nov. 15, 2004); ECOSOC, CESCRC, *Report of Open-Ended Working Group*, U.N. Doc. E/CN.4/2005/52 (Feb. 10, 2005); ECOSOC, CESCRC, *Report of Open-Ended Working Group*, U.N. Doc. E/CN.4/2006/WG.23/2006/CRP.1. Each paper contains summaries of national, regional, and international cases on economic, social, and cultural rights. *See also* David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53 (2006).

Africa of an effective and large program to stop mother-to-child transmission of HIV/AIDS.³²

These are valuable insights for transitional justice and constitute a potentially vital counterweight to lingering misapprehensions concerning the potential enforceability of economic, social, and cultural rights. The need for these lessons to permeate transitional justice realms could not be greater. The continuing underenforcement of economic, social, and cultural rights in the transitional justice context is reflected in the fact that when truth commissions have actually investigated violations of these rights, they have generally fallen short of proposing reparations to redress the documented violations. For example, the Timor Leste Commission, which investigated in great detail economic, social, and cultural rights violations committed by the Indonesian government, decided not to consider victims of economic and social rights violations as beneficiaries for reparation. The decision was justified based upon reasons of “feasibility and needs-based prioritisation.”³³

By making a case for the integration of economic, social, and cultural rights into the transitional justice framework, I am not suggesting that courts and truth commissions should strive to investigate and provide remedies for violations of these rights under all circumstances and unconditionally. As with existing judicial mechanisms dealing with gross violations of human rights and humanitarian law, specific criteria grounded in solid theoretical and legal analysis and empirical research must be established to determine which violations should be addressed and at what priority level.³⁴ Clarification

32. See *Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)* (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2378.PDF>. See generally Mark Heywood, *Preventing Mother-To-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health*, 19 S. AFR. J. HUM. RTS. 278 (2003).

33. TIMOR-LESTE COMMISSION REPORT pt. 11, *supra* note 24, at 40-41.

34. Obviously, the choice should be context-specific: If a conflict left a whole section of the population particularly traumatized or injured, the right to health might be a guiding principle. If vulnerable groups were targeted (on the basis of sexual orientation, age, disabilities, or otherwise), equality would need to be ensured. If the use of hate propaganda was widespread, the right to education might be as relevant as freedom of expression. Invariably, housing and health would feature prominently. See, e.g., *infra* notes 48-55 and accompanying text.

in this respect can be drawn from the practice of the CESCR³⁵ and transitional justice mechanisms (as outlined further below) as well as from case law at the national and regional level.³⁶

IV. THE INCLUSION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN EXISTING MECHANISMS OF TRANSITIONAL JUSTICE

In the last Part, I showed that, contrary to common perceptions, there is no legal, judicial, or empirical basis for the comparative neglect of economic, social, and cultural rights in mainstream justice, including transitional justice. This Part will briefly explore the potential of existing mechanisms of transitional justice for a more systematic inclusion of economic, social, and cultural rights.

Because they usually have the mandate to examine the causes, consequences, and nature of gross human rights violations and to make recommendations in this regard, truth commissions lend themselves particularly well to the investigation and protection of economic, social, and cultural rights.³⁷ The Timor Leste Commission dedicated a whole chapter of its final report to economic and social rights violations, stressing that “the impact of the conditions in which the people of East Timor lived, while often less remarked on, was equally damaging and possibly more long lasting”³⁸ than violations of their physical integrity and civil and political rights. This demonstrates that it is both possible and appropriate for future truth commissions to examine violations of economic, social, and cultural rights more systematically. For instance, the UN esti-

35. See, e.g., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Note by the Secretariat*, 9-161, U.N. Doc HRI/GEN/1/Rev.8 (May 8, 2006) (clarifying the content of rights recognized under the ICESCR and the circumstances under which a violation of these rights may be found). See *supra* note 29 for a clarification of the right to adequate housing.

36. See *supra* note 31.

37. See generally PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGES OF TRUTH COMMISSIONS* (2002). Among others, CEH undertook a significant analysis of the policies of racism and social exclusion in Guatemala as part of its examination of the historical causes of the armed conflict. See I MEMORIA DEL SILENCIO, *supra* note 22, at 86-94.

38. 7 TIMOR-LESTE COMMISSION REPORT, *supra* note 24, at 2.

mates that 700,000 people were directly affected through loss of shelter and livelihood during what the government of Zimbabwe called the “clean up operation” of its cities.³⁹ Were a truth commission set up at some point in Zimbabwe, it is hard to imagine that it would be capable of investigating summary executions and disappearances, ill treatment, or arbitrary detention but not massive violations of the right to housing or the deliberate targeting of food aid to exclude opponents of the regime. While recognition of violations of economic, social, and cultural rights goes a long way, truth commissions should also strive to provide remedies for violations of these rights that are as effective and comprehensive as those they can and do provide for violations of civil or political rights.⁴⁰

The adjudication of economic, social, and cultural rights in a transitional context has also been shown to be possible. Although prosecutions by domestic, hybrid, and international tribunals mainly address violations of civil and political rights that constitute international crimes, in some cases they have dealt with selected violations of economic, social, and cultural rights. For example, the trial chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kupreskic* case recognized that the comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with the requisite intent.⁴¹ Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies, is also recognized as an international crime.⁴² There are still other examples, and the use of statutes of existing international and

39. U.N. Special Envoy on Human Settlements Issues in Zimbabwe, *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina*, 67, delivered to the Secretary-General (July 18, 2005), available at http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf.

40. See *supra* notes 31-35 and accompanying text (discussing enforceability of economic, social, and cultural rights).

41. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Judgment, ¶¶ 628-631 (Jan. 14, 2000).

42. Protocols Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 54, para. 1, June 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court, art. 8, para. 2(b)(xxv), U.N. Doc. A/CONF. 183/9 (July 17, 1998). See also *id.* arts. 6(c), 8(2)(b)(ix), 8(2)(b)(xvi).

national courts to adjudicate economic, social, and cultural violations as international crimes should thus be further explored.⁴³ Ultimately, the possibility of expanding the current scope of international criminal law to encompass and ensure the redress of other gross violations of economic, social, and cultural rights—such as the discriminatory or deliberate targeting of certain groups in cases of forced evictions or with respect to access to food, health care, or drinkable water—should be considered.

In a transitional context, special attention should also be paid to the judicial enforcement of economic, social, and cultural rights in settings other than purely criminal ones. More use could be made, for instance, of human rights courts and quasi-judicial bodies with jurisdiction over a particular country emerging from an episode of serious human rights violations, such as the Inter-American human rights system.⁴⁴ In these

43. See, e.g., CENTRE ON HOUSING RIGHTS AND EVICTIONS & ZIMBABWE LAWYERS FOR HUMAN RIGHTS, OPERATION MURAMBATSVINA: A CRIME AGAINST HUMANITY—AN INDEPENDENT LEGAL OPINION ON WHETHER THE 2005 OPERATION MURAMBATSVINA FORCED EVICTIONS CONSTITUTED A CRIME UNDER THE ROME STATUTE (2007), available at <http://www.cohre.org/store/attachments/Operation%20Murambatsvina%20CAH%20Report%20-%20Final%20Web.pdf>; Brendan O'Malley, United Nations Educational, Scientific, and Cultural Organization, Education Sector, Division for the Coordination of U.N. Priorities in Education, *Education Under Attack: A Global Study on Targeted Political and Military Violence Against Education Staff, Students, Teachers, Union and Government Officials, and Educational Institutions* 30-33 (discussing the use of international standards and mechanisms, including the Rome Statute, to prevent and adjudicate crimes against education).

44. The internal armed conflicts in Latin America have given rise to many cases brought to the Inter-American human rights system. The Inter-American Court of Human Rights has issued well-known orders for reparation awards for victims of human rights violations committed during a conflict; for example, in the *Plan de Sánchez* case, reparations included obligations for the state of Guatemala to implement health, education, and infrastructure programs for the affected communities. *Plan de Sánchez Massacre v. Guatemala Case*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, at 101 (Nov. 19, 2004). In the post-Fujimori years, the Peruvian government publicly acknowledged responsibility before the Inter-American Commission for forced sterilization, primarily of rural and indigenous women, under the Fujimori Family Planning Policy. See, e.g., *María Mamérita Mestanza Chávez v. Peru*, Petition 12.191, Inter-Am. C.H.R. Report No. 71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003). For more general discussion on civil and political rights, see Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK OF REPARATIONS 504, 504-38 (Pablo de Greiff ed., 2006). In Bosnia and Herze-

fora, equal attention should be given to violations of all rights, be they civil, political, economic, social, or cultural. With this in mind, truth commissions could recommend the ratification of regional and international human rights treaties to increase protection of economic, social, and cultural rights.⁴⁵ Moreover, the work done to strengthen the domestic judicial system in the aftermath of conflict could include proper training of judges and sensitization of judicial actors to economic, social, and cultural rights.

Investigation and adjudication by truth commissions and judicial bodies are only some elements of a complete transitional justice strategy. Additional transitional justice mechanisms have dealt with economic, social, and cultural rights. Notably, reparations programs offer a valuable opportunity to redress the economic and social aspects of human rights and humanitarian law violations and to adequately address the needs and rights of victims. Several reparations programs have already gone beyond a focus on civil and political rights violations or remedies to include measures related to economic, social, and cultural rights. Housing and property restitution programs in South Africa,⁴⁶ Guatemala⁴⁷ (both coupled with

govina (Bosn. & Herz.), the Human Rights Chamber, established through article II(2) for annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), offered effective remedies with respect to a wide range of violations linked to the conflict, particularly in relation to property restitution. See General Framework Agreement for Peace in Bosnia and Herzegovina [GFAP], Bosn.-Herz.-Croat.-Yugo., annex 6, Dec. 14, 1995, 35 I.L.M. 89, available at http://www.ohr.int/dpa/default.asp?content_id=380; Walpurga Englbrecht, *Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber towards their Protection*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 83, 83-142 (Scott Leckie ed., 2003) [hereinafter RETURNING HOME].

45. For example, the CEH recommended the ratification by Guatemala of several human rights treaties, including the Protocol of San Salvador, which Guatemala ratified on October 6, 2000. V MEMORIA DEL SILENCIO, *supra* note 22, at 70.

46. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 191, 193, 316, 319, available at <http://www.doj.gov.za/trc/report/finalreport/TRC%20VOLUME%205.pdf> [hereinafter TRC REPORT]. See also Monty J. Roodt, *Land Restitution in South Africa*, in RETURNING HOME, *supra* note 44, at 243, 243-71.

47. See V MEMORIA DEL SILENCIO, *supra* note 22, at 63. See also Agreement on Social and Economic Aspects and Agrarian Situation, Guat.-Unidad

land reform programs), and Bosnia and Herzegovina⁴⁸ are among these. Recommendations on reparation measures related to health care, including mental health, were put forward by truth commissions in South Africa,⁴⁹ Chile,⁵⁰ Peru,⁵¹ and Morocco,⁵² among others. In Guatemala and Peru, recommendations for educational reforms were made in order to redress the loss of educational opportunities caused by the conflict and improve access to and adequacy of education for indigenous peoples.⁵³

Revolucionaria Nacional Guatemalteca, May 6, 1996, U.N. Doc. A/50/956; Agreement on Identity and Rights of Indigenous Peoples, Guat.-Unidad Revolucionaria Nacional Guatemalteca, March 31, 1995, U.N. Doc. A/49/882-S/1995/256; Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Guat.-Unidad Revolucionaria Nacional Guatemalteca, June 17, 1994, U.N. Doc. A/48/954-S/1994/751, Annex I [hereinafter Guatemala Agreements]. All Guatemala Agreements are available in translation at Conciliation Resources, Guatemala, Key Texts and Agreements, <http://www.c-r.org/our-work/accord/guatemala/key-texts.php> (last visited Oct. 31, 2007). For an overview of property restitution and the implementation of the Peace Agreement in Guatemala in this respect, see Cecilia Bailliet, *Between Conflict and Consensus: Conciliating Land Disputes in Guatemala 254-301* (2002) (unpublished thesis, University of Oslo), available at http://folk.uio.no/ceciliab/between_conflict_and_consensus.pdf.

48. Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441 (2006). Note that property restitution programs may have their source in peace agreements, such as in Guatemala and Bosn. & Herz. See GFAP, *supra* note 44, at annex 7; Guatemala Agreements, *supra* note 47.

49. 5 TRC REPORT, *supra* note 46, at 192.

50. CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, IV REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (1991), *reprinted in* THE HANDBOOK OF REPARATIONS, *supra* note 44, at 740-43.

51. COMISIÓN DE LA VERDAD Y LA RECONCILIACIÓN EN EL PERÚ, IX INFORME FINAL DE LA COMISIÓN DE LA VERDAD Y LA RECONCILIACIÓN 168 (2003), available at <http://www.cverdad.org.pe/ifinal/index.php> [hereinafter INFORME FINAL].

52. THE MOROCCAN EQUITY AND RECONCILIATION COMMISSION, THREE-PART SUMMARY OF THE FINAL REPORT pt. 2 (Int'l Ctr. for Transitional Justice, trans.) (Dec. 2005), <http://www.ictj.org/static/MENA/Morocco/IERreport.findingssummary.eng.pdf> [hereinafter MOROCCAN FINAL REPORT].

53. Agreement on Social and Economic Aspects and Agrarian Situation, *supra* note 47, ¶¶ 21-22; V MEMORIA DEL SILENCIO, *supra* note 22, at 68-70; IX INFORME FINAL, *supra* note 51, at 180.

Truth commissions and other transitional justice mechanisms have generally focused on victims of war crimes and of selected gross civil and political rights violations, thereby limiting the scope of their proposed reparation measures.⁵⁴ This has not been universally true, however. Aware that an approach solely focused on individual victims of such crimes would offer inadequate support for many other people who had been differently affected by the conflict, the Moroccan Justice and Reconciliation Commission expressed its determination to treat “the issue of reparations in a symbolic and material form, involving individuals, *communities* and *regions*.”⁵⁵ The Commission thus recommended “communal reparations” to strengthen the economic and social development of specific regions that were particularly affected by political violence and were marginalized and excluded.⁵⁶

The approach taken by the Moroccan Commission is a welcome expansion of the scope of reparations programs and provides a further avenue for the protection of all human rights, including economic, social, and cultural rights.⁵⁷ Often

54. Victims of some civil and political rights violations, such as victims of torture in Chile, have either not been afforded any reparations or have been afforded them to a lesser extent than other victims. See Hayner, *supra* note 37, at 172-74. See generally *id.* at 170-82.

55. THE MOROCCAN EQUITY AND RECONCILIATION COMMISSION, SUMMARY OF THE FINDINGS OF THE FINAL REPORT 11 (Int’l Ctr. for Transitional Justice, trans.) (Dec. 2005), <http://www.ictj.org/static/MENA/Morocco/IERreport.summary.eng.pdf> (emphasis added). It should be noted that the Moroccan Commission only investigated gross violations of civil and political rights. *Id.* at 1.

56. Royaume du Maroc, Instance Equité et Réconciliation, La Réparation, http://www.ier.ma/article.php3?id_article=1432 (last visited Sept. 24, 2007); Royaume du Maroc, Instance Equité et Réconciliation, Les Recommandations, http://www.ier.ma/article.php3?id_article=1433 (last visited Sept. 24, 2007). Although implementation of the Moroccan Commission’s recommendations and reparations has started, it is too early to draw any lessons from it.

57. It is important to note that collective reparations should not be equated with the protection of economic, social, and cultural rights alone. Both individual and collective reparations can contribute to the realization of civil and political rights as well as economic, social, and cultural rights. Aside from the Moroccan example, very few examples exist with respect to collective reparations. While the Peru Commission recommended measures of a similar nature, their implementation is limited and characterized by what seems to be an operational confusion between broader development or poverty reduction programs and reparations. JULIE GUILLEROT & LISA

in situations of political transformation, both law and policy are caught between different imperatives—between the past and the future, between the individual and the collective.⁵⁸ It is precisely this tension between the individual and the collective that deserves further reflection when thinking about mechanisms of transformation.

However, individual reparations and collective reparations to individual victims will never substitute for more broad-based and longer term socio-economic policies that aim to redress and prevent widespread inequalities and discrimination. And it would be a mistake to believe that these policies are best left solely to the responsibility of development actors.⁵⁹ Indeed, transitional justice mechanisms have a crucial role to play in recommending the adoption of such measures as part of the necessary reparation for victims and of a comprehensive strategy of national reconciliation and peace. It is justice that is at stake—justice in its deepest sense, including social justice and the guarantee of substantive equality in the enjoyment of all rights.

MAGARRELL, REPARACIONES EN LA TRANSICIÓN PERUANA: MEMORIAS DE UN PROCESO INACABADO 58-60, 181 (2006), *available at* <http://www.ictj.org/static/Peru.Reparations/Memorias.Peru.esp.pdf>. The Timor Leste Commission recommended that “collective measures be developed to ensure that rehabilitation of victims of human rights violations takes place in context and together with their communities.” TIMOR-LESTE COMMISSION REPORT pt. 11, *supra* note 24, at 40. However, this approach seems closer to a community-based approach to health rehabilitation than to the Moroccan Commission’s stand-alone collective reparations.

58. As Ruti Teitel observes, in situations where one is trying to advance justice in the midst of political transformation, “law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective.” TEITEL, *supra* note 1, at 6.

59. Development and economic growth do not necessarily translate into improved living conditions for specific groups or the realization of their human rights unless specific measures are taken to that end. UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT 80-82 (2000), *available at* <http://hdr.undp.org/reports/global/2000/en/>. Moreover, development agencies’ interventions with respect to human rights have traditionally focused on civil and political rights. *See generally* LAURE-HÉLÈNE PIRON & TAMMIE O’NEIL, INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: A SYNTHESIS OF DONOR APPROACHES AND EXPERIENCES (2005), http://www.odi.org.uk/rights/Publications/humanrights_into_development.pdf.

V. A WAY FORWARD: LEGAL AND INSTITUTIONAL
FOUNDATIONS FOR THE PROTECTION OF ECONOMIC,
SOCIAL, AND CULTURAL RIGHTS

As transitional justice aims at contributing to the building of solid foundations for a future based on the rule of law in societies in transition, it is imperative to understand how best to equip a country to redress deep-seated social and economic inequalities. A powerful starting point in this respect is to anchor economic, social, and cultural rights in the domestic legal system, starting with the constitution.⁶⁰ The constitutional recognition of rights can serve two purposes. It is crucial to the implementation of state obligations with respect to international human rights standards, including economic, social, and cultural rights.⁶¹ It can also contribute to transitional justice and the redress of past discrimination and abuse.⁶² With respect to societies in transition, prerequisites for the drafting or revision of a constitution would obviously need to be fulfilled; only a careful appraisal of factors such as the political context would allow relevant stakeholders to decide whether such an undertaking is appropriate in a particular case. When possible, truth commissions could, along with other actors, contribute recommendations to that end.⁶³

60. See ECOSOC, *Report of the UN High Commissioner for Human Rights*, ¶¶ 18-22, U.N. Doc E/2006/86 (June 21, 2006); Mac Darrow & Philip Alston, *Bill of Rights in Comparative Perspective*, in *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, at 465, 465-524 (Philip Alston ed., 1999).

61. As Darrow and Alston note, "it is becoming increasingly difficult for a state to demonstrate that it has taken all appropriate measures [to give effect to its international human rights undertakings] in the absence of some kind of constitutional recognition of human rights standards." Darrow & Alston *supra* note 60, at 469.

62. In the words of Ruti Teitel, "[t]ransitional constitution making comprehends the codifying, entrenching purposes associated with constitutionalism and also the transformative, disentrenching purposes peculiar to transitions." TEITEL, *supra* note 1, at 219. On the relevance of constitutions to transitional justice, see generally *id.* at 191-211; Aeyal M. Gross, *The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel*, 40 *STAN J. INT'L L.* 47 (2004).

63. In its final report, the Moroccan Justice and Reconciliation Commission recommended the consolidation of constitutional guarantees with respect to human rights (albeit on civil and political rights only) as well as the reform of several pieces of legislation to adequately reflect international human rights standards. MOROCCAN FINAL REPORT, *supra* note 52, pt. 3.

The South African constitution is probably one of the best known examples of a constitution that incorporates economic, social, and cultural rights.⁶⁴ The constitution lists rights related to labor relations, environment, property, housing, health care, food, water, social security, education, and language and culture.⁶⁵ It is not surprising that the drafters of the constitution included these rights, as violations of these had been a major feature of the previous regime.⁶⁶ Accordingly, while issues of transitional justice “cannot be exhausted within constitutional law,”⁶⁷ the constitutional protection of economic, social, and cultural rights may contribute to the redress and prevention of widespread discrimination—and hence to greater justice, including social justice.

Peace agreements may serve similar functions. They are often the starting point of any transitional justice process. In fact, in some cases, peace agreements are related to constitu-

64. S. AFR. CONST. 1996, available at <http://www.info.gov.za/documents/constitution/index.htm>. Another example is the Constitution of Bosnia and Herzegovina, one of the many annexes of the GFAP. The Constitution guarantees a list of rights, stresses that the European Convention for the Protection of Human Rights and Fundamental Freedoms has priority over all other law, and lists in an annex additional human rights treaties that are applicable in Bosn. & Herz., including the International Covenant on Economic, Social and Cultural Rights. BOSN. & HERZ. CONST. art. 2, annex I, available at http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf. Notwithstanding its other problematic provisions, this Constitution has arguably given Bosn. & Herz. a strong ground for the judicial and legal protection of all human rights.

65. S. AFR. CONST. 1996 ch. 2.

66. As Albie Sachs noted: “It is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedom and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system.” ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 19 (1990). Sachs saw the Bill of Rights as a “truly creative document that requires and facilitates the achievement of the rights so long denied to the great majority of people.” *Id.* On this basis, he proposed the inclusion in a future Bill of Rights of economic, social, and cultural rights, along with affirmative action policies. *Id.* at 7-20, 121-27, 169-73; see also Gross, *supra* note 62, at 56-57.

67. Gross, *supra* note 62, at 103. Critiques have noted the widespread poverty and inequality that characterize post-apartheid South Africa and the inadequate government response in this respect. See Patrick Bond, *Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition*, 60 J. INT'L AFF. 141 (2006).

tion drafting;⁶⁸ and in many cases, they set out key political, administrative, legal, or judicial structures for the state that is the object of the agreement. Since peace agreements have a tremendous impact on other transitional justice mechanisms and on the overall ability of the government to redress past abuses and rebuild society, they are intimately linked to the entire transitional justice process. Such agreements demand greater attention in this context.

Many recent peace agreements already include specific commitments to human rights. They generally focus on civil and political rights and only rarely cover economic, social, and cultural rights.⁶⁹ There is, however, no reason why peace agreements could not include these rights more systematically.⁷⁰ The Guatemala Peace Agreement (1996) is a key example in this regard, as it sets standards and provides specific targets for the achievement of various economic, cultural, and social rights, including those of indigenous peoples.⁷¹ It also clearly spells out the rationale for securing economic and social rights in post-conflict Guatemala, recognizing that the violations of these rights and the corresponding lack of social justice had represented a source of conflict and instability and,

68. See, e.g., GFAP, *supra* note 44.

69. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, NEGOTIATING JUSTICE?: HUMAN RIGHTS AND PEACE AGREEMENTS 101 (2006), available at http://www.ichrp.org/public/publications.php?id_proj=27&lang=en.

70. The Comprehensive Peace Agreement reached between the Government of Nepal and the Communist Party of Nepal is a recent example of a peace agreement that recognizes various socio-economic rights and sets up measures to redress inequalities. Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal (Maoist), Nepal-Communist Party of Nepal, Nov. 21, 2006, ¶¶3.5-3.7, 3.9-3.12, 7.5, available at http://www3.brookings.edu/fp/projects/idp/Nepal_PeaceAgreement.pdf.

71. The Agreement contains three sections relevant to human rights: namely the Agreement on Human Rights (which focuses on civil and political rights), the Agreement on the Socio-Economic Aspects and the Agrarian Situation (which sets standards for the achievements of various economic and social rights), and the Agreement on the Rights and Identity of Indigenous Peoples (which, among other goals, aims at securing the economic, social, and cultural rights of indigenous peoples). See *supra* note 47 (Guatemala Agreements); Agreement on a Firm and Lasting Peace, Guat.-Unidad Revolucionaria Nacional Guatemalteca, Dec. 29, 1996, U.N. Doc. A/51/796/Annex II, available at <http://www.c-r.org/our-work/accord/guatemala/key-texts.php>.

therefore, that respect for those rights was a precondition for development and peace.⁷²

In addition to paying increased attention to the role of constitutions and peace agreements, it is crucial to examine key legislation to ensure that it is directed towards strengthening state accountability in relation to economic, social, and cultural rights. Domestic recognition and protection of these rights in national law would go a long way to redress discriminatory patterns and inequalities. Recognition of rights would complement remedies and reparation afforded to victims through existing transitional justice mechanisms while benefiting the whole population. In Bosnia and Herzegovina, the Office of the High Commissioner for Human Rights (my office), together with victims' associations and non-governmental organizations, worked on ways to improve the protection afforded to victims of torture and sexual violence in the existing laws pertaining to social protection, health care, internally displaced persons, and returnees. An analysis of these laws showed the need for their revision; it also identified the need for the adoption of a law at the state level that would provide reparation to these particular groups and, more broadly, guarantee their economic and social rights in a comprehensive

72. The Preamble of the Agreement on the Socio-Economic Aspects and the Agrarian Situation reads as follows:

[A] firm and lasting peace must be consolidated on the basis of social and economic development directed towards the common good, meeting the needs of the whole population,

This is necessary in order to overcome the poverty, extreme poverty, discrimination and social and political marginalization which have impeded and distorted the country's social, economic, cultural and political development and have represented a source of conflict and instability,

Socio-economic development requires social justice, as one of the building blocks of unity and national solidarity, together with sustainable economic growth as a condition for meeting the people's social needs. . . .

Agreement on Social and Economic Aspects and Agrarian Situation, *supra* note 47. It is important to note that of all the elements that constitute the Guatemala Peace Agreement, the Agreements on socio-economic rights and on indigenous peoples have met with particularly low degrees of compliance and implementation. The Secretary-General, *United Nations Verification Mission in Guatemala*, ¶¶ 40-43, 51-59, *delivered to the General Assembly*, U.N. Doc A/59/307 (Aug. 30, 2004).

manner. This is precisely what the Committee against Torture (CAT) and CESCR recommended to the Bosnia and Herzegovina government after examining the country's reports in 2005.⁷³ Today, the Bosnia and Herzegovina government is committed to the adoption of a state law on victims of torture to comply with the recommendations of these two human rights committees.⁷⁴

Adopting, reviewing, and strengthening legislation should be seen as an essential part of the mechanism of institutional reforms, which have so far focused largely on law enforcement sectors and the vetting of relevant personnel.⁷⁵ These mechanisms could be used to promote public sector reforms that

73. Committee Against Torture [CAT], *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Comm. Against Torture: Bosnia & Herzegovina*, ¶ 10, U.N. Doc. CAT/C/BIH/CO/1 (Dec. 15, 2005); ECOSOC, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Bosnia & Herzegovina: Concluding Observations of the Committee On Economic, Social, and Cultural Rights*, ¶ 41, U.N. Doc. E/C.12/BIH/CO/1 (Jan. 24, 2006). CESCR recommended, *inter alia*, "that the State party ensure that victims of sexual violence suffered during the armed conflict of 1992-1995 obtain the status of civilian war victims, to devise and implement a coherent strategy at State level to protect the economic, social, and cultural rights of victims of sexual violence and their family members, and to ensure the participation of victims of sexual violence in any decision-making processes affecting them." While these remedies were provided to victims of civil and political rights violations, the same should be made available to victims of violations of economic, social, and cultural rights. See Office of the U.N. High Comm'r for Human Rights [OHCHR] in Bosn. & Herz., *The Rights of Torture Victims under International Law—Analysis of the Legal Framework in Bosnia and Herzegovina* (2006) (copy on file with OHCHR).

74. At the time of writing, a draft "Law on the Rights of Victims of Torture and Civil Victims of War" was under preparation by the relevant government bodies. CAT, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Comments by the Government of Bosnia and Herzegovina to the Conclusions and Recommendations of the Committee Against Torture*, ¶ 8, U.N. Doc. CAT/C/BIH/CO/1/Add. 2 (June 20, 2007).

75. See generally TEITEL, *supra* note 1, at 149-89; OHCHR, *Rule-of-Law Tools For Post-Conflict States: Vetting: An Operational Framework*, at 3-5, U.N. Doc ST/HR/PUB/06/5 (2006), available at http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Vetting_en.pdf. One of the exceptions to that narrow focus may be the "government" purges that took place in post-war Europe. The purges expelled individuals from a broader segment of society than what was traditionally considered part of the administrative apparatus, including sectors such as education and the media. TEITEL, *supra* note 1, at 161-63.

have a direct impact on the protection of economic, social, and cultural rights as well as to review related legislation.

VI. CONCLUDING REMARKS

In spite of many achievements and occasional exceptions, transitional justice has, like mainstream justice, not yet dealt with economic, social, and cultural rights adequately or systematically. I suggest that transitional justice should take up the challenges to which mainstream justice is reluctant to rise: acknowledging that there is no hierarchy of rights and providing protection for all human rights, including economic, social, and cultural rights. As with all other human rights, economic, social, and cultural rights call for constitutional protection, legislative promotion, and judicial enforcement.⁷⁶ A comprehensive strategy for transitional justice would, therefore, address the gross violations of all human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place. International humanitarian law may not permit reaching back that far, but international human rights law does. If judicial resistance makes it difficult at first to offer appropriate judicial redress for massive violations of economic, social, and cultural rights, the demands of justice, as part of the transition to a peaceful society, would at the very least require that protective constitutional, legislative, and institutional measures be put in place to ensure that these violations will not be perpetuated in the future.

Societies in transition present unique opportunities for countries to equip themselves appropriately to ensure respect for human rights and human dignity. Transitional justice, as a dynamic and cutting-edge field, could serve as a springboard for the systematic anchoring of economic, social, and cultural rights in the political, legal, and social structures of societies in transition. The brief overview this Essay has provided of some of the possible measures that could be taken to ensure greater protection of economic, social, and cultural rights in this context confirms that there is significant potential to expand the scope and reach of transitional justice in order to address root

76. See ECOSOC, CESCR, *General Comment No. 9: Domestic Application of the Covenant*, U.N. Doc. E/1999/22/Annex IV (Dec. 1, 1998).

causes of conflicts and the related violations of all rights in a more comprehensive manner.

Transitional justice should thus reach beyond its traditional mechanisms, rooted as they are in criminal law, and pay proper attention to economic, social, and cultural rights. By embracing social justice, transitional justice will not only realize its full potential but also challenge the traditional justice agenda to do likewise. This is not a matter of possibility; it is a matter of choice: one which we now can—and must—make.

