

Rhetoric and Realpolitik: Interrogating the Relationship Between Transitional Justice and Socio-Economic Justice

Padraig McAuliffe*

ABSTRACT: In the last decade, theorists and scholars of transitional justice have not only explored avenues for the field to address the socio-economic roots of conflict, but have increasingly argued that success in this regard is the metric by which it should ultimately be judged. However, the record of the field in identifying or remedying violations of economic, social and cultural rights is underwhelming at best. While one might agree that the roots of conflict and authoritarianism are structural and that such deprivations *do* lend themselves to judicial or quasi-judicial action, neither the mechanisms of transitional justice nor the context in which they apply are apt to significantly catalyse beneficial change. As regards the former, the temporary, exceptionalist and extra-governmental nature of the mechanisms leave them unsuited to tackle structural abuses. In terms of the context in which transitional justice applies, advocates of a greater role in addressing root causes of conflict need to acknowledge that political transition from less to more democratic regimes is a relatively superficial phenomenon. The very real sense of civil-political possibility that transitions from war or authoritarianism to peace and democracy present is rarely accompanied by a transition in the shape of economic power. Transitional justice can take advantage of the period of flux to redress or temper political power imbalances symbolically, historically and jurisprudentially. These achievements are now dismissed by some as merely cosmetic outcomes of an overly liberal-legalist approach, but simultaneous opportunities to redress socio-economic imbalances simply may not exist. A more realistic appraisal of transitional justice's merits is possible only if we accept the relative superficiality of its mechanisms and context of application. Addressing structural injustice is the task of the transitional government and development agencies—schemes for transitional justice can at best form just one of many valid sources of advice, but assuming they can catalyse, dominate or contribute substantially to re-ordering horizontal inequalities is to set expectations too high.

KEYWORDS: transitional justice, peace-building, horizontal inequality, socio-economic justice

* Senior Lecturer, School of Law and Social Justice, University of Liverpool. E-mail: p.g.mcauliffe@liverpool.ac.uk. With thanks to the anonymous reviewer for a number of useful suggestions.

'For every complex problem there is an answer that is clear, simple, and wrong.' H. L. Mencken

1. Introduction

There is a growing belief among advocates, practitioners and policy-makers in transitional justice that the field needs to transcend its liberal-legalist origins in addressing violations of the civil and political rights of individuals. It is now argued with increasing frequency that policies in the area should demand wider systemic reform of those socio-economic structures in society that cause, exacerbate, and are produced by authoritarianism and conflict. As Miller outlines, the justifications for including issues of structural violence and inequality within the remit of transitional justice are pragmatic (only with attention to root causes can peace be sustainable), philosophical (an ethical preference for distribution and equity) and sociological (it is the concept of justice the population concerned most prefers).¹ This new emphasis has largely been compelled by the acknowledgment that while transitional justice can succeed to a greater or lesser degree in acknowledging or punishing the evil that flowed from abuse of political power, many of the economic advantages enjoyed by the *ancien* regime or portions of the population it represented remain in place to potentially sow the seeds of future conflict.² The precise nature of the claims that transitional justice can significantly impact socio-economic structures in post-conflict and post-authoritarian societies will be explored in greater detail in Sections 2 and 3, but it should be noted at this juncture that the arguments made for transitional justice's potential in addressing problems of under-development and inequality are distinctly ambitious. African scholars have argued transitional justice can and must 'elaborate remedial actions that comprehensively address grievances in societies emerging from conflict.'³ Others contend that transitional justice measures should 'actively reverse the systems and attitudes that discriminate and dehumanize' across the entire society.⁴

1. Zinaida Miller, '(Re)Distributing Transition', 7 *International Journal of Transitional Justice* (2013) 370–380 at 377.

2. Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press, 2011) at 27.

3. Japan International Co-Operation Society & International Center for Transitional Justice, 'Workshop on Transitional Justice and Development in Africa: Enhancing Socio-Economic Justice in Societies in Transition: Case Studies on the African Continent' (2008), <<http://ictj.org/sites/default/files/ICTJ-JICA-Africa-Justice-Development-2008-English.pdf>> (References to online sources are accurate as of 27 February 2015) at 7.

4. Matthew Mullen, 'Reassessing the Focus of Transitional Justice: The Need to Move Structural and Cultural Violence to the Centre', 26 *Cambridge Review of International Affairs* (2013) 1–18 at 16.

As Section 3 examines, the presumption among many in the literature is that the sheer fact of transition to peace and/or democracy automatically conduces to a revision of systemic inequalities. Implicit in this presumption is a further supposition that the transitional justice mechanisms available are capable of addressing economic inequalities and development issues with at least some degree of efficacy and all that prevents them modifying inequitable social structures (or mitigating their ill-effects) is the overly-narrow, liberal-legalist lens transitional justice habitually employs. However, this article contends that the problem is not that justice has been defined too narrowly or that civil and political rights have been elevated to a higher plane than socio-economic ones. The problem is instead the transition itself, regrettably but invariably a matter of elite bargaining over political and institutional reforms. As Payne, Reiter and Olsen demonstrate through controlling for old and new regime types, conflict type, duration, democratic history and the presence of a negotiated regime change, transition-type is ultimately the key deciding factor in determining how far and how expansively transitional justice can be pursued.⁵ Many transitions end political repression but progress in this regard is often implicitly dependent on the pre-transition economy going unreformed or unpunished.

Because transitional justice is generally presented in very idealistic terms, scholars in the field have begun to acknowledge that its virtuous effects are more easily presumed than proven.⁶ Amongst advocates and activists in particular, one sees in the literature an emotional commitment to expanding transitional justice that generally eschews doubts about its overall efficacy. Mobekk's warning that the 'expectations of truth commissions have tended to be exaggerated, and their challenges minimised' is one that applies across the board in transitional justice.⁷ Indeed, the underestimation of costs, exaggeration of benefits and hyperbole in discussing pros and cons of proposals that blights humanitarian policy-making is particularly prevalent in transitional justice.⁸ A fear has developed among practitioners and theorists about the damage to the credibility of transitional justice from exaggerated claims, and

5. Tricia Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace: Washington, DC, 2010).

6. Hugo van der Merwe, 'Delivering Justice During Transition: Research Challenges', in Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP Press: Washington, DC, 2009) 115–142 at 121.

7. Eirin Mobekk, *Transitional Justice and Security Sector Reform: Enabling Sustainable Peace* (Geneva Centre for the Democratic Control of Armed Forces, 2006) at 77.

8. David A. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004) at 112.

concern has long been expressed that transitional justice advocacy ‘claims too much.’⁹ Some in the field now fear the ‘overselling’¹⁰ of transitional justice can encourage unrealisable public expectations of what it can achieve, ultimately causing unfair assessments that the mechanisms employed have failed:

Governments, societies, and international actors have high expectations for transitional justice—so high, in fact, that it seems to be overloaded with goals ... Regardless of how comprehensive its programs, transitional justice could not possibly fulfil all these goals.¹¹

If the increasing ambition of transitional justice’s goals were merely an academic question, there would be little cause for concern. However, its mechanisms must compete with ongoing peace-building processes like democratisation, demobilisation, development, rule of law reconstruction and land reform that donors also fund. Given that as much as 5% of development aid to a country can take the form of assistance to transitional justice initiatives,¹² it is necessary to question the extent to which this may lessen the availability of funding for other social reconstruction projects. As Hurwitz notes, ‘there is often a high demand to include more activities in the peace-building equation, yet these demands are not often met with the funding or national or international capacity necessary to implement the dizzying array of activities.’¹³ Pressure from donors who have funded transitional justice thus far has forced the movement to think more critically about the claims it makes and the ends it pursues.¹⁴ Indeed, the management of expectations has now emerged as one of transitional justice’s key challenges.¹⁵

9. Laurel E. Fletcher and Harvey M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’, 24 *Human Rights Quarterly* (2002) 573–639 at 601.
10. Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’, 34 *Journal of Law and Society* (2007) 411–440 at 426; Rachel Kerr and Eirin Mobekk, *Peace & Justice: Seeking Accountability After War* (Polity Press: London, 2007) at 181.
11. Olsen, Payne and Reiter, *Transitional Justice in Balance*, *supra* note 5, at 131.
12. For example, it constituted 5% in both Guatemala and Rwanda (Roger Duthie, ‘Introduction’, in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council: New York, 2009) 17–27 at 21.
13. Agnes Hurwitz and Kaysie Studdard, *Rule of Law Programs in Peace Operations* (International Peace Academy: New York, 2005) at 11.
14. Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’, 3 *International Journal of Transitional Justice* (2009) 5–27 at 11.
15. Office of the United Nations High Commissioner for Human Rights, ‘Rule of Law Tools for Post-Conflict States: Prosecution Initiatives’, <www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> at 3.

Bearing this in mind, this article examines the potential for transitional justice to significantly impact on patterns of distribution, development and inequality. It argues that the lack of progress in reducing inequality or poverty is less the result of 'ideological preoccupations'¹⁶ of those administering justice or pursuing reconciliation and reparations than the product of doubts based (i) on practicality and (ii) on the law of unintended consequences. The first, practical, doubts flow from the belief that current transitional justice mechanisms, alone or in combination, are unsuited professionally, organisationally and conceptually to resolving issues of structural injustice. The apparent faith in the transitional justice literature that its mechanisms can or should operate generally as a simple mechanical lever for pursuing economic justice in deeply divided peace-building ecologies conspicuously lacks any reference to political economy literature on post-conflict reconstruction. This vast literature examines the distribution of political authority and economic reward, the politics embedded in the everyday operations of economic life and, in transitional societies, explores how institutions and policies can be crafted to channel patterns of illicit accumulation in the direction of sustainable development and structural change. However, if one looks beyond the aspirational language, one gets little sense in transitional justice literature how corrupt authoritarian or wartime accumulation can be transformed into fruitful and egalitarian structural change, how the degree to which a centralised bureaucratic state was degraded prior to transition impacts on the potential for developmental resource mobilisation, or how prospects for broad-based development is affected by GDP per capita levels. This new frontier in transitional justice is comprised of laudable but generic aspirations for a more equitable society, but there are no generic transitions. Each period of dramatic political change in each country will endure its own idiosyncrasies and institutional legacies which must inevitably make the aspirations for a beneficial structural impact of transitional justice more or less feasible. However, there appears to be little awareness in the literature of what the most relevant idiosyncrasies (e.g., duration and type of war/authoritarianism, extractive capacity of state, legitimacy) might be.¹⁷

The second, consequentialist, basis for doubt about the wider emancipatory potential of transitional justice stems from fear of jeopardising the transition by alienating those who stand to lose from fairer distribution of opportunities and wealth. On this basis, as Holmes argues, the greater attention given

16. Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice', 2 *International Journal of Transitional Justice* (2008) 266–291 at 271.

17. This is, of course, a critique which extends more generally to the field of transitional justice.

to civil and political rights deprivations in transitional justice overall that is increasingly criticised is ‘neither impartial nor random’ (nor, it might be added, biased), but determined by the exigencies of transition:

The selectivity of our attention to injustice is governed by asymmetries of political power. We ignore one injustice and focus on another depending on who has more political power or a more audible political voice.¹⁸

If, as critics of the hitherto-dominant liberal-legalist view of transition so correctly point out, the causes of the initial conflict endure beyond transition, so too will opposition to any amelioration of them. As Section 6 explores, the opposition of narrow but immensely powerful sectoral interests can stymie the developmental potential of transitional justice, but this essential factor of *transition* has received far less attention in the literature than the narrowness of the concept of *justice*. Kennedy’s warning that the human rights professional’s vocabulary ‘encourages an overestimation of the distinction between its own idealism and the hard realpolitik of those it purports to address’ is particularly apt in these circumstances.¹⁹ Even in the most benign conditions, changing the imperatives of a domestic economy is a protracted and conflictual process. So too, it might be said, is altering the political landscape, but at the time when transitional justice projects are being mooted, the fact of a transition from conflict to peace and/or from authoritarianism to democratic rule implies some distribution of political power has already taken place, however superficially. However, after conflict or authoritarianism, struggles between the political leadership and those they replace or exclude over resources endure and may intensify even if the contest for political power is resolved.

Section 2 begins by recapitulating the links between socio-economic deprivation and conflict, and goes on to examine the perception in much of the literature that transitional justice’s narrow focus on civil and political rights abuses has marginalised issues of development and redistribution. Section 3 examines how this critique, initially focused on the omission of the field to address parallel exploitations, has now degenerated into a rhetorical battle which pitches transitional justice as an actively harmful, neo-liberal project which calls into question the legitimacy of existing modalities of truth commissions, trials and reparations. Section 4 assesses the extent to which the marginalisation of socio-economic issues can be ascribed to ideological bias and the extent to which the practical limitations of traumatic political

18. Stephen Holmes, ‘Concluding Remarks’, in Morten Bergsmo *et al* (eds), *Distributive Justice in Transitions* (Torkel Opsahl: Oslo, 2010) 421–430 at 423.

19. Kennedy, *Dark Sides of Virtue*, *supra* note 8, at 28–29.

transition provide a complementary or superior explanation. Section 5 analyses the practical limitations of trials, truth commissions and reparations in catalysing development, fostering social justice and stimulating redistribution, arguing that the historical record and the inherent potential of these mechanisms offers far less scope for optimism than the rhetoric examined in Sections 2 and 3 would suggest. Section 6 argues that the fundamental premise underlying this rhetoric, namely that the freedom transition offers in the political-democratic sphere is equal, comparable or analogous to that in the economic, social or cultural spheres, is flawed.

To reduce the field to its composite words, the article concludes by arguing that there is less to be gained from questioning the *conception of justice* in transitional justice than there is from questioning the *potential of transition*. Much of the dissatisfaction with transitional justice in the literature in fact reflects the shortcomings of transition and not the amalgam of theories, individuals and institutions that apply in context-specific iterations of transitional justice. Applying these generalised one-aspiration-fits-all expectations to post-conflict states like Somalia or the Ivory Coast reveals what Colvin describes as the naïve technicism of transitional justice in assuming 'that societies can be understood and manipulated, and people behave rationally or at least predictably.'²⁰ Transitional justice consistently makes unrealistic conjectures about the malleability of social and political processes. Indeed, the need to separate utopian dreams from practical possibilities is seen by some as the most pressing challenge for the field overall.²¹ Increased concern with issues of socio-economic justice in the field is welcome, necessary, and can highlight modest but beneficial ways in which post-conflict societies can be made more equitable. However, transitional justice's greatest impact will generally be in the area of civil and political rights. There is a danger that the socio-economic critique of transitional justice risks stigmatising advances in this area as unduly modest or even as impediments to greater reform.

2. Socio-Economics, Conflict and Transition

It borders on the truistic to argue that poverty is deeply intertwined with the dynamics of both conflict and authoritarianism. Though political, psychological and cultural stimuli may drive human rights abuses, they are usually

20. Christopher J. Colvin, 'Purity and Planning: Shared Logistics of Transitional Justice and Development', 2 *International Journal of Transitional Justice* (2008) 412–425 at 423.

21. Brandon Hamber, Liz Sevenko, and Ereshnee Naidu, 'Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialisation in Societies in Transition', 3 *International Journal of Transitional Justice* (2010) 397–420.

conditioned by deeper socio-economic factors and pathologies of power that determine types of harm and who should suffer it. Poverty, inequality and absence of means for redress are among the primary causes of violence in conflicted societies.²² Low-income states are estimated to be 15 times more prone to internal conflict than those in the Organization for Economic Cooperation and Development.²³ The inextricable linkage of underdevelopment with a high risk of violent conflict has long been a core assumption in development discourse.²⁴ The problem where there is an economic source to conflict is often less the scarcity of resources (though this is of course contributory), but rather horizontal inequality between groups and the impossibility of rectifying these socio-economic injustices through political channels:

The cause is not so much lack of resources, per se, as injustice: social, economic and political structures that maintain the dominance of an in-group at the centre of power over an out-group at the periphery to the extent of denying the most basic economic, social and political rights.²⁵

Even conflicts that are ostensibly cultural or ethnic are strongly associated with lower levels of economic well-being.²⁶ Even where inequality and poverty did not cause conflict, they may have constituted an aggravating factor or flowed from the conflict.²⁷ It is something of a commonplace that war can be a sustainable system of economic organisation. Conflict is often driven as much by the opportunity for a group to enrich itself through loot or control of natural resources as it is by grievance.²⁸ Authoritarianism is even more lucrative. When they died, the DR Congo's Mobutu Sese Seko and Indonesian dictator President Suharto amassed US\$12bn and US\$9bn respectively in assets,²⁹ while Chad's Hissène Habré left office taking the national treasury

-
22. Cynthia J. Arnson and I. William Zartman (eds), *Rethinking the Economic of War: The Intersection of Need, Creed and Greed* (Johns Hopkins University Press, 2005).
 23. Stuart E. Eizenstat, John Edward Porter and Jeremy M. Weinstein, 'Rebuilding Weak States', 84 *Foreign Affairs* (2005) 134–146 at 140.
 24. Mark Duffield, *Global Governance and the New Wars* (Zed Books: London, 2001) at 115.
 25. Linda Agerbak, cited in Rama Mani, *Beyond Retribution—Seeking Justice in the Shadows of War* (Polity Press: Cambridge, 2002) at 128–129.
 26. E.g., Philip Verwimp, 'An Economic Profile of Peasant Perpetrators of Genocide: Micro-level Evidence from Rwanda', 77 *Journal of Development Economics* (2005) 297–323.
 27. E.g., Susan L. Woodward, 'Do the Root Causes of Civil War Matter? On Using Knowledge to Improve Peacebuilding Interventions', 1 *Journal of Intervention and State-Building* (2007) 143–170; Lars-Erik Cederman, Kristian Skrede Gleditsch and Halvard Buhaug (eds), *Inequality, Grievances and Civil War* (Cambridge University Press, 2013).
 28. Paul Collier, Anke Hoeffler and Dominic Rohmer, 'Beyond Greed and Grievance: Feasibility and Civil War', 61 *Oxford Economic Papers* (2009) 1–27.
 29. Carranza, 'Plunder and Pain', *supra* note 16, at 312.

with him.³⁰ Collaborators, kin and supporters will benefit commensurately. Internal conflict or repression operates as a form of ‘development in reverse,’³¹ eviscerating the economy at a macro-level by destroying or corrupting state institutions, infrastructure and resources, and at a micro-level by obliterating employment, welfare provision (if any) and public services.³² Even when war or authoritarianism ends, pre-existing inequalities can endure to structure the life experiences of the survivor population, while displacement, disease and wide availability of weaponry can exacerbate these difficulties. Most civic unrest and violence which follows ostensibly successful transitions stem from socio-economic grievances that catalysed or flowed from pre-transitional conditions.³³

2.1. The Narrow Lens of Transitional Justice

Though the types of states dealing with post-conflict legacies of deprivation and inequality are those to which transitional justice actors typically deploy, issues of socio-economic justice have until very recently played a marginal role in transitional justice, defined herein as ‘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.’³⁴ The most familiar examples of transitional justice like trials, truth commissions and lustration have paid minimal attention to issues of structural inequality. Because the conception of transition was typically a limited one implying a progression from war or authoritarianism to liberal democracy (defined in its most basic forms by Teitel as ‘the move from less to more democratic regimes’³⁵ or by Smiley as one from a regime ‘whose norms are bad to one whose norms are good’),³⁶ the conceptual and philosophical dimensions of economic injustice were not deeply analysed by those within and outwith transitioning societies attempting to make the emergent peace sustainable. The over-riding concerns were stability, reconfiguration of

30. Luc Huyse, *All Things Must Pass Except the Past* (Van Halewyck: Kessel-Lo, 2009) at 69.

31. Paul Collier *et al*, *Breaking the Conflict Trap: Civil War and Development Policy* (Oxford University Press, 2003) at i.

32. Jane Alexander, *A Scoping Study of Transitional Justice and Poverty Reduction* (DFID: London, 2003) at 6.

33. Rama Mani, ‘Editorial: Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development’, 2 *International Journal of Transitional Justice* (2008) 253–256 at 262.

34. U.N. Secretary-General, *The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies*, UN Doc. S/2004/616 (3 August 2004) at para. 8.

35. Ruti Teitel, *Transitional Justice* (Oxford University Press, 2001) at 5.

36. Marion Smiley, ‘Democratic Justice in Transition’, 99 *Michigan Law Review* (2001) 1332–1347 at 1336.

state institutions and popular participation in politics. While the political universe changed, the poverty, inequality and under-development that characterised the earlier conflict consistently persist in the new liberal democratic dispensation, as illustrated by a random sample of states which undertook transitional justice to at least some degree. Four years after the end of *apartheid* in South Africa, 61% of blacks lived in poverty while only 1% of whites did.³⁷ The prime beneficiaries of apartheid famously retired into luxury holiday homes, their accrued wealth untouched.³⁸ Today, inter-race inequality remains high while intra-race inequality increases dramatically.³⁹ Even after democratic transition, Brazilian and Filipino land-ownership continued to be dominated by large *latifundia*, continuing to impoverish dependant rural communities.⁴⁰ The discredited militaries of Chile and Indonesia retained control of important enterprises within the state like copper mining and food distribution respectively, even where they lost political control.⁴¹ Transition to Maoist rule in democratic Nepal did little to diminish the wealth of the deposed king.⁴² Though Guatemala's peace accords established an increased target ratio for tax-to-GDP in order provide basic services and infrastructure for the indigenous groups whose deprivation led to war, the landed elite resist tax reform of any sort.⁴³

Transitional justice appeared to concentrate on the civil-political tip of the iceberg and hence ignored vast structural issues beneath the waterline which formed the background or catalyst for the abuses it reckoned with. Its mechanisms concerned themselves more with physical violence attending past civil and political rights violations than with past or present structural violence, defined herein as the phenomenon whereby the structure of society manifests

-
37. Kora Andrieu, 'Transitional Justice: A New Discipline in Human Rights' *Online Encyclopedia of Mass Violence* (2010), <www.massviolence.org/IMG/article_PDF/Transitional-Justice-A-New-Discipline-in-Human-Rights.pdf> at 18.
 38. Hennie Van Vuren, *Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994* (Institute for Security Studies: Cape Town, 2006) at 16.
 39. Mullen, 'Reassessing the Focus', *supra* note 4, at 11.
 40. John H. Hertz, 'An Historical Perspective', in Justice and Society Program of the Aspen Institute (ed.), *State Crimes: Punishment Or Pardon* (Aspen Institute: Queenstown, Md., 1989) 19–38 at 22.
 41. Tony Addison, 'The Political Economy of the Transition from Authoritarianism', in De Greiff and Duthie (eds), *Transitional Justice and Development*, *supra* note 12, 110–142 at 114 and 123.
 42. Daniel Aguirre and Irene Pietropaoli, 'Gender Equality, Development and Transitional Justice: The Case of Nepal', *2 International Journal of Transitional Justice* (2008) 356–377 at 361.
 43. Tony Addison, Abdur Chowdhury and S. Mansoob Murshed, 'Financing Reconstruction', in Gerd Junne and Willemijn Verkoren (eds), *Post-Conflict Development: Meeting New Challenges* (Lynne Rienner Publishers: Boulder, 2005) 211–222 at 212.

unequal power relationships which lead to unequal life chances, harming people by preventing them from meeting their basic needs.⁴⁴ The wrongs pursued were those gross human rights violations committed against individuals or collectivities (eg crimes against humanity, torture, murder) which were motivated by gaining or retaining political control, as opposed to social or economic abuses.⁴⁵ Likewise, the targets of transitional justice were perpetrators for whom criminal justice was the appropriate response, as opposed to beneficiaries of a systematically unfair economy where a more distributive conception of justice would be more opportune.⁴⁶ Criminal trial tends to cast conflict in terms of identifiable criminal acts against the victim's bodily integrity, formalising an attitude that the conflict was primarily about physical violence.⁴⁷ It singles out the instigators and actual perpetrators of violence 'while leaving to broader initiatives in rule of law, humanitarian assistance, democracy building, and economic development the task of resuscitating a "sick society."⁴⁸ TRCs also focused initially on a narrow range of extreme forms of human rights abuse, as opposed to more mundane socio-economic deprivations like land dispossession or ethnic/religious/gendered discriminations. Even the widely valorised Latin American and South African TRCs have been criticised for merely revealing a 'diminished truth,' defining victimhood too narrowly, ignoring the political economies of repression, and, in the latter, eclipsing the racialised relationships between the beneficiaries of white power and deprived black citizens.⁴⁹ As van der Merwe put it, transitional justice is thus a concept 'that can be criticised as superficial for addressing only the excessive use of oppressive power or the ravages of collective violence rather than the basic nature of an exploitative system.'⁵⁰ Though it is argued the gains of transitional justice might be lost⁵¹ or not fully realised if the

44. John Galtung, 'Violence, Peace and Research', 6 *Journal of Peace Research* (1969) 167–191 at 167.

45. Hugo van der Merwe, Victoria Baxter and Audrey Chapman, 'Introduction', in van der Merwe, Baxter and Chapman (eds), *Assessing the Impact*, *supra* note 6, 1–12 at 8.

46. John Torpey, 'Introduction: Politics and the Past', in John Torpey (ed.), *Politics and the Past: On Repairing Historical Injustices* (Rowman & Littlefield: Lanham, Md., 2003) 1–35 at 1, 7–8 and 10.

47. Colm Campbell and Catherine Turner, 'Utopia and the Doubters: Truth, Transition and the Law', 28 *Legal Studies* (2008) 374–395 at 376.

48. Fletcher and Weinstein, 'Violence and Social Repair', *supra* note 9, at 580.

49. Mahmood Mamdani, 'A Diminished Truth', in Wilmot James and Linda Van de Vijer (eds), *After the TRC: Reflections On Truth and Reconciliation in South Africa* (Ohio University Press, 2001) 58–61 at 58.

50. Van der Merwe, 'Delivering Justice', *supra* note 6, at 117.

51. Carranza, 'Plunder and Pain', *supra* note 16, at 329.

structural causes of repression or conflict are left unaddressed,⁵² the field's concentration on consequences instead of structural causes was deemed to leave it ill-equipped to influence or inform any broader structural reform project.⁵³ Transitional justice's failure to examine the structural reasons for violence, amend injurious development policies or foster redistribution meant old grievances would inevitably morph into new ones.⁵⁴

Transitional justice scholarship began to acknowledge that structural change in the state was more important than any of its individual processes in assuring the success of transition.⁵⁵ Many now argue it is imperative to permanently integrate structural issues and socio-economic justice into the transitional justice architecture. Scholars now routinely argue that addressing mass poverty should be recognised as an object of justice⁵⁶ and that the mechanisms of transitional justice should be applied to transforming oppressive economic arrangements that disenfranchise and exclude vulnerable and resentful segments of society.⁵⁷ Transitional justice would now connect with broader social justice projects, and in particular pursue a conception of development oriented not around the dangers of pursuing growth simpliciter through economic liberalisation but rather around equitable forms of growth geared ultimately towards welfare, securing minimum levels of income, and human dignity.⁵⁸ The most forceful advocacy of this shift in transitional justice from a limited concept of conflict prevention to societal metamorphosis is found in a widely-cited speech in 2006 by the then-UN High Commissioner for Human Rights Louise Arbour who argued that transitional justice 'must' have the ambition of assisting the transformation of oppressed societies into free ones by exposing discriminatory practices and violations of

-
52. 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*, *supra* note 12, 28–75 at 33.
 53. Ruti Teitel, 'Transitional Justice in a New Era', 26 *Fordham International Law Journal* (2002) 893–906 at 894.
 54. Lisa Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework', 2 *International Journal of Transitional Justice* (2008) 331–355 at 334.
 55. Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective', 31 *Human Rights Quarterly* (2009) 163–220 at 205–206.
 56. Carranza, 'Plunder and Pain', *supra* note 16, at 315.
 57. Ismael Muvingi, 'Sitting on Powder Kegs: Socio-Economic Rights in Transitional Societies', 3 *International Journal of Transitional Justice* (2009) 163–182 at 181.
 58. Naomi Roht-Arriaza and Katherine Orlovsky, 'A Complementary Relationship: Reparations and Development', in de Greiff and Duthie (eds.), *Transitional Justice and Development*, *supra* note 12, 170–213 at 175.

economic, social and cultural rights before and during conflict.⁵⁹ This turn in transitional justice fits with an increased willingness in the field to embrace holistic, integrated strategies that combine retributive, restorative and reparative justice.⁶⁰ Transitional justice also embraces other disciplines such as peace-building and security sector reform which are increasingly conceptualised by the UN and INGOs in terms of human security.⁶¹ Since 2011's World Bank Development Report identified a correlation between recurrent political violence and enduring poverty, the prevention of political violence has become a key goal of development assistance generally.⁶²

This altered focus may have flowed from, and certainly accorded with, the perceptions of those whose lives international and domestic transitional justice actors tries to ameliorate. As victimisation was studied in greater depth came the realisation among scholars that it occurs on the level of gender, wealth and class, paving the way for a greater insistence on the indivisibility of rights in the literature that was not always appreciated in the hitherto predominant liberal-legalist paradigm.⁶³ Polls of survivor populations overwhelmingly demonstrate that socio-economic concerns trump the desire for criminal justice or truth in transitions. For example, Corkalo *et al* found that all communities in Bosnia deemed economic reconstruction and social justice more imperative than accountability.⁶⁴ In a survey of 2585 adults in Uganda in 2005, less than 1% believed justice was the most pressing priority after conflict, a figure dwarfed by the need for food (33%), education (5%) and health (6%).⁶⁵ In Nepal, only 3% of respondents thought punishing perpetrators was a priority, in contrast to compensation (24%), education (17%) and basic needs (16%).⁶⁶ Similar conclusions have also been drawn in the Democratic

59. Louise Arbour, 'Economic and Social Justice for Societies in Transition', 40 *NYU Journal of International Law & Policy* (2007) 1–27 at 3.

60. Paul Gready, 'Reconceptualising Transitional Justice: Embedded and Distanced Justice', 5 *Conflict, Security and Development* (2005) 3–21 at 7.

61. UN Development Programme, *New Dimensions of Human Security: Human Development Report* (1994) at 23.

62. World Bank, 'World Development Report 2011: Conflict, Security, and Development', <<http://wdr2011.worldbank.org/>>.

63. Laplante, 'Roots of Violence', *supra* note 54, at 346.

64. D. Corkalo *et al*, 'Neighbors Again? Intercommunity Relations after Ethnic Cleansing', in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Cleansing* (Cambridge University Press, 2004) 143–161 at 143.

65. Phuong Pham & Patrick Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda* (University of California Human Rights Center, 2010) at 25.

66. Carla Fajardo and Warisha Farasat, 'Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and the Transition in Nepal', International Center for Transitional

Republic of the Congo⁶⁷ and in Kenya.⁶⁸ East Timor's Commission for Reception, Truth and Reconciliation acknowledged violations of bodily integrity but went on to affirm that 'the impact of conditions in which [the Timorese people] lived, while often less remarked upon, was equally damaging and possibly more long-lasting.'⁶⁹ Laplante observes that widespread protests and riots in post-transitional Chile, South Africa and Guatemala arose from the same types of socio-economic grievances that underpinned earlier periods of human rights violations in these states.⁷⁰ A study of victims in Rwanda, Cambodia and East Timor demonstrated that the failure of their societies to secure their basic needs constituted significant impediments to peace and reconciliation, notwithstanding the apparent stability of the respective transitions.⁷¹ While Latin American societies have been observed to tolerate violations by authoritarian regimes in the pursuit of public order, the revelation that the juntas and caudillos were corrupt (most notably the Pinochet Riggs Bank and tax fraud scandals) have proven far more damaging to their historical reputations than civil and political rights abuses.⁷² Black South Africans in particular perceive the beneficiaries of apartheid as having escaped much-needed scrutiny.⁷³ As Oomen argues, '[e]ven if the input and output of justice mechanisms are perceived as fair, they will still lack legitimacy if they operate within a context of ongoing discrimination and deprivation.'⁷⁴

Justice and Advocacy Forum (2008), <ictj.org/sites/default/files/ICTJ-Nepal-Voices-Reconciliation-2008-English.pdf>.

67. Patrick Vinck and Phuong Pham, 'Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Development Perspective from Eastern DRC', 2 *International Journal of Transitional Justice* (2008) 398–411.
68. Simon Robins, "'To Live as Other Kenyans Do": A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations' International Center for Transitional Justice and Advocacy Forum 28 (2011), <www.ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> .
69. Commission for Reception, Truth and Reconciliation, *Chega! The Report of the Commission For Reception, Truth And Reconciliation* (2005), Chapter 7(9) at 2.
70. Laplante, 'Roots of Violence', *supra* note 54, at 331.
71. Wendy Lambourne, 'Transitional Justice and Peace-building After Mass Violence', 3 *International Journal of Transitional Justice* (2009) 28–48 at 42.
72. James Cavallaro and Sebastian Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond', in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle For Change* (Hart Publishing: London, 2008) 121–142 at 131–137.
73. Yasmin Sooka, 'The Politics of Transitional Justice', in Chandra Lekha Sriram and Suren Pillay (eds), *Peace Versus Justice?: The Dilemma of Transitional Justice in Africa* (James Currey: Suffolk, 2010) 21–43 at 33.
74. Barbara Oomen, 'Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda's Multi-layered Justice Mechanisms', in Kai Ambos, Judith Large and Marieke

2.2. Towards an Expanded Focus

Until recently, these complaints about transitional justice's shortcomings and the potential for a more holistic response were merely 'Sunday beliefs,' conceptions of (in)justice that commanded subjective assent without actually inducing action to bring about an improved state of affairs.⁷⁵ The UN's seminal *Rule of Law and Transitional Justice Report* in 2004 acknowledged the need to repair the material damage of conflict or authoritarianism, but neglected to outline even a basic blueprint for tackling structural roots of conflict.⁷⁶ Practice on the ground offered little by way of example. However, in the last five years different suggestions have emerged as to how the field can address its past derelictions.⁷⁷ Lambourne conceives of a relatively wide form of 'socioeconomic justice' divided into historical justice (compensation, restitution, reparation) for past abuses and prospective distributive justice to minimise structural violence in future.⁷⁸ Andrieu asserts that the transformation of transitional justice should develop collective recognition procedures as the new rationale for social redistribution,⁷⁹ echoing Mani's and Alexander's earlier proposals of an explicitly distributive approach geared towards equity in resources and power in addition to pre-existing legal and rectificatory forms of justice.⁸⁰ Pillay similarly contends that a redistributive approach 'might enable the creation of lasting peace by addressing the material discrepancies and psychological legacies of conflict.'⁸¹ Kalmanovitz would prefer transitional justice to prioritise social minima like education, nutrition,

Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice* (Springer: Berlin, 2009) 175–202 at 197.

75. Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004) at 81.
76. UN Secretary-General, *supra* note 34, at para. 54.
77. A significant milestone was the International Journal of Transitional Justice's 2008, volume 2 special issue on transitional justice and development where a number of the contributors argued for an expansion of the transitional justice field. A sizeable literature has followed, most notably de Greiff and Duthie (eds), *Transitional Justice and Development*, *supra* note 12; Gaby Oré Aguilar and Felipe Gomez Isa (eds), *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Intersentia: Cambridge, 2011); Bergsmo *et al* (eds), *Distributive Justice*, *supra* note 18; Paul Gready, *The Era of Transitional Justice* (Routledge: New York, 2011).
78. Lambourne, 'Transitional Justice and Peace-building', *supra* note 71, at 41.
79. Andrieu, 'New Discipline', *supra* note 37, at 20.
80. Mani, *Beyond Retribution*, *supra* note 25, at 10; Alexander, *Scoping Study*, *supra* note 32, at 48.
81. Suren Pillay, 'Conclusion', in Sriram and Pillay (eds), *Peace Versus Justice?*, *supra* note 73, 347–356 at 353.

education and health for the survivor population before attempting more corrective forms of justice.⁸² Miller argues the field should aspire towards what she calls ‘economic justice’ which would address the economic roots of conflict, temper economic liberalisation with redistribution and impact on the transitional government’s development plans.⁸³ Most ambitiously of all, Selim and Murithi assume transitional justice ‘should be about expanding not only the choices, but also the options and blueprint for society and individuals to improve their livelihoods and wellbeing.’⁸⁴ Aguirre and Pietropaoli contend that it should assure outcomes based on the third generation right to development.⁸⁵ Perhaps more modestly, Duthie argues transitional justice measures are not a development strategy but should be designed in ways that are ‘development sensitive,’⁸⁶ but this is an unusually circumspect vision of transitional justice’s potential effect on post-conflict or post-authoritarian society. These distributive/egalitarian/developmental approaches would address the causes of poverty as well as its symptoms, conceptualising justice as equality in addition to the traditional transitional justice preoccupation with liberty.⁸⁷ The presumption is that virtuous circles would emerge wherein justice, development and democracy would mutually reinforce each other.⁸⁸

In considering this presumption, it is imperative to note that development discourse and literature has largely neglected to engage with transitional justice,⁸⁹ though the UNDP has committed to strengthening the linkages between the two areas.⁹⁰ Development practitioners in the field are frequently unaware or uninterested in parallel transitional justice activities, a

82. Pablo Kalmanovitz, ‘Corrective Justice versus Social Justice in the Aftermath of War’, in Bergsmo *et al* (eds), *Distributive Justice*, *supra* note 18, 71–96 at 76–77.

83. Miller, ‘Effects of Invisibility’, *supra* note 16, at 267.

84. Yvette Selim and Tim Murithi, ‘Transitional Justice and Development: Partners for Sustainable Peace in Africa’, 6 *Journal of Peacebuilding and Development* (2011) 58–72 at 64.

85. Aguirre and Pietropaoli, ‘The Case of Nepal’, *supra* note 42, at 356.

86. Roger Duthie, ‘Towards a Development-sensitive Approach to Transitional Justice’, 2 *International Journal of Transitional Justice* (2008) 292–309.

87. Muvingi, ‘Sitting on Powder Kegs’, *supra* note 57, at 166.

88. De Greiff, ‘Articulating the Links’, *supra* note 52, at 28; Lisa Hecht and Sabine Michalowski, ‘The Economic Dimensions of Transitional Justice’, University Of Essex Transitional Justice Network Concept Paper (2012), <www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf>.

89. Markus Lenzen, ‘Roads Less Travelled: Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice’, in de Greiff and Duthie (eds), *Transitional Justice and Development*, *supra* note 12, 76–109 at 77 and 85.

90. United Nations Development Programme, ‘Strengthening the Rule of Law in Conflict and Post-Conflict Situations: A Global UNDP Programme for Justice and Security 2008–2011’ (2011), <www.unrol.org/files/rol_final_apr09.pdf> at 9.

phenomenon that reflects less the professional balkanisation that attends all peace-building than a belief that the mechanisms and insights of transitional justice are of limited application in conjuring a sustainable socio-economic agenda into being. If the international development community largely discounts transitional justice as being of anything more than tangential importance and if the record for transitional justice in addressing the structural roots of conflict by this point is negligible, why are there such large expectations? The novelty of focus may provide one explanation. Another answer may lie in the traditional optimism of scholars in the field regarding the potency of transition to redefine the norms on which a conflict-ridden society is based. The presumption of many is that periods of transition are times when 'everything is up for grabs all at once.'⁹¹ Aguirre and Pietropaoli, for example, assert that transitions are rare periods of rupture 'that offer opportunities to reconceive the social meaning of past conflicts in an attempt to reconstruct their present and future effects,'⁹² while Bergsmo *et al* see transition as a transformative constitutional moment where the distribution of poverty and wealth, land reform and the economy may be publicly addressed.⁹³ It is suggested that truth commissions may have greater purchase because they take place in times when significant decisions about the future course of the state will be adopted.⁹⁴ It is assumed that states should feel a greater compulsion to redress conditions of socio-economic deprivation in the transitional period, especially if they are presented as rights violations.⁹⁵ Arbour's optimism is explained by her faith that '[s]ocieties in transition present unique opportunities for countries to equip themselves appropriately to ensure respect for human rights and human dignity.'⁹⁶ Even the very narrow criminal remit of the ICC's interventions in Africa have been viewed as 'windows of opportunity' for restructuring the state and reducing poverty (albeit without any concrete proposals for how it should do so).⁹⁷ Given that development actors

91. Francois DuBois and Adam Czarnota, 'The Transitional Rule of Law', 24 *Alternative Law Review* (1999) 9–19 at 10.

92. Aguirre and Pietropaoli, 'The Case of Nepal', *supra* note 42, at 357.

93. Morten Bergsmo *et al*, 'Introduction', in Bergsmo *et al* (eds.), *Distributive Justice*, *supra* note 18, 1–14 at 2.

94. Rolando Ames Cobián and Felix Reátegui, 'Toward Systemic Social Transformation: Truth Commissions and Development', in de Greiff and Duthie (eds.), *Transitional Justice and Development*, *supra* note 12, 142–169 at 145.

95. Laplante, 'Roots of Violence', *supra* note 54, at 331 (Preamble) and 341.

96. Arbour, 'Economic and Social Justice', *supra* note 59, at 26.

97. Christine Bjork and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya', 14 *Yale Human Rights and Development Law Journal* (2011) 205–230 at 226 and Wanza Kioko, 'The Place of Transitional Justice in Kenya's Political Transition', in Lawrence M. Mute, Kichamu Akivaga and

also generally use periods of political change to foster systemic changes in the structure of society, transition may appear an unusually propitious time for ambitious projects.⁹⁸ This faith is shared to varying degrees by some development actors,⁹⁹ anti-corruption theorists¹⁰⁰ and political economists who argue that egalitarian structural change is most feasible where antagonistic interest groups have temporarily or permanently lost power.¹⁰¹

Of course, critics of the emancipatory rhetoric of human rights have argued that humanitarians make arguments ‘they know to be less persuasive than they claim’ when activists and advocates attempt to revamp its tools (like transitional justice) to correct critical shortcomings (like a perceived narrowness of focus).¹⁰² Notwithstanding the ostensibly immense confidence scholars have in transitional justice, even optimistic works are studiously opaque about what their conceptions of distributive, developmental or socio-economic justice will ultimately look like on the ground. Elements of a broad-based, development-friendly recovery like inflation policy, currency reform, bank regulation and even taxation go unaddressed in the literature. Advocates of a role for transitional justice in fundamentally altering the structures of divided societies acknowledge that thus far all we have are a series of hypothetical connections to be further researched,¹⁰³ points of possible interconnection,¹⁰⁴ ‘a starting point for a broader conversation’¹⁰⁵ and underdeveloped concepts and boundaries.¹⁰⁶ Suggested activities (‘exposing’ discriminatory practices,¹⁰⁷ ‘reaching’ for deeper justice,¹⁰⁸ ‘making connections’)¹⁰⁹ exist in the realm of the exhortatory, at some causal remove from concrete betterment of peoples’ lives. Though these developments in transitional justice ostensibly represent a welcome change from the traditional humanitarian reluctance identified

Wanza Kioko (eds), *Building an Open Society: The Politics of Transition in Kenya* (Claripress: Nairobi, 2002) 330–350 at 331.

98. Cobián and Reátegui, ‘Toward Systemic Social Transformation’, *supra* note 94, at 145.
99. Alexander, *Scoping Study*, *supra* note 32.
100. Christine Cheng and Dominik Zaum, ‘Key Themes in Peace-Building and Corruption’, 15 *International Peacekeeping* (2008) 301–309 at 307.
101. Donald Snodgrass, ‘Restoring Economic Functioning in Failed States’, in Robert I. Rotberg (ed.), *When States Fail: Causes And Consequences* (Princeton University Press, 2004) 256–268 at 264.
102. Kennedy, *Dark Sides of Virtue*, *supra* note 8, at 28.
103. Colvin, ‘Purity and Planning’, *supra* note 20, at 414.
104. *Ibid.*
105. Miller, ‘Effects of Invisibility’, *supra* note 16, at 291.
106. Hecht and Michalowski, ‘Economic Dimensions’, *supra* note 88, at 1.
107. Arbour, ‘Economic and Social Justice’, *supra* note 59, at 3.
108. Tafadzwa Pasipanodya, ‘A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal’, 2 *International Journal of Transitional Justice* (2008) 378–397 at 397.
109. De Greiff and Duthie (eds), *Transitional Justice and Development*, *supra* note 12.

by Kennedy to make distributional choices, current advocacy is still slow to identify winners and losers, how much the winners stand to benefit, or how the losers might react.¹¹⁰ The apparent progress in redefining transitional justice, therefore, is more rhetorical than programmatic or policy-based. Because these exhortations have yet to be acted upon, there is no established theoretical or empirical base on which to build.¹¹¹ Even a rudimentary 'lessons learned' stage that could serve as a generic template for activities to this end has yet to be arrived at. The generalised arguments made are inspiring but lacking in even the most minimal concrete detail if considered in the context of particularised transitions.

3. Transitional Justice and Rhetoric

If the potential of transitional justice to transform social and economic organisation of the state is as self-evident as its proponents suggest, the question remains as to why socio-economic justice has been pursued so infrequently in times of significant political change. In answering this question, the answer is found to lie not with the inadequacy of trials, truth commissions or reparations as catalysts for macro-economic reforms, nor the often painfully negotiated nature of transition, but in the conception of justice within the field. Arguments to the effect that more egalitarian social change is impaired by the narrowness of the concept of justice presuppose a wide latitude for transitional justice actors to define their fields of action and a high degree of efficacy once they act.

3.1. Transitional Justice as the Marginaliser of Socio-Economic Injustice

Aside from the startlingly ambitious nature of the propositions made about transitional justice's potential to thoroughly transform unjust arrangements in a manner that war, democracy, development and aid have not, what is most notable about this line of argumentation is the firmness with which it rejects transitional justice's existing modes of practice. As noted above, all arguments asserting a hitherto-unrealised distributive/developmental potency in transitional justice begin by deprecating the narrowness of the existing conception of justice. This narrowness is viewed as an inevitable consequence of the liberal paradigm which dominates the field, elevating legalism and

110. Kennedy, *Dark Sides of Virtue*, *supra* note 8, at xxiii–xxiv.

111. Colvin, 'Purity and Planning', *supra* note 20, at 414.

political rights at the expense of including economic and cultural issues.¹¹² The paradigmatic example of this is the South African TRC's very limited definition of a gross violation of human rights as '(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit [killing, abduction, torture or severe ill-treatment]' in a state where hunger and deprivation arguably were responsible for far greater losses of life.¹¹³ Torture, war crimes and rape committed by police, soldiers or politicians fall comfortably within the conceptual parameters of transitional justice, but income flows and inequalities they made possible for the much larger number of corporations, landowners and other beneficiaries do not. Socio-economic rights have historically been marginalised in scholarship and policy-making since the Universal Declaration of Human Rights. Transitional justice is therefore seen by some as yet another skirmish in a wider ideological battle over human rights. On this view, the failure to integrate structural violence perspectives is seen as the product of the following traditional liberal-legalist assumptions in the wider human rights literature:

1. that the transitioning government's obligations to positively secure economic rights will inevitably fall foul of the state's lack of resources, capacity or agency, and therefore should not be pursued;¹¹⁴ or
2. that deprivations of economic, social or cultural rights are less egregious than violations of civil and political rights,¹¹⁵ or
3. that socio-economic rights violations are non-justiciable and therefore better addressed by development actors.¹¹⁶

Overall, as Arbour puts it, 'not actively protecting and promoting economic, social, and cultural rights reflects the hidden assumption that ESC rights are not entitlements but aspirational expectations' in transitional justice.¹¹⁷

The modern critique of transitional justice takes Arbour's position further by arguing that it applies with greater force in transition than in ordinary conditions of political stability, for two reasons. The first is that transitional

112. Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice From the Bottom Up', 35 *Journal of Law & Society* (2008) 265–292 at 274.

113. Pablo de Greiff, 'Repairing the Past: Reparations for Victims of Human Rights Violations', in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006) 1–18 at 8.

114. Mani, *Beyond Retribution*, *supra* note 25, at 41.

115. Kora Andrieu, 'Dealing With a "New" Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?', 11 *Journal of Human Rights* (2012) 537–557 at 543.

116. Carranza, 'Plunder and Pain', *supra* note 16, at 315.

117. Arbour, 'Economic and Social Justice', *supra* note 59, at 4.

justice's traditional preoccupation with a rupture between the repressive/conflicted past obscures the ongoing nature of past structural violence.¹¹⁸ In this way, the predominant concern of transitional justice with the cessation of military or repressive violence and handover of power has marginalised questions of socio-economic development.¹¹⁹ The second reason is that the teleological impetus of transitional justice towards a peaceful democratic future depoliticises debate over social structures by assuming all fundamental dilemmas are either resolved by the sheer fact of liberalising transition or resolvable soon within the new democratic dispensation.¹²⁰ It is alleged that progress is stymied by the field's building-blocks approach in which justice mediates political transition and only then can larger problems be addressed by the polity or the market.¹²¹ As Arthur puts it

Instead of 'coming to terms' with historical complexities (as one might expect in an effort to deal with 'the past'), transitional justice was presented as deeply enmeshed with political problems that were legal-institutional and, relatively, short-term in nature. So short-term, in fact, that they could be dealt with specifically during a 'transitional' period.¹²²

The position that transitional justice has ignored wider issues of social justice is inarguable. What is notable, and indeed regrettable, about these arguments is the dramatic ratcheting-up of the surrounding rhetoric to the effect that transitional justice as currently constituted in practice or conceptualised in theory is worthless, pointless or merely counter-productive if it does not address poverty or social exclusion. It is one thing to argue, as Mamdani does, that social justice is more important in some or all transitions than traditional modalities of transitional justice like trial,¹²³ or that the narrow mainstream practice of transitional justice reinforces a narrative that the conflict was political or ethnic but unrelated to deeper economic inequalities.¹²⁴ Few would dispute the assertion that transitional justice is essentially incomplete without attention to wider injustices. As Dwyer put it, 'How much reconciliation can be achieved if, in post-apartheid South Africa, Whites admit that their economic, social and political status was based on a morally bankrupt system but

118. Miller, '(Re)Distributing Transition', *supra* note 1, at 375; Andrieu, 'New Discipline', *supra* note 37, at 19.

119. Muvingi, 'Sitting on Powder Kegs', *supra* note 57, at 167.

120. Cobián and Reátegui, 'Toward Systemic Social Transformation', *supra* note 94, at 155.

121. Arbour, 'Economic and Social Justice', *supra* note 59, at 4.

122. Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', 31 *Human Rights Quarterly* (2009) 321–367 at 333.

123. Mahmood Mamdani, 'Reconciliation Without Justice', XLVI *South African Review of Books* (1996) 3–5 at 5.

124. Andrieu, 'New Discipline', *supra* note 37, at 19.

then refuse to accept sharply redistributive taxation?’¹²⁵ These are valid, some might say unavoidable, criticisms of transitional justice as currently practiced. It is also reasonable to suggest transitional justice may seem an empty gesture to those victims who benefit only indirectly from democratisation and establishing the rule of law or to those whose children and grandchildren will be the ultimate inheritors of any long-term transitional dividend.¹²⁶

3.2. Transitional Justice as an Aggravator of Socio-Economic Injustice

However, there is another, more antagonistic strain to this position that significantly ups the rhetorical ante, going beyond merely cataloguing the regrettable omissions of the field to argue transitional justice as currently practiced is actively harmful in socio-economic terms. The most prevalent example is a zero-sum game argument already familiar in wider human rights debates to the effect that pursuing civil and political rights represents an acquiescence to the dominant neo-liberal economic order and an implicit renunciation of social justice issues like health, welfare and poverty. For example, Miller argues that the standard set of debates on transitional justice (truth versus justice, what works, etc.) have erected an artificial binary separation between the realms of economics and justice, a deliberate ‘constructed invisibility’ that consciously or unconsciously fosters an aggressively liberalising post-transition politics.¹²⁷ Carranza similarly argues that the field deliberately ‘looks away’ when it sees socio-economic injustices.¹²⁸ Teitel vaguely suggests that transitional justice ‘has, in large part, displaced broader reform projects, and appears to represent a move away from progressive politics’ without suggesting what those broader reform projects might be.¹²⁹ Wilson is more direct in contending that the South African TRC’s narrow focus on extreme violence ‘actually obstructed’ a wider search for social justice there.¹³⁰ On this view, transitional justice appears a deliberate mechanism for ideological obfuscation to divert attention from the economic beneficiaries of the predecessor regime.¹³¹ Mullen

125. Miriam J. Aukerman, ‘Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice’, 15 *Harvard Human Rights Journal* (2002) 39–98 at 83.

126. Andrieu, ‘New Discipline’, *supra* note 37, at 15.

127. Miller, ‘Effects of Invisibility’, *supra* note 16.

128. Carranza, ‘Plunder and Pain’, *supra* note 16, at 330.

129. Teitel, ‘New Era’, *supra* note 53, at 901.

130. Richard A. Wilson, ‘Justice and Legitimacy in the South African Transition’, in Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratising Societies* (Oxford University Press, 2001) 190–217 at 207.

131. Van der Merwe, ‘Delivering Justice’, *supra* note 6, at 117.

is somewhat more generous when he accepts that widespread labour abuses and private sector exploitation in El Salvador 'are not entirely attributable' to the mandate of its Commission on Truth, which again focused more on individuals than broader systems.¹³² Though rhetorically compelling, these arguments appear to conflate a failed operation (transitional justice) with the pre-existing disease (inequality). The best example of this tendency towards hyperbole is Miller's assertion that by ignoring the deeper roots of conflict, transitional justice mechanisms in explicitly causal terms "may actively contribute to new outbreaks of violence."¹³³ The extension of this argument, that ignoring inequalities will inevitably lead to a recurrence of conflict,¹³⁴ appears to ignore the plethora of transitions in states like Mozambique, Angola, Guatemala and Sierra Leone which appear highly durable notwithstanding the absence of any real distributive justice.¹³⁵

Others go further rhetorically to argue that transitional justice as currently practiced is effectively the handmaiden of neo-liberal structural adjustment programs. Certainly, economic liberalisation tends to accompany political transition, though few states will be untouched by it beforehand—it may after all have been a contributory factor to war or authoritarian rule. Numerous scholars argue that transitional justice must be understood as an integral part of the liberal peace-building model and therefore automatically promotes neo-liberal market-based economic models antithetical to redistribution of wealth or economic equality.¹³⁶ Makau Wa Mutua, for example, sees transitional justice as reproducing the assumption in global human rights of the naturalness of the market and the inevitability of capitalist relationships.¹³⁷ Nagy contends that transitional justice is open to the accusation of attempting to 'produce subjects and truths that align with market democracy and are blind to gender and social justice.'¹³⁸ Gready contends that by privileging

132. Mullen, 'Reassessing the Focus', *supra* note 4, at 14.

133. Miller, 'Effects of Invisibility', *supra* note 16, at 288.

134. *Ibid.*, at 287.

135. As Holmes reminds us, since de Tocqueville progressive politics has had to grapple with the fact that many extremely unequal societies have manifested stability and immunity from class-based revolution (Holmes, 'Concluding Remarks', *supra* note 18, at 422).

136. Sandra Rubli, *Transitional Justice: Justice by Bureaucratic Means?* (Swiss Peace Working: Berne, 2012) at 3; Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice', 21 *Global Society* (2007) 579–591 and Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice', in McEvoy and McGregor (eds), *Transitional Justice From Below*, *supra* note 72, 99–120 at 104.

137. Makau Mutua, 'A Critique of Rights in Transitional Justice: The African Experience', in Aguilar and Gomez Isa (eds), *Rethinking Transitions*, *supra* note 77, 31–45 at 36–37.

138. Rosemary Nagy, 'Transitional Justice as a Global Project: Critical Reflections', 29 *Third World Quarterly* (2008) 275–289 at 275–276.

civil and political violations over economic abuses in the South African TRC, the ‘result has been entrenched, even increasing, inequality.’¹³⁹ On the basis of these arguments, transitional justice isn’t merely failing to address socio-economic justice, it appears to exacerbate it by serving to protect the interests of the privileged at the expense of the poor,¹⁴⁰ actively perpetuating the position of existing economic elites instead of empowering the marginalised,¹⁴¹ and serving as an enabling context for the ravages of the free market.¹⁴² Lost amongst the stridency of these claims is the fact that these are essentially arguments from omission and temporal correlation. Because transitional justice has not addressed socio-economic justice and is located within broader trends of peace-building and democratisation that exacerbate or at least fail to mitigate socio-economic inequalities, it is argued that the field must therefore automatically support or conduce to marketisation and liberalising growth.

Ignatieff is convincing in arguing against this mechanical conflation of free market globalists and human rights internationalists. Though the moral individualism that traditionally characterises human rights and its transitional justice variant has some ‘elective affinity with the economic individualism of the global market’, the two cannot be presumed to march hand in hand as the relationship between the two is more usually antagonistic.¹⁴³ Because humanitarians presume institutions like transitional justice are inherently benign and effective, when they fail to realise their assumed potential claims tend to arise that policy-making has been ‘captured,’ distorted or misused.¹⁴⁴ In this case, transitional justice is assumed to have been commandeered by agents sympathetic to, or actively supportive of, globalising capital. However, as Section 4 goes on to argue, it is difficult to find any scholars or activists or policy-makers in the field supportive of neo-liberal economics or the idea that transitional justice should facilitate capitalism. Even if transitional justice does not act as a brake on simultaneous processes of economic liberalisation, it cannot be assumed to facilitate these processes. It may be entirely neutral. The prosecutor exploring the role of blood diamonds in the Sierra Leone conflict or the truth commissioner listening to rape testimony in Guatemala would be astonished to discover their work provided an ‘enabling context for free markets’¹⁴⁵ purely because the scope of their enquiry didn’t expand as far

139. Gready, ‘Embedded and Distanced Justice’, *supra* note 60, at 5.

140. Mvingi, ‘Sitting on Powder Kegs’, *supra* note 57, at 182.

141. Aguirre and Pietropaoli, ‘The Case of Nepal’, *supra* note 42, at 367.

142. Gready, ‘Embedded and Distanced Justice’, *supra* note 60, at 5.

143. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) at 7.

144. Kennedy, *Dark Sides of Virtue*, *supra* note 8, at 121.

145. Gready, ‘Embedded and Distanced Justice’, *supra* note 60, at 5.

as the roots of all social division. Advocates of a wider role for transitional justice must remain alive to the possibility that neither a ‘conspiracy of interests’ nor a ‘coherence of blindness’ explain its lack of impact on unjust societal structures.¹⁴⁶

A few other less common rhetorical strategies have been employed to criticise existing modalities of transitional justice. The first is the dramatic re-orientation of the metrics by which transitional justice should be judged. For example Villa-Vicencio contended the South Africa TRC should be judged not on the basis of who went to prison but on whether the quality of everyday life was better,¹⁴⁷ while Alexander argues that transitional justice was ‘critical’ and ‘vital’ to poverty reduction (before somewhat contradictorily noting it rarely has this role).¹⁴⁸ Another line of argument is that transitional justice, with its focal points of retribution and restoration, is pointless if it doesn’t make everyday life better or reduce poverty. The argument of Boraine, on the one hand, and Selim and Murithi, on the other, that reconciliation without economic justice ‘is cheap and spurious’, or merely symbolic, is implicitly or explicitly commended in much of the literature.¹⁴⁹ Another rhetorical strategy is to juxtapose transitional justice with other projects. Mani’s position that transitional justice represents a costly luxury in a highly-constrained environment is reasonable, but she too appears to accept the zero-sum game interpretation when she further asserts that transitional justice ‘often comes to represent a trade-off of sorts between justice or development.’¹⁵⁰ Though there is a legitimate concern that costly transitional justice projects are pitched financially against justice sector reform activities,¹⁵¹ neither Mani nor anyone else manages to cite specific examples of money being diverted from development projects to transitional justice. Funding for transitional justice and development tend to come from different sources, while financial support for development dwarfs that of transitional justice.¹⁵²

The trend in transitional justice scholarship towards addressing structural, socio-economic issues is welcome, and the critique of the limitations of its

146. Miller, ‘Effects of Invisibility’, *supra* note 16, at 272.

147. Conference speech cited in Mani, *Beyond Retribution*, *supra* note 25, at 125.

148. Alexander, *Scoping Study*, *supra* note 32, at 3 and 47.

149. Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Oxford University Press, 2000) at 357; Selim and Murithi, ‘Transitional Justice and Development’, *supra* note 84, at 61.

150. Mani, ‘Editorial’, *supra* note 33, at 253, repeated at 257.

151. Muna B. Ndulo and Roger Duthie, ‘The Role of Judicial Reform in Development and Transitional Justice’, in de Greiff and Duthie (eds), *Transitional Justice and Development*, *supra* note 12, 250–281 at 265.

152. Lenzen, ‘Roads Less Travelled’ *supra* note 89, at 86.

existing modalities is a welcome antidote to the exaggerated claims that it forms the centre-piece of social repair.¹⁵³ It becomes counter-productive, however, when the existing valuable work trials, truth commissions and reparations programs do is devalued in the strident demands for a re-orientation of the field. If, as has been suggested, transitional justice, as a whole, risks losing credibility unless it improves overall living conditions for citizens in the transitional state, the field itself might be in danger.¹⁵⁴ In driving the field from non-existence to peace-building mainstream in less than two decades, transitional justice scholars formulate the issues, but also define how those issues are resolved, using their moral appeal, investigative missions and national NGO partners to pressure states to comply with their conceptions of how justice should be pursued.¹⁵⁵ Historically, ideas outlined in papers, conferences or the field about how transitional justice can be practiced often amount to self-fulfilling prophecies of what will be done in future, even if the success anticipated does not follow as inevitably. Kritz exaggerates only slightly when he contends that a government's transitional justice policy 'often depends less on well-grounded and proven policy considerations than on whether the junior member of staff writing the policy memo has some experience with the South African TRC or another transitional justice process,'¹⁵⁶ but he highlights the very salient fact that how scholars, advocates and practitioners think about and experience transitional justice can have a large impact on how it is practiced and its relationship to other socio-political phenomena. The parameters of transitional justice are often defined by what international donors at supranational, bilateral or INGO levels are willing to pay.¹⁵⁷ If mere accountability, or truth, or purges or lustration are held to be worthless by those within the field, then external support from donors and peace-builders may be jeopardised. Some rather large babies risk being thrown out with the bathwater if this perception that transitional justice as currently constituted unduly narrows the potential for thoroughgoing social transformation becomes an article of faith. It is worth therefore considering whether transitional justice has these wider, egalitarian and developmental potentials, both in terms of the mechanisms employed and the context in which they are used.

153. Fletcher and Weinstein, 'Violence and Social Repair', *supra* note 9, at 577.

154. Mani, 'Editorial', *supra* note 33, at 253–254.

155. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton & Co.: New York, 2011).

156. Neil J. Kritz, 'Policy Implications of Empirical Research on Transitional Justice', in van der Merwe, Baxter and Chapman (eds), *Assessing the Impact*, *supra* note 6, 13–21 at 14.

157. Barbara Oomen, 'Donor-Driven Justice and its Discontents', 36 *Development and Change* (2005) 887–910.

4. The Circumspection of Transitional Justice: Pragmatism or Ideology?

The foregoing criticisms of transitional justice have proceeded on the basis that the field has resisted claims for structural justice because its liberal-legalist framework and (unspoken) sympathy for market economics denies the legitimacy of these aims¹⁵⁸ or because transitional justice actors fear the dilution of the field's purposes.¹⁵⁹ However, while it is clear that the traditional debates on stability, truth and criminal justice have operated to overshadow the importance of economic factors in transition, it is questionable the extent to which this trend can be explained by any acceptance of the rightness of the neoliberal free market paradigm. On the basis of a survey of writings on transitional justice since the late 1980s, it is hard to discern any theorist in the field explicitly or implicitly arguing in favour of neo-liberal capitalist economics. It is significant that none of the writers mentioned earlier who disdain the liberal-legalist limitations of the conception of justice in transition can cite any scholars in the field who do so. For over a decade, mainstream transitional scholars have willingly accepted that reconstructing the socio-economic bases of society can exert a greater beneficial impact than accountability or truth without attracting principled dissent.¹⁶⁰ Even the architects of the now-maligned South Africa TRC fully accepted at the time that the reversal of apartheid economic policies was more important than seeing PW Botha behind bars, but regretted that the need to avoid alienating right-wing elements who could prevent the transition to democratic rule made this impossible.¹⁶¹ Though the UN *Transitional Justice and the Rule of Law Report* (2004) neglected economic injustice, the UN Office of the High Commissioner for Human Rights' influential *Rule of Law Tools* series subsequently acknowledged that structural violence can have even more deleterious effects for the public than civil and political rights violations¹⁶² and recommended that transitional justice mechanisms address it.¹⁶³ Numerous

158. Arthur, 'How "Transitions" Reshaped Human Rights', *supra* note 122, at 326 and 355.

159. Miller, 'Effects of Invisibility', *supra* note 16, at 267.

160. Robert Meister, 'Human Rights and the Politics of Victimhood', 16 *Ethics & International Affairs* (2002) 91–108; Fletcher and Weinstein, 'Violence and Social Repair', *supra* note 9, at 603.

161. Kader Asmal, 'Truth, Reconciliation, and Justice: The South African Experience in Perspective', 63 *Modern Law Review* (2000) 1–24 at 16 and 11.

162. Office of the United Nations High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict States: Truth Commissions', <www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf> at 9.

163. *Ibid.*, at 16.

truth commissions, the indictments in the Charles Taylor and Darfur trials, and the aforementioned polling of survivor communities constantly emphasise the inter-relation of bodily integrity abuses and economic injustice. Far from constituting a marginal position, the thesis that economic policies in authoritarianism and war are more permanent and damaging than civil and political abuses is something of an article of faith in transitional justice. No significant dissent is to be found in the literature on the universality of economic, social and cultural rights, on the one hand, or the indivisibility of all three generation of rights, on the other. Few would quibble with the assertion that traditionally parsimonious views of transitional justice risk limiting its potential, even if estimations of that potential exist on a wide spectrum from minimalist to utopian.

None of this should be surprising. Transitional justice invariably rallies 'reformist forces' and progressist elements that might be expected to support socio-economic justice.¹⁶⁴ As this section goes on to examine, the very few scholars who explicitly oppose a role for transitional justice in directly addressing socio-economic wrongs do so not on the basis of opposition to economic justice, development or redistribution, but on the basis that the available mechanisms of transitional justice are unsuited to doing so. What one instead sees in traditional transitional justice discourse is a concentration on how transitional justice can facilitate progress towards a liberal agenda of electoral politics, the rule of law, responsive governance and constitutionalism which opens the political space, essentially demonstrating ambivalence about the economic order. Transitional justice aspires towards a stable society, but not necessarily a capitalist one. Transitional justice is certainly guilty of under-analysing its potential in stimulating socio-economic reform, a matter which is slowly being redressed. However, under-analysis of the potential to catalyse socio-economic reform should not be confused with opposition to it. Much of the rhetoric surrounding transitional justice and structural injustice takes place on the basis of an unhelpful 'those who are not with us are against us' view of the field.

If policy-makers in transitional justice hold development or redistribution as legitimate aims in peace-building generally, then the palpable lack of enthusiasm for a developmental or redistributive role for transitional justice is better explained by the yawning gap between the ends proposed and the

164. Godfrey M. Musila, 'Accountability Debate in Kenya in Near Policy Vacuum and Ethnic Tension', in Phil Clark (ed.), *Oxford Transitional Justice Research: Debating International Justice in Africa* (Foundation for Law, Justice and Society: Oxford, 2010) 104–107 at 105.

means available than any ideological bias. As Cobián and Reategui put it, any significant developmental or redistributive project

operates in the arena of massive and anonymous policies directed to whole categories of the population and is aimed at designing a general institutional framework, [while] transitional justice usually takes as its starting point the domain of the particular and the concrete: bringing justice to bear in relation to serious human rights violations suffered by specific individuals.¹⁶⁵

By comparison to what critics of transitional justice argue it *should* pursue, the finite, targeted, traditional ambitions of the field of some truth and some accountability thus far appear mere micro-projects unsuited to grappling with widespread patterns of abuse, astronomical numbers of victims and complex consequences. Of course, one can argue that transitional justice can and must expand beyond this narrow remit, but the required change is not simply a technocratic expansion of institutions. Transitional justice needs new conceptual and philosophical foundations beyond the negative self-critique examined thus far or the largely unelaborated pleas for distributive, developmental or socio-economic justice. On the terms of the existing self-critique of transitional justice and in the absence of even the most rudimentary overall policy framework, the field must outline solutions based on different combinations of public and private legal norms (affirmative action, expropriation, taxation policy, investment, (de)nationalisation) to the most fundamental questions of distribution of wealth, allocation of capital, control of production and standard of living, as well as other practical-philosophical problems like how far back to address root problems or whether the new government can be held responsible for all or some of the depredations of the regime they removed. All of this must take place at a time when the state is rebuilding its constitutional institutions, creating a functioning civil service, imposing civilian control over the military and stabilising a currency, to name but a few of the vast plethora of state-building activities, all of which make acute economic demands. In addition, existing post-conflict or post-authoritarian institutions are dysfunctional or corrupted. Transitional justice typically occurs in what de Greiff labels ‘very imperfect worlds.’ By this, he means a society characterised not just by the massive and systematic violation of norms, but by the fact that there are enormous disadvantages implicated in any attempt to enforce compliance.¹⁶⁶ Finally, these societies must grapple with the paradox of transitional justice that the states with the greatest need for economically transformative justice will often be those with the fewest available resources.

165. Cobián and Reategui, ‘Toward Systemic Social Transformation’, *supra* note 94, at 147.

166. Pablo de Greiff, ‘Theorising Transitional Justice’, in Melissa Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice* (New York University Press, 2012) 31–77 at 35.

Given the dearth of concrete proposals from those who urge a more expansive role for transitional justice and the complexities of the post-conflict or post-authoritarian ecology, it is not that surprising that even those who acknowledge the shortcomings of the field are less than sanguine about its practical possibilities. Discussions about the relationship of transitional justice to wider reform need to acknowledge in practical terms 'the weakness of agency, actors, and organisational forms that could bring about profound change.'¹⁶⁷ Though enjoying a highly visible public profile and a degree of legal and/or moral authority, truth commissioners, like those who administer lustration or reparation schemes, merely constitute a corps of temporary public servants.¹⁶⁸ Transitional justice mechanisms are generally interdisciplinary and well-equipped to draw attention to injustices, to define the discourse of violation and perhaps to propose general outlines for reform. However, this is something quite far removed from the inherently conflictive and highly technical expert processes by which proposals are budgeted, designed and implemented. The apparent timidity of transitional justice is less the product of ideological bias than the commonly observed preferences within the field for clearly defined, mutually coherent and projectisable objectives.¹⁶⁹ With the exception of prosecutorial initiatives, transitional justice institutions are traditionally more reliant on the mobilisation of shame than on any enforcement capability they might possess. This circumspection better explains the perceived failure of the field to expand than an unspoken desire to obscure conflict's economic or resource-based origins.¹⁷⁰

Much like 'a comprehensive anticorruption strategy ends up looking like a comprehensive peacebuilding or state-building strategy',¹⁷¹ the most aspirational claims sketched in Section 3 resemble something of a Borgesian map of desired outcomes so multi-dimensional that they reproduce the entire scope of peace-building in one-to-one facsimile. To take but one example, the forms of reparation usually proposed (ranging from employment and property guarantees to compensation and guarantees of non-repetition) 'could easily be read as the stuff of modern governance in its entirety, rather than as a special case of the requirements of governance in transitional societies.'¹⁷² The UN Officer of the High Commissioner for Human Rights accepts that poverty, homelessness, education policy failures and other social ills are critically

167. Cobián and Reátegui, 'Toward Systemic Social Transformation', *supra* note 94, at 146.

168. *Ibid.*, at 146.

169. Alexander, *Scoping Study*, *supra* note 32, at 55; Lenzen, 'Roads Less Travelled', *supra* note 89, at 83.

170. As argued in Miller, 'Effects of Invisibility', *supra* note 16, at 268.

171. Alix Boucher et al, 'Mapping And Fighting Corruption In War-Torn States', Stimson Center Report No.61 (2007) at 57.

172. Asmal, 'South African Experience in Perspective', *supra* note 161, at 16.

important subjects, but argues that incorporating them within the scope of transitional justice could risk expanding the mandate of a truth commission so broadly that it may be impossible to reasonably complete its tasks.¹⁷³ Even transitional justice scholars on the more expansive wing of the discipline like Roht-Arriaza warn that ‘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.’¹⁷⁴ Building peace and building social justice should be inseparable processes,¹⁷⁵ but it does not necessarily follow that the institutions that work towards these ends must be inseparable also. In recognising the complementarity between development and transitional justice, the need to respect the integrity of the two fields is forgotten in much of the more optimistic scholarship.¹⁷⁶ Much of the foregoing has assumed that transitional justice mechanisms can formulate comprehensive strategies for a fairer society, but practitioners on the ground traditionally defer upwards to the state and downwards to smaller units that supply the want of expertise or on-the-ground knowledge that transitional justice mechanisms typically manifest.

To begin with the former, it is clear the even the weak apparatus of the transitioning state has far greater functionality and reach than any transitional justice mechanism alone or in combination. This is all the more so when intrusive peace-building missions like UNTAET or UNAMSIL or UNMIK are on the ground. Though Miller regrets that ‘[b]y leaving economic development, issues of resource distribution or inequality of power or wealth to separate courts or to executive control, transitional justice institutions implicitly tell society that development and conflict may be separated in a fair fashion,’¹⁷⁷ in the radically imperfect conditions of transition, a division of labour may actually be welcome.¹⁷⁸ The areas of economic injustice that the literature points to as key to a revitalised transitional justice are really all sectors of governance; as such they are inextricably interdependent. Practitioners appreciate that transitional justice is not necessarily the most conducive to taking into account the complexities of such governance. Adequate recompense for

173. Office of the High Commissioner for Human Rights, *supra* note 162, at 9.

174. Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice’, in Naomi Roht-Arriaza and Javier Marriecurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press, 2006) 1–16 at 2.

175. Nagy, ‘Transitional Justice as a Global Project’, *supra* note 138, at 277.

176. Lenzen, ‘Roads Less Travelled’, *supra* note 89, at 84.

177. Miller, ‘Effects of Invisibility’, *supra* note 16, at 3.

178. De Greiff points out that any beneficial connection of development to transitional justice also means preserving the integrity of the things that are being connected and that “effective synergies depend on sensible divisions of labour” (De Greiff, ‘Articulating the Links’, *supra* note 52, at 29).

lost employment opportunities, forced displacements or resource deprivation would tie up entire national budgets for years to come of governments.¹⁷⁹ Transitional justice bodies on the ground are far less bullish about their prospects than external critics of transitional justice. For example, Peru's Integral Reparations Plan Group (*Grupo sobre el Plan Integral de Reparaciones-GPIR*) was at great pains to delimit their work from the macro-economic role of the state:

[The] PIR does not seek to resolve poverty, exclusion and inequality, which have a structural character and respond to the overall functioning of a political and economic system. While some of its programs can and should contribute to improving the quality of life of victims and their families, its central objective is reparation and recognition of the victims as human beings, whose fundamental rights have been violated. This does not mean that the State should not also carry out a policy of social development aimed at attacking the roots of poverty and inequality, and the TRC provides, in other parts of this Report, concrete proposals of necessary institutional reforms, but the PIR has another purpose.¹⁸⁰

Peace agreements, constitutions and programs for government could reach many of the same conclusions as a truth commission in a much faster time, with greater enforcement power and arguably with far greater democratic legitimacy. Indeed, Waldorf argues that because of the sensitivity of local political factors and the need for some form of democratic accountability, a short-term intervention like transitional justice is less apt to address structural injustice than whatever state structures emerge in the longer-term.¹⁸¹ Beyond this, some dilemmas like the movement of capital and goods in globalised markets or conflicting private demands in the black economy, labour and production lie largely beyond the grasp of even highly functional states, let alone temporary bodies in dysfunctional ones.

The standard institutions of transitional justice also rely on smaller units to remedy the lack of capacity they typically manifest. The best-funded truth commission ever was that in South Africa, which nevertheless needed 1888 days to process requests for amnesty, and only published its report five years after ending hearings. Giving additional tasks to truth commissions will severely test already-strained competencies. The Liberian Truth and Reconciliation Commission acknowledged it could provide only limited recommendations to remedy issues over land tenure and redistribution,

179. Asmal, 'South African Experience in Perspective', *supra* note 161, at 16.

180. Comisión Verdad Y Reconciliación, *Informe Final De La Comisión Verdad Y Reconciliación Vol. IX* (2003), Part 4, Ch. 2.2, at 148.

181. Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', 21 *Social and Legal Studies* (2012) 171–186 at 179.

and so proposed a specific land commission to review the complexities of the land tenure system, which commenced work in 2010.¹⁸² Tunisia hived off the anti-corruption remit from its commissions on human rights abuses and political reforms,¹⁸³ as did Bangladesh and Ghana.¹⁸⁴ South Africa and Rwanda similarly devolved issues of land to bodies other than their main transitional justice institutions. One can of course argue that it is regrettable that the truth commission and, to a lesser extent, trials in both countries could not influence the procedures of these land commissions on the basis that they might generate lessons about the use and abuse of land,¹⁸⁵ but this does remind us that transitional justice mechanisms operate best in terms of exercising influence (the mobilisation of shame) than defining policy (which needs both wide-ranging expertise, enforcement capacity and democratic legitimacy). Reasonable qualms about the adaptability of transitional justice mechanisms to the universe of post-conflict injustice are a more convincing explanation for their perceived under-performance in relation to economic justice than fears about their dilution or neo-liberal capture.

5. The Limitations of Transitional Justice Institutions

Scholars like Duthie or Hecht and Michalowski have suggested that the relative neglect of economic justice might owe to the complex nature of socio-economic rights and the various interlinked causes for their deprivation which the mechanisms of transitional justice might not be able to reckon with adequately on account of their limited resources, skills, size or capacity.¹⁸⁶ Certainly, it is easier for transitional justice to deal with civil and political abuses like torture or a murder in terms of identifying a violator (the physical perpetrator and the government/military figure who gave the order), the violated person(s) and a remedy (criminal punishment, guarantee of non-repetition by the democratising state) than it is to diagnose the reasons for, and ways to rectify, the unequal macro-level economic organisation of society.¹⁸⁷ However, examples like the bills of rights in South Africa, Nepal

182. Selim and Murithi, 'Transitional Justice and Development', *supra* note 84, at 65–66.

183. Christopher Lamont and Hela Boujnef, 'Transitional Justice in Tunisia: Negotiating Justice During Transition', 49 *Politicka Misao-Croatian Political Science Review* (2012) 32–49 at 39.

184. Andrieu, 'Dealing With a "New" Grievance', *supra* note 115, at 548.

185. Miller, 'Effects of Invisibility', *supra* note 16, at 286–287.

186. Duthie, 'Towards a Development-sensitive Approach', *supra* note 86, at 306; Hecht and Michalowski, 'Economic Dimensions', *supra* note 88, at 5.

187. Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization', 26 *Human Rights Quarterly* (2004) 63–73.

and India demonstrate that socio-economic rights can be enforceable by law, while truth commissions in the likes of Sierra Leone, Liberia and South Africa have wrestled credibly (if not entirely successfully) with structural causes of conflict.

On similarly practical lines, Addison¹⁸⁸ and Elster¹⁸⁹ suggest that the dearth of resources available to transitional justice limit its distributive impact, while Waldorf argues the short life-spans of transitional justice mechanisms undermine their potential.¹⁹⁰ These organisational explanations are also unconvincing—if transitional justice could deliver on even a fraction of the promise advocates hold out for it in redressing socio-economic wrongs, any resource impediments could surely be overcome by international aid, while the case for extending, or even making permanent, mechanisms so obviously beneficial would be inarguable. The Limburg Principles that guide interpretation of the ICESCR accept the progressive realisation of rights over time and over the course of evolving national economic strength.¹⁹¹ An extended time-frame for transitional justice would fit comfortably within the progressive realisation paradigm if states and donors were convinced of its developmental merit. The suggestion that expansive views of transitional justice are vague or utopian is also unconvincing.¹⁹² The traditional aspirations of transitional justice have always existed on a spectrum of the immediately realisable (identifying those responsible for abuses, punishing them) to the nebulous (reconciliation at all levels of society) and quixotic (preventing all human rights abuses).

The most reasonable qualms over adaptability of transitional justice to issues of socio-economic justice are made clear on an examination of the three most commonly-used institutions, namely trials, truth commissions and reparation, in ascending order of assumed potential.

5.1. Trials

The litany of economic crimes that take place in the course of authoritarian rule is wearily familiar—corruption, tax evasion, customs evasion, fraud, misappropriation of public funds and exploitation of illegal or migrant labour. In situations of military conflict, war crimes like appropriation of

188. Addison, 'Political Economy of Transition', *supra* note 41, at 114.

189. Jon Elster, 'Introduction', in Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (Cambridge University Press, 2006) 1–14 at 1.

190. Waldorf, 'Anticipating the Past', *supra* note 181, at 6–7.

191. Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17/Annex (1987) at paras 21–24.

192. A risk suggested, but not accepted, in de Greiff, 'Articulating the Links', *supra* note 52, at 40.

property, pillage and starvation can be added.¹⁹³ They are as much a part of an indivisible system of crimes on the part of the government or non-state grouping as torture and persecution. The clandestine nature of many of these activities is usually a reflection of their illegality, and most will be justiciable as crimes. Criminal trial remains the most familiar and most symbolically potent avenue for transitional accountability. As noted earlier, trials for economic abuses have sometimes proven far more damaging to reputations than those for civil and political rights abuses. Notable examples include the Pinochet tax fraud proceedings in Chile and the trials of Todor Zhivkov (Bulgaria) and Ramiz Alia (Albania) for embezzlement,¹⁹⁴ while Argentina's prosecutors probed the junta's liability for property theft.¹⁹⁵ Tunisia and Egypt prioritised the prosecution of Presidents Ben Ali and Mubarak for embezzlement in the aftermath of the Arab spring over crimes relating to physical abuse. However, these represent the exception rather than the rule—it is clear that transitional criminal accountability has more often ignored economic crimes on account of its primary concern with bodily integrity abuses.¹⁹⁶ Scholars now argue that criminal tribunals should approach economic crimes the way they undertake civil and political trials in the expectation that this can aid recovery of assets amassed by perpetrators and disclose information about the economic practices of the regime.¹⁹⁷ However, while trial can be successful in punishing economic malfeasance, it has much greater limitations in terms of the pedagogical or discursive role usually claimed for criminal prosecutions. Though economic crime is the product of social, economic and political factors, the individualist model of accountability in trial invariably struggles to expose or condemn wider patterns of conduct or structural conditions underlying the crime.¹⁹⁸ Furthermore, even where a conviction is secured, recovery is extremely difficult given the porosity of international financial borders and the trans-boundary activities of transnational corporations.

International criminal law and the ICC's complementarity regime increasingly sets the priorities for criminal accountability in many transitional states, but the law on economic crimes is far less developed than that relating to war crimes or crimes against humanity. One proposed solution has been to

193. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 901002.

194. Teitel, *Transitional Justice*, *supra* note 35, at 42.

195. Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction Publishers: New Brunswick, 1997) at 95.

196. Carranza, 'Plunder and Pain', *supra* note 16, at 310.

197. De Greiff, 'Articulating the Links', *supra* note 52, at 34 and 35.

198. Andrieu, 'Dealing With a "New" Grievance', *supra* note 115, at 543.

designate and define large-scale corruption as a crime against humanity,¹⁹⁹ but there is much fear that international criminal tribunals or hybrid courts could be overloaded if given such a remit.²⁰⁰ Restitution was not granted at the ad hoc tribunals or the hybrid courts of the previous decade. Indeed, if anything, international criminal justice has operated to jeopardise development—the extraditions of Slobodan Milosevic and Charles Taylor to The Hague were facilitated by the threat of withholding aid to Serbia and Liberia.²⁰¹ The UN Convention against Corruption criminalises corruption and prioritises asset recovery as its ‘fundamental principle.’²⁰² While states parties are legally obliged to incorporate its measures into national legislation, most of the measures therein lie in the realm of civil law.

5.2 Truth Commissions

Truth commissions offer valuable advantages over trials in terms of reckoning with the anonymous catalysers and beneficiaries of structural violence as they employ less individualistic models of accountability, enjoy more lenient standards of proof, have a more explicitly pedagogical role and have demonstrated infinitely more pliability in terms of abuses covered, remedies awarded and agents employed. Nevertheless, when these commissions were being mainstreamed in the late 1980s and 1990s, their understanding of wrongdoing during the prior regime was limited to a ‘dominant script’ narrowly focused on civil and political rights abuses.²⁰³ It was estimated that only three out of 34 truth commissions between 1974 and 2004 expressly engaged with economic crimes.²⁰⁴ Abuses which could not be characterised as criminal (i.e. most socio-economic rights deprivations) were generally ignored, reinforcing a narrative of conflict that violence was political, ideological, ethnic or religious, and not economic.²⁰⁵ Everyday life was largely ignored, limiting the ‘truth’ a given mechanism could reveal and consequently impeding its transformative potential. Latin American truth commissions typically noted the polarisation between left and right, the depredations of police and military, the corruption of the rule of law and the weakness of state institutions, but consciously

199. Ilias Bantekas, ‘Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies’, 4 *Journal of International Criminal Justice* (2006) 466–484.

200. Andrieu, ‘Dealing With a “New” Grievance’, *supra* note 115, at 543.

201. Olsen, Payne and Reiter, *Transitional Justice in Balance*, *supra* note 5, at 86–87.

202. United Nations Convention against Corruption, 31 October 2003, entered into force 14 December 2005, 2349 UNTS 41.

203. Cavallaro and Albuja, ‘The Lost Agenda’, *supra* note 72, at 125.

204. Carranza, ‘Plunder and Pain’, *supra* note 16, at 315.

205. Campbell and Turner, ‘Utopia and the Doubters’, *supra* note 47, at 377.

omitted the socio-economic reasons underlying repressive behaviour.²⁰⁶ The El Salvadorian truth commission focused on non-derogable breaches of the Geneva Conventions, the ICCPR and the American Convention on Human Rights.²⁰⁷ Chile's influential Truth and Reconciliation Commission similarly focussed on bodily integrity violations like disappearances and torture, admitting that even though it recognised the 'crisis has deep roots, of a socio-economic character, it would go beyond its mandate to explore them.'²⁰⁸ Notwithstanding its statutory remit to establish 'as complete a picture as possible of the causes, nature and extent of gross violations of human rights,' the South African TRC ignored corruption, employment patterns and access to resources as these matters were outside its mandate, though it did refer damningly to the role of business in sustaining apartheid rule, albeit only after the Commission's solitary hearing on issues of economic violence.²⁰⁹ The sustained criticism of the South African body for its neglect of everyday living conditions was highly influential.²¹⁰ In its aftermath, policy-makers slowly began to accept that without attention to the enabling environment of structural violence, the work of truth commissions would be undermined and their impact weakened.

Most subsequent truth commissions have been more expansive in their approach. Guatemala's Commission on Historical Clarification scrutinised the systemic sources of cyclical state violence, and went on to make recommendations relating to social participation of Mayan communities, employment and integration into state agencies, and the use of indigenous forms of conflict resolution.²¹¹ The Sierra Leone TRC examined patterns of social injustice and their interaction with conflict. It made recommendations on issues like discriminatory inheritance, skills training, economic empowerment, micro-financing schemes and the need to improve opportunities for women in the economy.²¹² The Liberian Truth Commission listed greed and corruption as being among the root causes of conflict surrounding the Taylor regime and implicated the international community's hunger for raw materials

206. Laplante, 'Roots of Violence', *supra* note 54, at 335.

207. Thomas Buergenthal, 'The UN Truth Commission for El Salvador', 27 *Vanderbilt Journal of Transnational Law* (1994) 497–507.

208. Comisión Nacional de Verdad y Reconciliación, *Informe De La Comisión Nacional de Verdad y Reconciliación, Vol. 1* (1991) at 38.

209. Wilson, 'Justice and Legitimacy', *supra* note 130, at 208.

210. Eg Mamdani, 'Reconciliation without Justice', *supra* note 123.

211. Commission for Historical Clarification, *Guatemala: Memory of Silence; Report Of The Commission For Historical Clarification* (1999).

212. Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Vol. 2* (2004), Chapter 3, at paras 107–111 and 316–376.

as a contributory factor in conflict.²¹³ The Peruvian Truth and Reconciliation Commission examined how horizontal inequalities fed, and were exacerbated by, political violence and the role of social exclusion in the recruitment of Shining Path guerrillas, and integrated this analysis into a wider critique of national economic structures.²¹⁴ The report of East Timor's Commission for Reception, Truth and Reconciliation incorporated the international coffee trade, environmental degradation, forced displacement and famine.²¹⁵ The mandate of Kenya's Truth, Justice and Reconciliation Commission extended far beyond 2007's electoral violence to include corruption, displacements and irregular acquisitions of land.²¹⁶ Chad's truth commission was tasked with investigating the finances of former president Hissène Habré and his cronies but went on to highlight corruption, economic mismanagement and discrimination within important state institutions.²¹⁷

In light of these successes, a number of scholars now recommend that truth commissions go beyond analysing the structural roots of war or repression to propose detailed, feasible solutions to the economic problems raised that would be acceptable to the public and actionable by the executive.²¹⁸ Truth commissions are seen as the cornerstone of justice, a triggering device for reforms and the measure 'best placed to take on the role of "spokesperson" for the changes sought by transitional justice' because of their moral standing and because they provide the largest factual context for legacies of socio-economic exploitation.²¹⁹ Perhaps most valuably, Laplante argues truth commissions can diagnose the state's failure to provide core minimum socio-economic conditions as rights violations²²⁰ and 'can help initiate a longer-term reform process by creating the possibility for viewing underlying socio economic conditions not as unchangeable facts of life but as consequences of conscious policy decisions that fail to protect fundamental rights.'²²¹

213. Truth and Reconciliation Commission of Liberia, *Consolidated Final Report Vol. 1* (2009) at 300–308 and 322–323.

214. Truth and Reconciliation Commission of Peru, *Final Report of The Truth And Reconciliation Commission, Vol. VIII* (2003), Part 2.

215. Commission for Reception, Truth and Reconciliation, *supra* note 69, at Chapter 7.

216. *National Dialogue and Reconciliation Agreement on Truth, Justice and Reconciliation Commission* (14 February 2009).

217. Alexander, *Scoping Study*, *supra* note 32, at 51.

218. Selim and Murithi, 'Transitional Justice and Development', *supra* note 84, at 66; Mani, 'Editorial', *supra* note 33, at 256; Laplante, 'Roots of Violence', *supra* note 54 at 333.

219. Cobián and Reátegui, 'Toward Systemic Social Transformation', *supra* note 94, at 148 and 151.

220. Laplante, 'Roots of Violence', *supra* note 54, at 352.

221. *Ibid.*, at 342.

However, even where truth commissions meet the four generally-accepted criteria for success (independence, adequate resources and subpoena power, public hearings and the ability to name accused publicly),²²² advancement does not depend purely on technocratic expansion of a truth commission's remit and expertise. Truth commissions are undoubtedly valuable as diagnostic tools in uncovering what conditions permitted past violations and outlining broad general conclusions. However, to make the type of impact some suggest transitional justice should aim for requires complex and technical understandings of how government, economies and poverty interact if their recommendations are to bridge the gap between comprehension and correction. Unfortunately, the operations of truth commissions are far removed from the governance world of painful budgetary choices, prioritisation and macro-economic impact. Truth commissions are generally made up of a moral elite chosen for their integrity, not a technocratic elite chosen for expertise.²²³ Genuine socio-economic justice will require the input of housing, education, health and finance ministries whose knowledge and skills will surpass those of the truth commission. Truth commissions may have representative legitimacy to identify past violations, but not necessarily the democratic legitimacy to dictate the disbursement of tax revenue or co-ordinate the activities of ministries. The South African TRC recommended reparations be paid to individual victims, but the elected government countered that the money should be spent on generic community needs like education, food and roofs for the homeless.²²⁴ Even advocates of a more socio-economic slant to transitional justice accept that truth commissions lack both the professional competences and the authority to make technical specifications²²⁵ or to make informed, strategic recommendations on areas like education.²²⁶ If recommendations are posited at broad levels of generality, they risk utopianism or vagueness.²²⁷ The best a truth commission may be able to do in macro-economic terms is to recommend that a certain policy or target should be prioritised,²²⁸ but it cannot be presumed this should trump the considered opinion of civil servants and elected political representatives.

222. Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge: New York, 2001).

223. Teitel, *Transitional Justice*, *supra* note 35, at 81.

224. Neil J. Kritz, 'Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation', in Alice H. Henkin (ed.), *The Legacy of Abuse: Confronting the Past, Facing the Future* (Aspen Institute: Washington DC, 2002) 21–45 at 44.

225. Cobián and Reátegui, 'Toward Systemic Social Transformation', *supra* note 94, at 160.

226. Gready, *Era of Transitional Justice*, *supra* note 77, at 215.

227. De Greiff, 'Articulating the Links', *supra* note 52, at 40.

228. Cobián and Reátegui, 'Toward Systemic Social Transformation', *supra* note 94, at 160.

Though truth commissions can be improved technically to compensate for these weaknesses by expanding their scope and employing more experts, their eventual success is ultimately reliant on the state's political will. The presumption of the optimists is that because truth commissions are a democratic channel, their proposals would not be 'rejected as disruptive and thus made susceptible to repression.'²²⁹ However, just as states ratify human rights treaties that they do not abide by, time and time again governments are content to reap the reputational rewards of establishing a truth commission without using their reports as a blueprint for change.²³⁰ As Mani notes, because executive commitment to implement truth commission recommendations is frequently lacking, the potential of truth commissions to catalyse institutional and structural reforms is 'still-born.'²³¹ The East Timorese CAVR report was handed over to the Parliament on 28 November 2005 by the then-President Xanana Gusmao at the direction of the Parliament, but since that time legislators have never debated its content or recommendations.²³² The Peruvian TRC was commended earlier for its breadth, but its recommendations on structural reform were ignored at the implementation stage.²³³ The ANC government disregarded the vast majority of the TRC's recommendations, especially those relating to monetary reparations.²³⁴ In Haiti, the recommendations of both the National Truth and Justice Commission and its Follow-Up Committee were rejected by the government.²³⁵

Explanations for what de Greiff identifies as the persistent gap between insight and transformation in truth commissions²³⁶ have been sought in weak legal traditions²³⁷ and lack of economic growth.²³⁸ Though these factors are certainly contributory, the weakness of transition overall (of which weak rule of law and slow economic growth may be symptomatic) may best explain

229. Laplante, 'Roots of Violence', *supra* note 54, at 334.

230. Fletcher, Weinstein and Rowen, 'Context, Timing and Dynamics', *supra* note 55, at 194.

231. Rama Mani, 'Rebuilding an Inclusive Political Community After War', 36 *Security Dialogue* (2005) 511–526 at 518.

232. Heather Castel, 'Maximising Transitional Justice Opportunities: The Case for East Timor's CAVR', in Deborah Mayersen and Annie Pohlman (eds), *Genocide and Mass Atrocities In Asia: Legacies And Prevention* (Routledge: London, 2013) 68–85 at 81–82.

233. Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development', 10 *Yale Human Rights and Development Law Journal* (2007) 141–177 at 170.

234. Miller, 'Effects of Invisibility', *supra* note 16, at 282.

235. Amnesty International, 'Haiti: Still Crying Out for Justice' (1998), <www.amnesty.org/en/library/asset/AMR36/002/1998/en/2662abc8-dab1-11dd-80bc-797022e51902/amr360021998en.pdf> at 7.

236. De Greiff, 'Articulating the Links', *supra* note 52, at 36.

237. Fletcher, Weinstein and Rowen, 'Context, Timing and Dynamics', *supra* note 55, at 194.

238. Olsen, Payne and Reiter, *Transitional Justice in Balance*, *supra* note 5, at 75.

their consistent failure to make a positive impact. It has been demonstrated statistically that negotiated transitions are most strongly associated with truth commissions²³⁹ and that truth commissions are correlated with negative effect on human rights.²⁴⁰ This correlation does not prove that the modalities of truth commissions are misguided or counter-productive, but does tend to suggest that truth commissions are often established in weak or precarious transitions to provide reassurances to still-powerful 'losers' in transitions (like the erstwhile beneficiaries of war or repression) that their losses will be limited. As Arthur admits, the main actors in transition are 'elites who enter into a series of bargaining arrangements with one another as a means of managing their interests. The main focus of these actors is legal-institutional reform, rather than transformation at the socio-economic level.'²⁴¹ Truth commissions are often established as a result of these negotiations not to alter society but rather to limit retributive justice (and, it might be added, redistributive justice) in an internationally palatable way, even if assertive and ambitious commissions attempt to transcend these limitations.²⁴² Fear of destabilisation by alienated but powerful groups and the weak position of new regimes (a phenomenon that is examined in greater detail in the next section) is reflected globally in the lack of implementation of truth and reconciliation commission recommendations.²⁴³ Longer-term impact is also limited by the fact that truth commissions do nothing to affect the local power relationships that impose restraints on the possibilities for justice.²⁴⁴ Many truth commission recommendations are implemented only partially or not at all:

[T]ruth commissions often exist in a sort of tension between, on the one hand, their objectives and results and, on the other hand a reality external to them over which they exercise no direct control.²⁴⁵

Given these limitations, which all but the most propitious of transitions will struggle with, the ultimate role of truth commissions will be beneficial but far removed from the transformational aspiration for transitional justice canvassed earlier. The legacy of even a quite successful truth commission will be less the sea-change in the national economic structure the rhetoric would suggest than a series of broad recommendations hostage to numerous political fortunes it has no control over. The translation of a report into the

239. *Ibid*, at 55.

240. *Ibid*, at 6.

241. Arthur, 'How "Transitions" Reshaped Human Rights', *supra* note 122, at 347.

242. Hayner, *Unspeakable Truths*, *supra* note 222, at 30.

243. Mobekk, *Enabling Sustainable Peace*, *supra* note 7, at 43.

244. Roht-Arriaza, 'The New Landscape', *supra* note 174, at 5.

245. Cobián and Reátegui, 'Toward Systemic Social Transformation', *supra* note 94, at 153.

improvement of everyday lives may remain chimerical. The impact of a truth commission will always be far more indirect and tentative than the sanguine expectations of its more optimistic advocates. What are left are more circumscribed, limited but undoubtedly beneficial tasks. Truth commissions can recommend a transparent budgetary structure to ensure state revenues are put to best use, but may not be able to define the precise shape of it. They can, like the South Africa TRC, propose a wealth tax where beneficiaries of apartheid can contribute to poverty reduction or reparations²⁴⁶ but the tax itself and its parameters would remain subject to the give-and-take of parliamentary agreement. Truth commissions can recommend the removal of state personnel with records of corruption as development blockers even if they cannot dictate state policy to their replacements.²⁴⁷ They can identify national ideals even if their concrete elaboration becomes the role of the executive, and operate as a powerful lobbying tool against government resistance even if they never become program designers.²⁴⁸ Furthermore, the value of truth commissions in establishing a contextual background for trials, compensation, restitution and reparations cannot be gainsaid (for example, the Chilean government provides a monthly pension, school tuition and medical coverage to thousands of victims of dictatorial rule as a result of TRC recommendations). One of the reasons why truth commissions are criticised for delivering less than they promise is because this promise is pitched at an unreasonable, virtually 'magical' level that cannot be attained in the conditions of transition.²⁴⁹ Scholars of truth commissions have long accepted that they can help create conditions in which reconciliation might occur, but cannot be tasked with generating that reconciliation.²⁵⁰ Similarly, it might be wise to accept that truth commissions can help create an atmosphere conducive to a more just economy, but may lack the political support or institutional capacity to directly advance the process.

5.3. Reparations

Reparations are possibly the best example of how socio-economic justice in transitional justice has been mainstreamed. Overshadowed by trials, truth commissions and lustration in the earliest debates, reparations received

246. David Goodman, 'Why Killers Should Go Free: Lessons from South Africa', 22 *Washington Quarterly* (1999) 169–181 at 180.

247. De Greiff, 'Articulating the Links', *supra* note 52, at 36.

248. Laplante, 'Roots of Violence', *supra* note 54, at 350.

249. Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006) at 13–14.

250. Campbell and Turner, 'Utopia and the Doubters', *supra* note 47, at 395.

noticeably less attention within the field.²⁵¹ One prominent objection was the fact that no financial measures could be commensurate with violations suffered.²⁵² Some contested the moral propriety of a new government and successor generations not implicated in prior wrongdoing (and often defined by opposition to it) having to pay for the crimes of the *ancien regime*.²⁵³ The scholarly fear that reparations would unacceptably monetise atrocity by ‘elevating things over persons’²⁵⁴ was made apparent by the Argentine *Madres de la Plaza de Mayo*’s rejection of compensation as blood money to silence legitimate victim complaints that might arise in the future.²⁵⁵

However, over time it became apparent that this principled stance could not be replicated by all survivors of conflict or authoritarianism who might endure poverty, hunger or homelessness. Increasingly in international human rights law the state is made liable for human rights violations either as the violator, on the grounds of omission to prevent, or as the subsidiary agent of compensation when the actual perpetrator cannot be identified or is unable to compensate. The entitlement of victims of grave human rights violations to reparations as rights-holders was recognised in a number of human rights instruments and conventions, but found its most comprehensive expression in the General Assembly’s *Declaration of 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* in 2005.²⁵⁶ The Principles outline that the victim is entitled to remedies that guarantee (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, though these as yet remain mostly in the realm of moral duty than enforceable legal obligation.²⁵⁷ Reparations are no longer regarded as empty promises, temporary stopgap measures, or attempts to buy the silence of victims.²⁵⁸

251. Arthur, ‘How “Transitions” Reshaped Human Rights’, *supra* note 122, at 356.

252. Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 104.

253. Teitel, *Transitional Justice*, *supra* note 35, at 139.

254. Raised but not necessarily endorsed in Minow, *Between Vengeance and Forgiveness*, *supra* note 252, at 131–132.

255. Laplante, ‘Indivisibility’, *supra* note 233, at 167.

256. *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*, GA Res. 60/147, UN Doc. A/RES/60/147 (16 December 2005).

257. *Ibid.*, Principle 11.

258. Lisa Magarrell, *Reparations in Theory and Practice* (International Center for Transitional Justice: New York, 2007) at 2.

Reparations are popular for a number of very obvious reasons. They can be justified intrinsically (victims deserve reparations) and instrumentally (they are needed to stabilise the transition).²⁵⁹ They are less abstract than truth or justice, the most tangible proof of a state's willingness to make amends.²⁶⁰ Consequently, reparations are assumed to have the greatest potential to make a difference in the lives of victims.²⁶¹ They can be faster to arrive than truth or justice as it is generally quicker and easier to identify a victim than to establish the guilt of a perpetrator. The material benefit of monetary support is obvious (though rarely, if ever, adequate), but reparations transcend their compensatory role to enable some less tangible rewards. Reparations can 'meet burning needs for acknowledgement, closure, vindication and connection.'²⁶² By demonstrating the seriousness with which the state now treats violations of rights, they promote civil trust.²⁶³

The *Basic Principles* distinguish four categories of reparation, namely restitution, compensation, rehabilitation and the guarantee of non-repetition.²⁶⁴ In states like South Africa and Chile, violations of civil and political rights were chosen as the 'point of entry' for reparations, as opposed to economic, social and cultural rights.²⁶⁵ This tended to favour individualised reparations such as compensation in the form of cash payments or pensions, and restitution in the form of returning property. However, it became apparent that the number of victims would always outstrip the finance available for reparations. As Kritz points out, while states like Chile, with a relatively healthy economy and a small, defined class of victims of state violence, could offer equitable and extensive compensation to individuals, this becomes impossible in a state like Rwanda where the handful of victims compensated satisfactorily (to the extent this can be said about any genocide reparations) would deplete the available funding for the vast majority of victims.²⁶⁶ Comprehensive individual restitution programs run the obvious risk of burdening national budgets indefinitely, stripping the government of the funding needed to rebuild

259. Jon Elster, 'Land, Justice and Peace', in Bergsmo *et al* (eds), *Distributive Justice*, *supra* note 18, 15–24 at 17.

260. Roht-Arriaza and Orlovsky, 'A Complementary Relationship', *supra* note 58, at 173.

261. Pablo de Greiff, 'Transitional Justice, Security and Development: Security and Justice Thematic Paper', 6 *World Bank World Development Report Thematic Paper* (2011), <openknowledge.worldbank.org/bitstream/handle/10986/9245/WDR2011_0015.pdf?sequence=1> at 6.

262. Minow, *Between Vengeance and Forgiveness*, *supra* note 252, at 106.

263. De Greiff, 'Articulating the Links', *supra* note 52, at 59.

264. *Basic Principles*, *supra* note 256, Principle 18.

265. Laplante, 'Indivisibility', *supra* note 233, at 144.

266. Kritz, 'Where We Are', *supra* note 224, at 44.

the economy and state. Even if adequate resources were available, civil and political violation-based criteria for eligibility left communities that suffered serious forms of social and economic exclusion unsatisfied and created divisions within communities between the compensated and those who received little or nothing.²⁶⁷

As the scope of inquiry of TRCs expanded, it became undeniable that the same state and sub-state structures that led to bodily integrity abuses and seizure of property also led to unjust deprivation of jobs, of educational opportunities, healthcare and infrastructural investment. In keeping with the generational change in transitional justice from an intrinsic, backwards-looking concern with punishment and truth to a more forward-looking, state-building perspective, the fact that compensation and restitution were not in themselves sustainable nor did much to address poverty sustainably called into question the instrumental value of traditional modes of reparation. Consequently, there is an observable redirection towards reparations programs of greater complexity where a public good is distributed to a specific victim community, incorporating structural and sustainable collective benefits like reconstruction of destroyed public buildings, religious sites, education or health facilities, and symbolic measures such as public apologies, memorials and the re-naming public spaces.²⁶⁸ Rubio-Marín, perhaps more accurately, uses the terminology of corrective reparations (i.e., giving adequate redress to victims) and transformative reparations (advancing the consolidation of a more inclusive democratic system).²⁶⁹ Truth commissions nowadays typically propose a mix of the individual and collective, the corrective and the transformative.

The problem that has arisen is that this transformative approach to collective reparations is often indistinguishable in practice from development funding. In theory, the two should be separate in conception and delivery. In conceptual terms, development is the province of sustained, concerted actions to improve the economic, political, and social well-being of all people in a state or defined local area dominated by metrics like need and sustainability. While reparations also take need and sustainability into account, they uniquely address actual damage suffered by a defined set of people acknowledged as victims. This conceptual distinction between improving well-being generally and repairing harm more narrowly has traditionally been reflected in

267. Alexander, *Scoping Study*, *supra* note 32, at 42 and 52.

268. De Greiff, 'Articulating the Links', *supra* note 52, at 37.

269. Ruth Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression', in Ruth Rubio-Marín (ed.), *The Gender Of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press, 2009) 381–402 at 384.

the means of delivery—as Roht-Arriaza and Orlovsky point out, reparations are the domain of human rights courts, claims commissions and administrative programs while development subsumes a much wider array of agencies like INGOs, aid agencies and financial institutions.²⁷⁰ The reason for the growing conflation of reparations with development is a simple economic one—in post-authoritarian and post-conflict situations, extreme poverty is the norm and the available resources are extremely limited. Money for reparation generally comes from general taxation, as opposed to re-appropriated loot. Compensating all the victims of socio-economic deprivations like those who suffered unemployment, corruption etc. would be beyond most reparations programs, which tend to be drastically under-funded. In this context, the estimated US\$385m set aside for apartheid victims in South Africa or the US\$45–60 per annum ring-fenced for Peru's 200,000 victims of human rights violations are both pitifully small in relation to the overall number of victims and rather large in terms of the national budget.²⁷¹ Reparations may take up a significant proportion of available funds but be too small or scatter-gun to make any appreciable impact on growth or redistribution.²⁷²

The consistent response of transitional states has been to prefer using finite resources for general development than particularised reparations. Just as collective reparations maximise the effectiveness of existing resources better than individual reparations, so too does subsuming collective reparations within development:

[G]overnments tend to prefer the use of collective reparations, often for pragmatic reasons. Collective reparations may allow them to funnel programs into existing ministries, seem more efficient and less likely to be politically sensitive, require less new bureaucracy, and seem more acceptable to budget-conscious managers and creditors. Nonexclusive reparations also avoid problems associated with singling out victims or creating new resentments.²⁷³

There is in this approach an implied recognition that reparations are an imperfect vehicle for restoring losses as complex as careers, opportunities and health, and that more forward-looking reforms are better public policy.²⁷⁴ For example, the Haitian government has decided to use the US\$5.8bn repatriated from Swiss Bank accounts on Baby Doc Duvalier's return for improving

270. Roht-Arriaza and Orlovsky, 'A Complementary Relationship', *supra* note 58, at 171.

271. Figures taken from Olsen, Payne and Reiter, *Transitional Justice in Balance*, *supra* note 5, at 61.

272. De Greiff, 'Articulating the Links', *supra* note 52, at 39.

273. Roht-Arriaza and Orlovsky, 'A Complementary Relationship', *supra* note 58, at 192.

274. Vojtech Cepl, 'A Note on Restitution of Property in Post-Communist Czechoslovakia', 7 *Journal of Communist Studies* (1991) 367–375 at 375.

national living standards for all instead of awarding it to identified victims or victim communities.²⁷⁵ Though the Peruvian TRC recommended a comprehensive slate of reparations such as healthcare, educational opportunities and restitution, the government made clear it preferred a more general social development program.²⁷⁶ Victim-survivors there have been shunted into pre-existing development and poverty-alleviation programs, while the government attempted to distribute the funds for collective reparation programs through competition.²⁷⁷ The general perception is that the government's reparations program does not correspond with specific damage caused by war and is instead more akin to development.²⁷⁸ The Guatemalan truth commission sat somewhat on the fence, recommending both individual and collective reparations but stating that the latter should 'also favour the entire population, without distinction between victims and perpetrators.'²⁷⁹ In the seminal *AZAPO* case, the South African constitutional court acknowledged that because the new constitutional state was tasked with reconciling and reconstructing the country, it would inevitably at some point have to choose whether to deploy national resources through reparations or to use available finances for food relief, housing and education. It held that parliament was justified in adopting a wide concept of reparations that would be communally balanced against the state's other obligations.²⁸⁰

This approach has divided opinion, once more illustrating the gap between transitional justice as traditionally understood and the more expansive hopes held out for it by some. Roht-Arriaza contends that equating collective reparations with development more generally 'conflates two separate obligations of government: to make reparation for wrongs it committed, and to provide essential services to the population.'²⁸¹ Victims believe that development is a pre-existing duty of the government, feel that incorporating reparations within development gives insufficient recognition to the violations they have suffered, and resent it when non-victims benefit from such programs.²⁸² Some argue that collective reparations have less trust-building power than

275. Andrieu, 'Dealing With a "New" Grievance', *supra* note 115, at 550.

276. Laplante, 'Indivisibility', *supra* note 233, at 160.

277. *Ibid.*, at 163.

278. *Ibid.*, at 163 and 164.

279. Commission for Historical Clarification, *supra* note 211, Part III, Reparatory Measures, at para. 10.

280. *AZAPO and Others v President of the Republic of South Africa and Others* (1996) 8 BCLR 1015 (CC) at 39, 25 July 1996.

281. Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas', 27 *Hastings International and Comparative Law Review* (2004) 157–219 at 188.

282. Laplante, 'Indivisibility', *supra* note 233, at 145 and 162.

individualised reparations derived from the recognition of responsibility by the perpetrator or the state would have.²⁸³ Others question whether the undifferentiated envelopment of reparations within development may violate their essential character as acts of atonement for past harms.²⁸⁴ By contrast, Kalmanowitz and Miller respectively argue that the focus on certain groups for certain violations erases the needs of the wider population from view²⁸⁵ and makes structural factors ‘doubly invisible.’²⁸⁶ As the former puts it:

[T]he more widespread and extensive the destruction caused by war, the weaker the rights [should be] to receive reparations. In the limiting case of a war that affects directly a large majority of the population (for example, Mozambique), rights and obligations of social justice should trump all rights of corrective justice.²⁸⁷

He recommends the mass pooling of all compensatory payments into a collective reconstruction fund to be dispersed in a forward-looking way according to broader principles of justice than have hitherto underpinned debates over reparations.²⁸⁸

The problem with changing from the traditional reparative allocation of resources based on entitlements to an allocation based on present or future needs is that it risks becoming completely uninformed by anything distinctly recognisable as transitional justice. Sceptics legitimately question is whether such measures would ‘really still be part of transitional justice.’²⁸⁹ Key questions that a transformative reparations policy would have to ask like whether citizenship in the violator state alone entitles one to indemnification, to what extent general taxation should be used, the liability of foreign governments and how much this liability can be encompassed within aid, how compensatory amounts should be decided or whether to compensate whole villages (or valleys, or provinces) would be dominated by state politicians or development actors given the relative paucity of reparations. The tail is unlikely to wag the dog—though useful in rebalancing power relations at a local level, reparations have little macro-economic impact²⁹⁰ and do not radically redistribute power or wealth,²⁹¹ while no direct correlations can be drawn between the largesse of

283. Pablo de Greiff and Marieke Wierda, ‘Reparations and the ICC: A Prospective Role for the Trust Fund for Victims’, International Center for Transitional Justice (2004), <ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf> at 8.

284. Roht-Arriaza and Orlovsky, ‘A Complementary Relationship’, *supra* note 58, at 173.

285. Kalmanowitz, ‘Corrective Justice versus Social Justice’, *supra* note 82, at 6.

286. Miller, ‘Effects of Invisibility’, *supra* note 16, at 278.

287. Kalmanowitz, ‘Corrective Justice versus Social Justice’, *supra* note 82, at 72.

288. *Ibid.*, at 92.

289. Andrieu, ‘Dealing With a “New” Grievance’, *supra* note 115, at 550.

290. Roht-Arriaza and Orlovsky, ‘A Complementary Relationship’, *supra* note 58, at 173.

291. Miller, ‘Effects of Invisibility’, *supra* note 16, at 284.

a reparations program and the degree of socio-economic development of the state in question.²⁹² Far from steering debates on the socio-economic future of the state or tackling poverty, the more reparations become intermingled with state reconstruction and development, the more they have to plead for their own distinctiveness or relevance. As with trials and truth commissions, while reparations can make significant, targeted impacts, it would appear the wider potential for reparations to significantly impact poverty and development are greatly over-stated.

5.4. Summary

None of the foregoing analysis of the limitations of trials, truth commissions and reparations is to argue that all claims based on practicality have merit. While all the institutions of transitional justice have immense practical shortcomings, there can be very valuable synergies between transitional justice and development or poverty reduction, particularly the diagnostic role of truth commissions and compensatory role of reparations. However, even with a more realistic appraisal of their technical potential, the socio-economic legacy of transitional justice bodies may be minimal. Though they criticise the liberal-legalism of transitional justice, the following section illustrates that advocates of an expanded role for transitional justice fall into the same trap as legalism of overestimating the impact of normative change and underestimating the influence of external political factors.

6. The Political Economy of Transition

If the conception of *justice* does not explain the lack of impact of transitional justice on socio-economic structures, development or inequality, it is worthwhile switching attention to the other composite element of the concept, namely the *transitional*. As argued earlier, believers in the distributive potential of transitional justice rely on the presumption that the sheer fact of transition constitutes a window of opportunity ‘not only for returning to a previous state of order but for deeply reforming it and dismantling old structures of economic crime, structural violence, and oppression.’²⁹³ This greater ambition springs from a welcome critique of the liberalising impetus of the transitional political order, most notably the recognition that the field’s concentration on the legal and political machinery of the new regime would benefit from a re-orientation towards economic and social conditions. However,

292. De Greiff, *Transitional Justice, Security and Development*, *supra* note 261, at 6.

293. Andrieu, ‘Dealing With a “New” Grievance’, *supra* note 115, at 538.

it cannot be assumed that post-authoritarian or post-conflict transitions where everything is 'up for grabs' politically offer the same scope for change in the economic arena. Transition is fundamentally a political phenomenon. Even if pre-transitional politics or conflict are driven by socio-economic factors and even if a relatively stable transition is to a government committed at least minimally to democracy and human rights, the widening of political opportunity does not automatically mean there has been any corresponding opening in the spheres of production, distribution, consumption or transfer of wealth in the economy overall.²⁹⁴ Transition is instead typically characterised or defined primarily in political terms by military victory, a peace agreement, a referendum, elections or a combination of these.

Transition occurs along a transformative continuum ranging from conservative to radical change.²⁹⁵ However, even very dramatic transitions like those in the Ivory Coast or Egypt or (possibly) Myanmar are rarely 'so large, so pervasive, and so abrupt' that they can properly be called revolutions where a culture or society is totally remaking itself and where there is obvious potential for substantial displacement of economic structures.²⁹⁶ Miller laments that 'the failure to include economic concerns in transitional justice mechanisms tends to make transition into a political rather than an economic story,' but this is to confuse the causal relationship between transition and transitional justice.²⁹⁷ Notwithstanding the liminality implied by its name, transitional justice usually occurs after the fundamental bargain underpinning transition is already agreed. Issues of resources, tax and revenue generation are central to peace agreements or regime change arrangements. As Wilson notes, the

294. Heine points out that societies may be undergoing multiple and overlapping transitions in the political and economic arenas in the sense that political and economic liberalisation may be happening at the same time (Jorge Heine, 'All the Truth But Only Some Justice? Dilemmas of Dealing With the Past in New Democracies', in William A. Schabas, Edel Hughes and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press, 2007) 65–79 at 67–68. Similarly, Miller assumes economic liberalisation that accompanies transition (Miller, 'Effects of Invisibility', *supra* note 16, at 267). It is worth pointing out, however, that given the pervasiveness of economic globalisation since the Cold War and the very small number of genuinely closed economies, economic liberalisation may long precede transition (it may in fact have been a cause of the conflict that culminated in transition) and in this sense cannot be deemed to be the fruit of transition, even if political liberalisation frequently operates to accelerate marketisation.

295. Teitel, *Transitional Justice*, *supra* note 35, at 6.

296. Frederick Schauer, 'Legal Development and the Problem of Systemic Transition', *John F Kennedy School of Government, Harvard University Faculty Research Working Papers Series* (2003) <web.hks.harvard.edu/publications/getFile.aspx?Id=85> at 12–13.

297. Miller, 'Effects of Invisibility', *supra* note 16, at 280.

area of justice is the one in which the civil groups that typically press for transitional justice paradoxically 'are usually the least effective in shaping the course of talks, and where the two protagonists in the conflict act most expediently to protect their interests. It is one of the most elitist of all the issues in transitional negotiations, and the one in which leaders are most likely to reach a deal over the heads of ordinary people.'²⁹⁸ Human rights groups are rarely serious players in transitional political coalitions and lack sufficient clout to critically affect the will to reform.²⁹⁹

Even in a relatively benign transition, of the four sources of power typically contested in war to peace transitions, namely military, political, ideological and economic, the last of these will generally see the least change.³⁰⁰ As a result, transition is very rarely an economic story as economic conditions seldom change systematically in the way the political system may have. Indeed, it is this very lack of change between pre- and post-transitional conditions that compelled the re-examination of transitional justice. However, the lack of economic transition—the continuing dominance on the part of elites or groups of the economy even if no longer accompanied by corresponding political control—is also what makes more redistributive or developmental approaches more difficult. The explanation for transitional justice's inability to make an appreciable impact on socio-economic structures is not the scope of transitional justice or the principles underlying it, but is actually the transition itself.

The tension between the ideals of justice and opportunity is one that has been present in transitional justice since its formative period. It is generally accepted that transitional justice policy depends on principled beliefs as well as politics, that it can be both ideational and epiphenomenal. Teitel reconciled the idealist and realist arguments, arguing that justice is extraordinary and constructivist—the potential scope of transition justice is defined by surrounding political conditions and balances of power, but once undertaken it can exercise a degree of influence on the nature of the transition itself, maintaining order but enabling transformation.³⁰¹ However, because most transitions are pacted or subject to peace agreement and often characterised by some degree of power-sharing (political, economic, military), these transitions will often veer more towards conservatism in its relation to the predecessor regime and its value systems. This in turn impacts on the prospects for

298. Wilson, 'Justice and Legitimacy', *supra* note 130, at 198.

299. Holmes, 'Concluding Remarks', *supra* note 18, at 426.

300. Christopher Cramer, 'Trajectories of Accumulation through War and Peace', in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge: London, 2009) 129–148 at 134.

301. Teitel, *Transitional Justice*, *supra* note 35, at 6.

economic justice—transitions are typically more about modifying the existing order politically than any thoroughgoing process of social transformation. Cession of political power may therefore not be accompanied by cession of property or resources. As Mani puts it, ‘faced with powerful lobbies resisting economic distribution, peacebuilders may turn to political ‘redistribution’ by way of elections as a stopgap measure.’³⁰²

The two decades of accelerated norm diffusion since transitional justice was mainstreamed have done little to alter the transitional stability calculus—the strength of the transition relative to the power of the *ancien* regime remains far more influential than the normative influence of international criminal law, international human rights law or civil society. For example, through analysis and coding of the pace of numerous transition types, Olsen, Payne and Reiter find that since the 1970s, a ‘clean break with the past’ such as overthrow, collapse or military defeat remains far more conducive to trial (the usual proxy employed for extensive transitional justice) than a negotiated transition, with trials being twice as frequent.³⁰³ Furthermore, negotiated transitions are most strongly associated with truth commissions or no transitional justice at all.³⁰⁴ Optimistic accounts of transitional justice’s distributive potential exaggerate the ability of transitional justice to ‘set the tone’ for future governance³⁰⁵—political transition is continuously negotiated by dynamic, non-teleological relations of control and consent, power and authority among multiple power poles, some of whom will be the inevitable (and extremely reluctant) losers in any distributive process and therefore resist it.³⁰⁶ Transitional justice therefore is a game of relatives not absolutes: the prospects for goals like land reform, return of ill-gotten profits by corporations and higher tax-burdens to rebalance the distribution of wealth should be determined not merely by the mechanisms available but also the opposition to be faced in a mediated state.³⁰⁷

The conviction that transitional justice can and should impact significantly on the macro-economic structures of all transitional states everywhere can be sustained only if the internal dynamics of the populations for which they were intended are disregarded, a recurring problem that bedevils the field.³⁰⁸ Space

302. Mani, *Beyond Retribution*, *supra* note 25, at 183–184.

303. Olsen, Payne and Reiter, *Transitional Justice in Balance*, *supra* note 5, at 54.

304. *Ibid.*, at 55.

305. E.g. Aguirre and Pietropaoli, ‘The Case of Nepal’, *supra* note 42, argue it can do this, at 375.

306. Tobias Hagmann and Didier Péclard, ‘Negotiating Statehood: Dynamics of Power and Domination in Africa’, 41 *Development and Change* (2010) 539–562 at 542–545.

307. E.g. Kalmanovitz, ‘Corrective Justice versus Social Justice’, *supra* note 82, at 92.

308. Pierre Hazan, ‘Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice’, 88 *International Review of the Red Cross* (2006) 19–47 at 46.

precludes a detailed examination of the political economy of transitional states generally, which in any event will display infinite variation. Nevertheless, it is possible to briefly outline four salient limitations transitions impose on the prospects for economic justice that will lie largely outside the control of transitional justice institutions regardless of the extent to which the field re-imagines its principles and practices:

1. The transitional stability calculus which leaves economic structures intact
2. The complexity of patterns of accumulation under authoritarian rule and war economies
3. Democratically expressed preferences
4. The influence of global neo-liberalism

6.1. The Transitional Stability Calculus

It is something of a commonplace that transitional justice's role in accounting for past wrongdoing lies in tension with its role in establishing stability. As Addison argues, while some transitions from authoritarianism to democracy have been successful, 'others remain tentative, and some have been reversed with either a relapse into full dictatorship or with the trappings of democracy used to cloak semi-authoritarianism.'³⁰⁹ Carothers argues that most post-authoritarian transitions are to a political 'gray zone' between liberal democracy and authoritarianism that maintains attributes of democratic life while the government disregards the law.³¹⁰ Periods of transition in partially democratised countries are those when risk of state failure is greatest.³¹¹ Post-conflict states are even more insecure—44% of post-war states see a resumption of conflict within five years and 50% revert back to war in their first decade.³¹² The war/peace distinction is increasingly viewed as a misleading one that obscures the sometimes dysfunctional nature of the peace. Peace may be more a reluctant hiatus in conflict born of fatigue than a process that results in genuine pacification between antagonistic groups.³¹³ Transition is also a time marked by unemployment, external debt, underdevelopment

309. Addison, 'Political Economy of Transition', *supra* note 41, at 111.

310. Thomas Carothers, 'The End of the Transition Paradigm', 13 *Journal of Democracy* (2002) 5–21 at 9–10.

311. Jack Goldstone *et al.*, 'It's All About State Structure: New Findings on Revolutionary Origins from Global Data', 21 *Homo Oeconomicus* (2004) 429–455 at 438–439.

312. Gerd Junne and Willemijn Verkoren, 'The Challenges of Post-Conflict Development', in Junne and Verkoren (eds) *Post-Conflict Development*, *supra* note 43, 1–14 at 1.

313. Philippe Bourgois, 'The Continuum of Violence in War and Peace: Post-Cold War Lessons from El Salvador', in Nancy Scheper-Hughes and Philippe Bourgois (eds), *Violence In War And Peace: An Anthology* (Wiley-Blackwell: New York, 2003) 425–433.

and hyperinflation, which themselves are destabilising. Consequently, many transitions are marked by a conservative approach to economic structures. The more assertively states flex their muscles against those who benefitted materially from conflict or authoritarianism, the greater the risk may be of undermining economic activity or even the political settlement outlined in a peace deal.³¹⁴

This risk is best illustrated by examples of the choices made even in relatively stable transitions. In Guatemala, those who signed the peace agreement (the liberal-conservative ruling party and the rebels) and those who supported it (civil society) were vastly outweighed in political-economic influence by the outgoing armed forces of the regime and the business elites who profited from past structural violence.³¹⁵ While progress on issues of identity and civil-political rights like cultural diversity, education reform, participation and political reform could be conceded, socio-economic reform aimed at reducing horizontal inequalities stalled.³¹⁶ Though the UN-brokered peace agreement stipulated democracy and reform of both army and governmental institutions, El Salvador's ARENA government resisted socio-economic redistribution in negotiations with leftist rebels lest it undermine its power-base in the business community.³¹⁷ Wood argues the peace agreement there reflected an explicit exchange of political inclusion for the rebels for the economic elite's continued control of assets, thereby preventing significant economic redistribution, even if there was ultimately some re-allocation of land.³¹⁸ The economic power of whites in South Africa was allied to the risk of collapsing the transition to democratic rule to foreclose an expansive conception of transitional justice.³¹⁹ National reconciliation in Namibia and post-Smith Zimbabwe was similarly dictated by the need to avoid antagonising the white community politically and economically.³²⁰

In more precarious transitions, political change is often to a form of belligerent power-sharing where those formerly in power try to maximise their economic gains even if political power is conceded. This should come as no

314. Cramer, 'Trajectories of Accumulation', *supra* note 300, at 135–136.

315. Graham K. Brown and Corinne Caumartin, 'Horizontal Inequalities in Post-Conflict Reconstruction: Guatemala and Nepal', in Aguilar and Gomez Isa (eds), *Rethinking Transitions*, *supra* note 77, 101–170 at 114.

316. *Ibid.*, at 107.

317. Mani, *Beyond Retribution*, *supra* note 25, at 151.

318. Elisabeth Wood, 'Agrarian Reform, Land Occupation, and the Transition to Democracy in El Salvador', in Bergsmo *et al* (eds), *Distributive Justice* *supra* note 18, 141–176 at 175.

319. Elster, *Closing the Books*, *supra* note 75, at 197.

320. Mani, *Beyond Retribution*, *supra* note 25, at 92–93; Huyse, *All Things Must Pass*, *supra* note 30, at 119.

surprise—oppressive regimes install themselves in order to pursue certain economic policies that sustain their rule. If the violent suppression of under-privileged groups to safeguard economic power led to pre-transitional war or repression, the threat of its renewal remains pertinent in anything but the rare case of total defeat. Where internal or global power relations compel the removal of that regime, their economic interests and investments might endure long beyond the return to democracy. Jean-Bertrand Aristide's first radically egalitarian government in Haiti was overthrown after only seven months by the business community and upper echelons of the military who feared redistribution of wealth.³²¹ The economic power of regional warlords in Afghanistan was such that observers feared prosecuting them would boil down to a choice between justice and development. As Giustozzi put it, such an option would rule out any concept of 'transitional justice' in Afghanistan, which would target many if not all leading strongmen.³²² Perhaps the most dramatic example of the sacrifice of economic justice to stability is in the persistent disparity between international aid given to security sector reform (and in particular disarmament, demobilisation and reintegration) and that given to reparations:

The realities of aid flows and of local expenditures reflect this asymmetry regarding 'security' and 'justice' concerns: of the 22 countries with ongoing DDR programs in a recent global study, programs involving 1.25 million beneficiaries and the expenditure of more than 2 billion dollars, only a few have discussed the possibility of establishing reparations programs, but none of these countries has implemented one.³²³

Of course, one can argue that states should take greater risks in transition, but the general practice of new democracies is to move cautiously and resist testing the stability of transition.³²⁴ States are more likely to adopt an initial 'weak state perspective' emphasising transitional stability, realistic goals for the state and incremental institutional development than choose risky confrontations with powerful groups. De Greiff, for example, argues that if expanding the scope of justice leads entrenched, powerful economic elites to oppose or block transition, it might be favourable to postpone dealing with these issues until more favourable times.³²⁵ This appears to be the implicit position in many transitions.

321. Alex Dupuy, *The Prophet and Power: Jean-Bertrand Aristide, the International Community, and Haiti* (Rowman & Littlefield: Lanham, MA, 2007).

322. Antonio Giustozzi, 'War and Peace Economies of Afghanistan's Strongmen', 14 *International Peacekeeping* (2006) 75–89 at 86.

323. De Greiff, *Transitional Justice, Security and Development*, *supra* note 261, at 20.

324. Olsen, Payne and Reiter, *Transitional Justice in Balance*, *supra* note 5, at 5.

325. De Greiff, 'Articulating the Links', *supra* note 52, at 41.

6.2. The Complexities of Patterns of Accumulation in War Economies and Authoritarianism

Even if incoming governments are in favour of redistribution, even if transitional justice mechanisms are geared towards it, and even if a favourable security environment obtains, patterns of accumulation in war economies and authoritarianism are highly complex and not amenable to easy solution. All forms of structural and cultural violence are abstract, often elusive and deeply resistant to change.³²⁶ In the heightened difficulty of transitional ecologies, attempts to expand the focus of transitional justice to economic crimes or redistribution would incur the same types of automatic political resistance by privileged groups that non-transitional bids to tackle corruption or inequality have traditionally incurred.³²⁷ Conflicts between the state and non-state actors over revenue streams and spoils the latter enjoyed before transition can significantly impair development, the equality agenda or poverty alleviation even where they do not destabilise transition.

Authoritarian regimes are associated with behaviours such as unproductive expenditures on agencies such as the army, abuses of natural resources, the channelling of infrastructure and investment to sympathetic regions, groups or individuals, undisciplined rent-seeking and favouritism in the distribution of legal permits, government grants, special tax breaks, or other forms of dirigisme. These behaviours are notoriously persistent after transition.³²⁸ Democratisation does not inoculate the state against deleterious everyday abuses like tax evasion, black markets, corruption and non-observance of efficient economic norms that can be more damaging than outright kleptocracy.³²⁹ This problem is exacerbated in times of military conflict. It is generally accepted that extractive, coercive and/or illegal war economies can prosper without the state and that war can be a sustainable system of economic organisation.³³⁰ Public goods once provided by the state like security or health become privatised by non-state actors, natural resources like mines or sea-lanes can be captured, while political, ethnic or religious factions can establish areas of control

326. Daniel J. Christie, 'Peacebuilding: Approaches to Social Justice', in Daniel J. Christie, Richard V. Wagner and Deborah Du Nann Winter (eds), *Peace, Conflict And Violence: Peace Psychology For the 21st Century* (Prentice-Hall: Englewood Cliffs, New Jersey, 2000) 277–281 at 277.

327. Madalene O'Donnell, 'Corruption: A Rule of Law Agenda', in Agnes Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development and Human Rights* (Lynne Rienner Publishers: Boulder, 2008) at 225.

328. Addison, 'Political Economy of Transition', *supra* note 41, at 119.

329. *Ibid.*, at 111.

330. Sabrina Grosse-Kettler, *External Actors in Stateless Somalia: A War Economy and its Promoters* (Bonn International Center for Conversion, 2004) at 2.

where they can levy taxes. Because in war these activities have high risks and high barriers to entry, they yield exceptionally high returns.³³¹

Two particular problems flow from these complex patterns of accumulation that transitional justice scholarship has downplayed or ignored. The first is the sheer difficulty of re-appropriating revenue streams and resources for the good of the commonweal even where considerable political will exists to do so. The problem here is not instability so much as the untouchability that results from the agentless and macro-economic nature of systematic inequality—the beneficiaries of these practices are more ‘amorphous’, ‘nameless’ and ‘faceless’ than those who commit defined crimes.³³² To the extent that property rights are even semi-secure, there are strict limits to what most transitional governments can do.³³³ The temptation for many governments in these situations is to allow those who have gained from the inequities of the pre-transitional period to continue their economic activities because they generate employment and to instead inculcate their interest in the long-term well-being of the state.³³⁴ Given the difficulties of securing access to illicit gains, pragmatism may lead governments ‘to recognise the role played by the strongmen in the economy, remove the uncertainty about their fate and offer selective incentives to invest in long-term businesses in order to speed up their conversion from “robber barons” to legitimate magnates.’³³⁵ Short-term growth may trump the longer-term imperatives of transitional justice. For example, the Mbeki government in South Africa resisted the possibility of apartheid victims seeking reparations from multi-national corporations for fear of jeopardising employment and investment.³³⁶

The second problem that flows from these complex patterns of accumulation is antipathy to the state-building process on the part of those who stand to lose. Any interaction of transitional justice with developmental concerns will inevitably be state-centred and organised conceptually along the lines of the nation-state because only the state has the resource-base, coercive capacity and administrative facility to make significant inroads into reducing inequalities.³³⁷ However, any state that can achieve the results

331. Cramer, ‘Trajectories of Accumulation’, *supra* note 300, at 132.

332. Mani, ‘Editorial’, *supra* note 33, at 255.

333. Cass Sunstein, ‘The Negative Constitution: Transition in Latin America’, in Irwin P. Stotzky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press: Boulder, 1993) 367–382 at 370.

334. Cramer, ‘Trajectories of Accumulation’, *supra* note 300, at 135.

335. Giustozzi, ‘War and Peace Economies’, *supra* note 322, at 86.

336. Lindiwe Knudson, ‘Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational corporations at Last Recognized?’, 7 *Sur—International Journal of Human Rights* (2010) 172–198.

337. Colvin, ‘Purity and Planning’, *supra* note 20, at 416.

which advocates argue an expanded transitional justice may catalyse betrays ideal-typical visions of the transitioning state as the monopolist of physical violence, as bureaucratically capable, as the aggregate of individual references and as a legitimate political-territorial entity that is wildly at odds with the typical transitional polity, particularly in the developing world. The tendency of transitional justice to ‘see like the state’ has operated to oversimplify dilemmas of transition and has failed to engage with local power structures, thereby encouraging grass-roots resistance.³³⁸ These non-state political orders may operate parallel to, or independently of, the state.³³⁹ Redistributive justice is not simply about conceiving justice holistically enough or calibrating institutions sufficiently—it is about resolving collective action problems where those who gain and lose power in transition are unable or unwilling to work towards the goals of development and equality. Solutions premised on the effectiveness and legitimacy of the state in question, or those based on the assumption that all states generally should function the same way, may struggle to attain the emancipatory potential assigned to them in textbook discussions. The primary reason for this is that continued state failure or the incapacity of the state to resume control over the political and economic space is highly conducive to elite retention of wealth, even if it imposes significant costs on ordinary people.³⁴⁰ As Bøås points out:

Most international interventions in fact overlook the deliberate aspect of state failure: the extent to which regimes allow and enable state recession in order to serve their own financial and security interests, regardless of the best interests of the people.... These interventions are therefore severely compromised, insofar as they are trying to ‘fix’ that which is probably broken for a reason. Even where this programming occurs in the context of post-conflict peace-building operations, the fact of ... regime shift does not necessarily change the incentives for continued state recession and informalization, as the pathologies that created these incentives typically remain intact.³⁴¹

Though transition may end the conflict which permitted these activities, these spoilers may reject the state-building process ‘because they believe it poses a fundamental threat to their political or economic interests. This can include

338. McEvoy, ‘Beyond Legalism’, *supra* note 10, at 424.

339. E.g. Trutz Von Trotha and Georg Klute, ‘From Small War to Parastatal Peace in the North of Mali’, in Trutz Von Trotha and Marie-Claire Foblets (eds), *Healing the Wounds: Essays on the Reconstruction of Societies After War* (Hart Publishing: Portland, 2004) 109–144.

340. Robert I. Rotberg, ‘The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair’, in Rotberg (ed.), *When States Fail*, *supra* note 101, 1–49 at 8.

341. Morten Bøås, ‘Returning to Realities: A Building-Block Approach to State and Statecraft in Eastern Congo and Somalia’, 10 *Conflict, Security and Development* (2010) 443–464 at 444–445.

so-called warlords for whom the return of the rule of law could result in their marginalization ... businesspeople whose activities are illicit, and whole clans that have benefitted from armed occupation of valuable real estate during the war.³⁴² The maintenance of the state in a low-equilibrium trap may be highly attractive to economic elites who can operate as both economic spoilers and governance spoilers if transition endangers their wealth.³⁴³

6.3. Democratically-Expressed Preferences

One of the notable features of the advocacy in transitional justice scholarship for a redistributive/egalitarian/developmental role for transitional justice is the lack of reference to the ideological commitments of the government that will ultimately be responsible for implementing transitional justice or, put more simply, the policies and parties the people of the state have actually voted for. The aforementioned spectres of destabilisation, capital flight and the bargains of transition will condition what parties campaign on and what the mandate of government will be. As Mani argues, the opening of political windows through elections may shut the door to economic reform by stiffening the will of those benefitting from inequalities to resist change—electoral democracy does not necessarily improve the prospects for economic equality.³⁴⁴

Centrist or centre-right policies may not be adopted solely from duress of circumstances, however. In every transitional state, the fundamental dilemma for the prospective new leadership will be the balance to be struck between the distributive justice perspective which directs resources to those who have suffered past wrongs and the economic efficiency perspective which directs resources to those who can exploit them most efficiently (of course, as the earlier examination of reparations suggests, there may be overlap between the two).³⁴⁵ Many states will pursue growth before redistribution, taking the position that it is better to increase the size of the pie for all than to divide a smaller one up,³⁴⁶ or adopt a stance where revenue generation precedes service delivery. Others will simply choose the path of least resistance, adopting economic policies that might promote pre-crisis levels of economic activity in a way that minimises politico-economic problems.³⁴⁷ Because the state

342. Ken Menkhaus, 'Governance without Government in Somalia: Spoilers, State-Building, and the Politics of Coping', 31 *International Security* (2007) 74–106 at 96.

343. O'Donnell, 'Corruption', *supra* note 327, at 226.

344. Mani, *Beyond Retribution*, *supra* note 25, at 184.

345. Bergsmo *et al*, 'Introduction,' *supra* note 93, at 2.

346. Elster, 'Land, Justice and Peace', *supra* note 259, at 20.

347. Snodgrass, 'Restoring Economic Functioning', *supra* note 101, at 260.

may have been weakened in conflict or authoritarianism, the government's ability to engage constructively in the economy may be significantly weakened, making market-oriented policies attractive.³⁴⁸

As a result, many transitions are to popularly-elected centrist or centre-right governments whose policies are markedly different to the redistributive and developmental policies truth commissions and reparations programs will recommend or attempt. In Africa, for example, instead of a focus on systematic redistribution and equality of opportunity, civil society and political parties typically embrace a limited social compact framed by the precepts of the liberal tradition like rule of law, political freedoms, property rights and separation of powers.³⁴⁹ Committed advocates of wider reform are usually a minority and struggle to marshal enough political resources to overcome the residual power of *ancien regime* figures.³⁵⁰ There is a presumption in the transitional justice literature that governmental legitimacy 'is inextricably linked to redistribution and redress of patterns of discrimination.'³⁵¹ However, this is open to the criticism that development is being examined through an overly Western lens in which welfare ranks much higher on the list of priorities than it does when viewed through the lens of the domestic political culture of the transitional society itself, where no such expectation may ever have attached to the state.³⁵² Redistributive or welfarist states are the product of unique historical and social processes. By contrast, in many states where the state has behaved in a predatory or abusive manner in the past, basic security and local autonomy may top the hierarchy of goods the state is expected to provide. Though many scholars (the author included) might conclude that such minimalist policies risk reinforcing pre-transitional equalities, it is necessary to remember that the government itself might disagree, imposing significant limitations on what even the most immaculately calibrated truth commissions or reparations programs can achieve.

Even transitions to ostensibly social-democratic governments rarely see considerations of equality trump power politics or discourses of entitlement based on participation in the pre-transitional struggle. Formal democratisation in Mozambique and Angola has seen the leftist Frelimo and MPLA build single-party systems to tightly control state resources through and for their own structures.³⁵³ Democracy itself can have adverse implications

348. *Ibid.*

349. Mutua, 'Critique of Rights', *supra* note 137, at 34–35.

350. *Ibid.*, at 42.

351. Aguirre and Pietropaoli, 'The Case of Nepal', *supra* note 42, at 371; Kalmanovitz, 'Corrective Justice versus Social Justice', *supra* note 82, at 94.

352. Junne and Verkoren, 'Challenges', *supra* note 312, at 9–10.

353. Hagmann and Péclard, 'Negotiating Statehood', *supra* note 306, at 548–549.

for development by providing systematic, long-term incentives to purchase state influence, collect rents to finance campaigns and distribute resources to supporters.³⁵⁴

6.4. The Influence of Global Neo-Liberalism

Though the previous section argued that many transitional states will prioritise growth over redistribution or the immediate securing of social minima, not all liberal economic programs are freely adopted. Neo-liberal globalisation provides the inescapable background against which all peace-building activities take place. As noted above, transition is also a time marked by unemployment, external debt, underdevelopment and hyperinflation. States urgently require international financial assistance, but to secure it must agree to conditional loans or structural adjustment policies that emphasise rapid market de-regulation, reductions in expenditure on welfare, a small state and privatisation of national resources to avoid economic chaos.

The pernicious impact of the neo-liberal cure in terms of the long-term stability of the state is well understood in transitional justice literature,³⁵⁵ but the relative ability of states to resist it does not appear to be. Loans and structural adjustment policies may undermine state capacity or the pursuit of development in the medium- and long-term, but are extremely tempting in the short-term as they may bolster political stability by mitigating or overcoming financial crises.³⁵⁶ Transitional justice must grapple with the regrettable reality that the imperatives of the global economy significantly limit the agency of the state to reform the economy for the benefit of the socially excluded, let alone transitional justice institutions. Privatisation, austerity and economic liberalisation tend to eliminate discretionary expenditure. These policies are often not chosen by the transitional government, but rather are imposed on states by the threat to withhold loans or demand interest at a time when economies are vulnerable and financial support is needed to prevent economic crisis.³⁵⁷

Given the neoliberal-capitalist demands of the world economy and Bretton Woods institutions if the state is to receive funding or participate in

354. O'Donnell, 'Corruption', *supra* note 327, at 241.

355. The most frequently cited work is Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge University Press, 2004) which succinctly describes the most common harms, especially at 166–169 and 99–205.

356. Nicolas van de Walle, 'The Economic Correlates of State Failure: Taxes, Foreign Aid, and Policies', in Rotberg (ed.), *When States Fail*, *supra* note 101, 94–115 at 112.

357. Irwin P. Stotzky and Carlos Nino, 'The Difficulties of the Transition Process', in Stotzky (ed.), *Transition to Democracy in Latin America*, *supra* note 333, 3–20 at 6.

world trade, scholars must question more critically whether the expectation that the temporary, ad hoc and cash-strapped institutions of transitional justice can enjoy anything more than marginal influence on domestic economic or development policies is legitimate. The paradigmatic example is the South African ANC's abandonment of its pre-transitional policy framework of redistribution, nationalisation and progressive taxation in favour of economic liberalisation and marketisation to secure a much-needed IMF loan in the mid-1990s.³⁵⁸ As Nagy notes, this policy shift had a lasting effect on the parameters of the truth and reconciliation process there and facilitated denial of responsibility on the part of economic elites.³⁵⁹ The causal relationship here is worth noting—economic conditions impact transitional justice, and not the other way around. These policies might be long in place before a commission reports or a trial concludes. As any observer of transitional criminal justice (for example, the ICC's laborious procedures) or truth commissions (the South Africa TRC started in 1996, closed its doors in 1998 and issued its final report five years later) will note, the fruits of transitional justice are harvested long after the agents of the World Bank and the IMF have deployed.

6.5. Summary

The foregoing analysis in this section should make two points clear. The first is that even if the mechanisms of transitional justice could transcend their institutional limitations to make constructive recommendations about the distribution of wealth or the promotion of equality, other factors both internal and external are at play which will have greater influence on public policy and in all likelihood will make their impact felt far more quickly. Even the best-designed and best-supported measures of justice may clash with the competing interests of domestic democratic constituencies (not all of whom will be reform-minded), revanchists and the dictates of the global economy. Because the rhetoric of redistribution and equality in transitional justice literature focusses on meta-level games of state-wide economic justice, it neglects the nested games embedded within this general meta-game.³⁶⁰

358. Rosemary Nagy, 'Postapartheid Justice: Can Cosmopolitanism and Nation-Building be Reconciled?', 40 *Law & Society Review* (2006) 623–652 at 643. Mani offers the precedents of the transitions in the 1990s in Haiti and Namibia where the incoming leftist Fwon Lespwa and SWAPO governments had to abandon redistributivist leanings to appease the Bretton Woods institutions and donors (Mani, *Beyond Retribution*, *supra* note 25, at 148–149).

359. Nagy, *ibid.*, at 644–645.

360. On meta-level games and nested games see Christopher Coyne, 'Reconstructing Weak and Failed States: Foreign Intervention and the Nirvana Fallacy', 2 *Foreign Policy Analysis* (2006) 343–360.

While transitional justice scholars focus on this one over-arching game, other games are being played simultaneously by actors (of self-enrichment, politics-as-usual, globalisation) which serve to constrain efforts to this end and are so complex that the standard encomiums of transitional justice scholarship to *do something* appear unduly simplistic. The assumption that transitional justice can exert decisive influence in times of transition pays scant regard to the generic ecologies of post-authoritarian states. Transitional justice can provide a symbolic repertoire of justice, human rights, democracy, development and equality to mobilise support for distributive justice or to challenge existing power relations. However, it cannot be assumed that this repertoire can automatically impact upon the dispersal of material resources that individuals and organised interest groups have at their disposal—money, land, skills, knowledge, violence.³⁶¹

Contrary to commonsensical assumptions, negotiation does not occur between co-equal parties or in an inclusive manner. Rather it engages heterogeneous groups with highly differentiated assets, entitlements, legitimacy and styles of expression. Not everything is or can be negotiated and not everyone takes part in negotiating statehood. But the political configurations and institutional arrangements that result from such negotiation processes must be seen as imprints of domination by the more powerful over weaker groups.³⁶²

The second point flows naturally from this, namely that the rhetorical charge that transitional justice somehow operates as a Trojan horse for neo-liberal economics wildly overstates its relevance and impact. The internal and external pressures on states to resist distribution, welfare and economic inequality vastly outweigh the pressure a truth commission or a human rights report or a reparations proposal can generate in terms of immediacy, size and sheer coercive power. Nevertheless, few advocates of a maximal role for transitional justice acknowledge these limitations.³⁶³ The best that may be achieved is a highly constrained optimum.

361. On the distinction between symbolic repertoires and material resources in this context, see Hagmann and Péclard, 'Negotiating Statehood', *supra* note 306, at 547.

362. *Ibid.*, at 545.

363. Notable examples include Waldorf, 'Anticipating the Past', *supra* note 181, at 7; Graham K. Brown *et al.*, 'Addressing Horizontal Inequalities in Post-Conflict Reconstruction', in Aguilar and Gomez Isa (eds), *Rethinking Transitions*, *supra* note 77, 11–30 at 19, 27 and 29; Alexander Segovia, 'Financing Reparations Programs: Reflections from International Experience', in de Greiff (ed.), *Handbook of Reparations*, *supra* note 113, 650–675 at 669–670.

7. Conclusion

In the terms outlined by Karl Popper, the attempt to expand the scope of transitional justice can be seen as a move from piecemeal social engineering in the sense of fighting against the greatest and most urgent evil of society like crimes against humanity and torture to more utopian social engineering in the sense of fighting for a greatest ultimate good, in this case equality and welfare.³⁶⁴ It is a significant evolution, from furthering an incremental change in a political sphere that is already undergoing regeneration to attempting to fundamentally transform a socio-economic sphere that may not. The enthusiasm and beguiling simplicity with which scholars contend that transitional justice can and should go further are intellectually attractive and intuitively appealing. However, these arguments are based on two questionable premises—firstly, that political transition opens significant opportunity for structural transformation, and secondly, that the mechanisms of transitional justice have the competence and legitimacy to help effect this transformation. This article has questioned both premises.

To begin with the first, it is clear that for a number of reasons political transition does not necessarily conduce to a fundamental re-evaluation of unjust economic structures. The preservation of an unequal economy may be the implicit or explicit bargain underpinning political liberalisation, the transitional state may lack the extractive capacity to redress the perverse incentives to maintain a weak state that flow from the war economies or authoritarian systems, the dictates of global neo-liberalism may exert greater influence than any national actor in government or transitional justice, and the mandates of democratically elected leaders might follow suit. Much, though certainly not all, of the socio-economic self-critique of transitional justice misdiagnoses the problem—the obstacle to fairer transitional justice is not the narrowness of the conception of justice, it is the narrowness of transition. One sees in the literature a type of cognitive dissonance—scholars observe on the one hand that transition rarely yields better socio-economic outcomes, but yet assume transition is automatically propitious time for reform.³⁶⁵ A more realistic assessment of the prospects for addressing unfair societal structures might flow from a recognition that the factors that compel a more distributive or developmental approach to transitional justice also impair it. For example, as Holmes observes about Colombia:

If part of the purpose of the original confiscations was to reduce the power of the peasants, and if this strategy was successful, would-be land reformers today do not

364. Karl Popper, *The Open Society And Its Enemies, Vol. II* (Routledge: London, 1992) at 145.

365. E.g., Aguirre and Pietropaoli, 'The Case of Nepal', *supra* note 42, at 372.

have well-organized peasant allies who can help them put land reform into effect. The reason why restitution is needed, in other words, is the same reason why restitution is so devilishly difficult. Justice requires that the Colombian peasantry be given back the power they have lost; but justice alone does not give them the power they need to reestablish their political role in the country.³⁶⁶

The impetus towards social justice, development and/or redistribution is welcome, but cannot escape the 'moral dilemmas versus practical solutions' divide which has characterised the field since its earliest days.³⁶⁷

Even if a more benign transition obtains, there must be some doubt that transitional justice, for so long concerned with individual conduct and the stabilisation of society after the bargains of political elites, can impact significantly on the comparatively agent-less, macro-social structures and collective processes which underlie poverty and inequality. Even strong advocates of a shift from the time-bound and projectisable to an essentially limitless role for transitional justice in alleviating the structural causes of conflict accept that the direct developmental impact of trials or truth commissions or reparations on growth or distribution of national resources is either minimal or untraceable in purely economic terms.³⁶⁸ Baldly put, because of its temporary, exceptional and often wholly/partly external nature, transitional justice exists at a considerable remove from the capture by states, individuals or groups of surpluses from production or exchange and the consequent use of those surpluses in the service of health, literacy, education, income and employment. In particular, there is little to suggest those citizens and professionals who administer criminal justice, lustration or truth commissions are in any better position than development actors, parliamentarians or civil servants to examine the fundamental issue of whether a state's developmental or redistribution policy should be based on past suffering, present needs or future efficiency. Kerr and Mobekk have argued that the goals of transitional justice are too ambitious, often 'imposed from elsewhere and not in the power of those working within such processes to deliver them.'³⁶⁹ This becomes apparent on the ground. Peru's Integral Reparations Plan Group made a conscious decision to renounce the ambition to remedy the causes of the civil conflict, eschewing an impossible attempt 'to achieve the goals of the whole transitional process' and preferring instead to address 'just an important piece

366. Holmes, 'Concluding Remarks', *supra* note 18, at 427.

367. Alexandra Barahona de Brito *et al.*, 'Introduction', in De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory*, *supra* note 130, 1–39 at 35.

368. De Greiff, 'Articulating the Links', *supra* note 52, at 39.

369. Kerr and Mobekk, *Peace & Justice*, *supra* note 10, at 181.

of it.³⁷⁰ It is a choice many truth commissions, reparation programs and prosecutors will be forced to reach by the pressure of circumstances, and one armchair critics might do well to understand more sympathetically.

As in many areas of human rights, the norms in question in this debate are so fundamental that commitment to equality and poverty alleviation 'may dull an appropriately sceptical attitude' to what transitional justice can do.³⁷¹ The belief transitional justice can significantly impact the distribution of wealth and opportunity in an economy if only practitioners understand justice in a more holistic sense exemplifies the field's technocratic and utopian imperative, relying heavily on a logic of project management in which the right combination of technique and planning will accomplish the goals set for any given mechanism.³⁷² This 'toolbox' approach tends to assume the universality of the norms underlying transitional justice as applicable in all contexts, an optimism that inevitably disregards local political, social, cultural and historical contexts and purports to operate immune to local power struggles and political instrumentalisation.³⁷³ In this manner, the types of 'vague statements' and 'received wisdom' canvassed in Section 3 and 5 'are produced about what transitional justice is and how its aims can be achieved.'³⁷⁴ Broad generalised aspirations about how transitional justice as a concept can achieve socio-economic justice (or heal the traumatised, or end centuries-old cycles of violence) have achieved widespread acceptability within the field without any attention to the inevitably idiosyncratic and difficult conditions it will be applied in.

The idea that law can displace politics and resolve conflict is tempting and one that has animated transitional justice from the beginning.³⁷⁵ The humanitarian tendency to assume tools like transitional justice conduce to humanitarian outcomes like poverty eradication and socio-economic reform is one all policy-makers should be wary of.³⁷⁶ Because even the most noble intentions can fail, scholars and practitioners in the field should be rigorous about what

370. Lisa Magarrell, 'Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice', 22 *Windsor Year Book of Access to Justice* (2003) 85–98 at 94.

371. Andreas Follesdal, 'Methods of Philosophical Research on Human Rights', in Fons Coomans, Fred Grunfeld and Menno T. Kamminga (eds), *Methods Of Human Rights Research* (Intersentia: Antwerp, 2009) 233–246 at 233.

372. Colvin, 'Purity and Planning', *supra* note 20.

373. Rubli, *Justice by Bureaucratic Means?*, *supra* note 136, at 9.

374. *Ibid.*

375. Ruti Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', 35 *Cornell International Law Journal* (2002) 356–387 at 385.

376. Kennedy, *Dark Sides of Virtue*, *supra* note 8, at 119.

transitional justice can and cannot do. The best transitional justice strategies are those that are clearly defined and realistic, while those that are overtasked will dash artificially elevated expectations and disillusion the public. Scholars now warn that the overpromising regarding transitional justice's transformative macro-economic impact can only lead to unfair assessments that the institutions have failed, with a consequent loss of support for transitional justice overall.³⁷⁷ Much of the rhetoric in this debate is unsupportable, and the absolutism of the claims makes traditional approaches to truth, justice and reparations look like craven betrayal when they may in fact be all political conditions and institutional competences allow for. Posner and Vermeule note that the literature in the field either condemns transitional justice for failing to reach unrealistic ideals of justice or dismisses any effort at transitional justice because it falls short of them.³⁷⁸ The danger is not that transitional justice remains unduly limited in its outlook, but rather that overzealous proponents of an expanded practice make the perfect the enemy of the good.

It is worthwhile, therefore, considering what developmental goods transitional justice delivers independent of any direct attempt to fundamentally alter economic structures. First and foremost, to the extent that transitional justice helps stabilise and legitimise the national political community through truth, criminal accountability and reparations, it may help inoculate society against re-inflammation of the passions that led to conflict or repression and can then be said to have a developmental impact. Above all else, preventing further conflict is the fundamental precondition for achieving poverty reduction.³⁷⁹ In more positive terms, transitional justice can foster the basic conditions in which development can occur by fostering a more participatory and inclusive environment, on the one hand, and good governance on the other. The primary connection between transitional justice and development flows from the former's ability to establish the rule of law and affirm the currency of rules and norms. This traditional focus on civil and political rights has two main impacts. The first is that it tends to develop public civic trust, an assumption that strangers or institutions comply with abstract and general values and norms, which tends to facilitate cheaper, faster and fairer economic transitions in economies that go on to enjoy better growth and investment.³⁸⁰ The second is the establishment of rights as justified

377. Addison, 'Political Economy of Transition', *supra* note 41, at 111; Duthie, 'Towards a Development-sensitive Approach', *supra* note 86, at 306.

378. Eric A. Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', 117 *Harvard Law Review* (2004) 762–825 at 768.

379. Alexander, *Scoping Study*, *supra* note 32, at 48.

380. De Greiff, 'Articulating the Links', *supra* note 52, at 46.

claims that trigger remedies for violation instead of fixing them merely as aspirations for future conduct.³⁸¹ Transitional justice can buttress rule of law values like accountability, culpability and duty, potentially creating a culture where all rights (civil, political, economic, social and cultural) are enforceable and subject to remedies where violated.³⁸² Given that macro-level social and economic development is thought by some to be impossible without a functioning legal system,³⁸³ transitional justice can highlight that functionality in a most publically visible manner.

If human development is conceived in terms of enlarging peoples' choices as Sen famously proposed, even a relatively conservative approach to transitional justice can help establish the courts and state as defenders of rights, helping the socio-economically marginalised to see themselves as full members of the political community.³⁸⁴ The South African judge Albie Sachs argues that while dignity, land, jobs and education are the 'real reparation' people want, there is still much value in apology, shame and humanising the relationship between perpetrator and victim.³⁸⁵ It should not be assumed that a concentration on the latter impedes realisation of the former, but much of the more enthusiastic rhetoric canvassed earlier does just that. Finally, transitional justice may contribute to better practice on the part of development actors by making them more aware of the effect of human rights violations on everyday life. It can empower state and non-state actors with a tool to pressure government toward ensuring equitable development. However, scholars should be readier to acknowledge that there will be countervailing pressures.

Establishing the rule of law and the currency of civil and political rights is a necessary condition for development and redistribution, even if it is far from sufficient. Bearing this and the relative inability of transitional justice mechanisms to directly effect macro-level economic change in mind, it is not necessarily be fatal to hopes for economic equality to postpone highly contentious, *potentially* transformative transitional justice policies lest they undermine the delicate balance of power and compromise that the transition represents. Development and socio-economic justice are not matters of one-off intervention, but are rather continuous processes of critical dialogue with an expanding set of groups and interests to ensure that engagements

381. *Ibid*, at 55.

382. *Ibid*, at 52.

383. Stephen Toope, 'Legal and Judicial Reform through Development Assistance: Some Lessons', 38 *McGill Law Journal* (2003) 357–417 at 363.

384. Amartya Sen, *Development as Freedom* (Knopf: New York, 1999).

385. Cited in Lyn S. Graybil, *Truth and Reconciliation in South Africa: Miracle or Model?* (Lynne Rienner Publishers: Boulder, 2002) at 155.

undertaken reflect the needs and interests of at least some of these groups, including those who benefitted from past injustice. As Waldorf contends, ‘the reduction of longstanding inequality is necessarily “post-transition”—something to be accomplished as part of creating a new and hopefully more democratic order,’³⁸⁶ though critics are certainly correct to argue that development of socio-economic rights cannot be assumed to flow automatically from positive developments in terms of democratisation and rule of law.³⁸⁷

Andrieu contends that it is the existence of boundaries to transitional justice that make it an actual theory. Attempts to turn transitional justice into a ‘catchall formula’ risk enchanting transitional justice unfairly with ‘magical powers’ to transform and regenerate societies, when in reality it is better suited to merely addressing individual social ills in the hope that it may ultimately contribute to the solution of the state’s wider problems.³⁸⁸ This is a position with which this paper concurs. The boundaries of transitional justice may benefit from some stretching, and few would quibble with more prosecutions for kleptocracy or corruption, a more structural remit for truth commissions or a more ambitious approach to reparations, but socio-economic metamorphosis and poverty reduction should not be the metric by which transitional justice should be judged. It may be necessary to compromise or abandon some of the undoubtedly laudable principles, assumptions and ideals inherent in the expansionary position for the sake of retaining the coherence, saleability and reputation of transitional justice.

Without attention to the dynamics of transition and the weakness of the state, arguments that transitional justice practitioners should ‘turn the majority of their attention and resources to efforts that directly target existing structural and cultural violence’³⁸⁹ or formulate a ‘holistic and comprehensive settlement addressing the foundational problems’ that unleashed conflict³⁹⁰ risk re-hashing the simplistic rhetoric and sloganeering advice that mar debates on the protection of socio-economic rights.³⁹¹ This conclusion is not to counsel hopelessness about the prospects of redressing long-term patterns of inequality in transitional states, but rather modesty about what can be achieved in the radically imperfect ecology of weak, impoverished and divided states.

386. Waldorf, ‘Anticipating the Past’, *supra* note 181, at 9.

387. Arbour, ‘Economic and Social Justice’, *supra* note 59, at 10; Peter Uvin, *Human Rights and Development* (Kumarian Press: Boulder, 2004) at 155.

388. Andrieu, ‘Dealing With a “New” Grievance’, *supra* note 115, at 553.

389. Mullen, ‘Reassessing the Focus’, *supra* note 4, at 10.

390. Mutua, ‘Critique of Rights’, *supra* note 137, at 39.

391. Roth, ‘Defending Economic, Social and Cultural Rights’, *supra* note 187, at 63 and 65.