

# Not Only ‘Context’: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights

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## ABSTRACT

Transitional justice programs traditionally focused on breaches of civil and political rights and violations of bodily integrity, largely ignoring violations of economic and social rights (ESRs) and relegating socioeconomic issues to the category of ‘background’ or context. This approach is becoming increasingly untenable given that ESRs articulate binding and increasingly justiciable legal obligations. Considering past ESR violations can also provide crucial insight into the causes of past conflict, and addressing socioeconomic grievances can help to reduce the chances of future rights violations or civil unrest. This Article sets out when transitional justice ought concern itself with breaches of ESRs using the ‘respect, protect, fulfill’ framework of state obligations. Drawing on past examples, the Article argues that failures to respect and protect ESRs are usually discrete enough to be included in the mandates of truth commissions, reparations schemes, and, in some cases, criminal prosecutions. Decentralization programs and the vetting of corrupt economic actors can also effectively address past ESR violations and lead to socioeconomic improvements. Addressing state failures to fulfill ESRs is a more complicated question, although there are occasions where such violations should be included in transitional justice mandates. Ultimately, transitional justice can no longer ignore that ESRs articulate non-negotiable and clearly defined standards, which often hold the key to stable and sustainable political transitions.

## INTRODUCTION

The field of transitional justice traditionally focused on breaches of civil and political rights when seeking to respond to periods of conflict, systemic rights violations, and political transition. Early instantiations of transitional justice generally ignored violations of economic and social rights (ESRs) or relegated them to issues of “background” or context.<sup>1</sup> While some transitional justice mechanisms may not be well suited to effectively respond to ESR violations, to completely exclude ESRs from transitional justice programs is imprudent. Socioeconomic grievances often figure as an important element to the dynamics of past conflict or atrocity and thus need to be investigated and understood. Properly addressing ESR

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1. See, e.g., Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 *FORDHAM INT’L L.J.* 780, 781–83 (2012) [hereinafter Sharp, *Addressing*] (noting that transitional justice has historically treated economic violations as “little more than useful context”).

violations can also help to prevent recurrence of rights violations or conflict. Further, ESRs are now justiciable in many forums.<sup>2</sup> The reasons for, and instances of, the inclusion of ESRs in transitional justice programs are detailed in Part I. Despite these considerations, many commentators advocate for exercising caution when considering whether to include ESRs within transitional justice mandates, arguing that addressing ESRs can lead a project into the realms of development, which requires tools and strategies that differ from those employed in transitional justice.<sup>3</sup> Part II explores these arguments. It then seeks to refute those concerns by exposing erroneous assumptions regarding civil and political rights as compared with ESRs, by debunking misplaced assumptions about how ESRs can and cannot be productively incorporated into transitional justice mandates, and by addressing certain practical considerations that can facilitate such incorporation.

In Part III the Article sets out when transitional justice ought to concern itself with breaches of ESRs using the 'respect, protect, fulfill' framework of state obligations and by considering past examples. State failures to respect and protect ESRs are generally discrete enough to be effectively included in transitional justice mandates. For instance, truth commission mandates now often include economic crimes or other forms of socioeconomic injustice,<sup>4</sup> and international criminal courts have used the crimes of enslavement, persecution, and genocide to prosecute crimes that include violations of ESRs.<sup>5</sup> Whether to include violations of the obligation to fulfill ESRs, which include notions of progressive achievement subject to a nation's "available resources,"<sup>6</sup> is a more complicated question. Nonetheless, various transitional justice mechanisms have the potential to meet failures to fulfill ESRs at the community level. Reparations schemes and decentralized governance have led to the better fulfillment of ESRs in traditionally marginalized communities,<sup>7</sup> and vetting processes can be used to root out corrupt public officials and to exclude complicit corporate actors from conducting business. Such efforts can strengthen economic governance and increase the amount of state revenue to be spent on health, education, welfare, and other ESRs.<sup>8</sup> Nationwide failures to fulfill ESRs will require extensive funding and sustained policy implementation and are therefore less suited to transitional justice responses. Nonetheless, the examples explored in this Article indicate how governments can capitalize on the opportunity presented by periods of

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2. See *infra* notes 45–51 and accompanying text.

3. See, e.g., Roger Duthie, *Transitional Justice, Development, and Economic Violence*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 165, 172–73 (Dustin N. Sharp ed., 2014) (noting that the mechanics for achieving transitional justice differ from those used in development because "they are conceptually distinct initiatives that rest on separate grounds and relate to different dimensions of justice").

4. See *infra* Part III.A.

5. See *infra* Part III.C.

6. International Covenant on Economic, Social and Cultural Rights art. 2 para. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

7. See *infra* Part III.D–F.

8. See *infra* Part III.H.

transition to engrain ESRs into the fabric of a country's political culture and legal regime, which can positively impact on the future fulfillment of ESRs.

### A. *Cultural Rights?*

This Article focuses on economic and social rights, rather than the usual grouping of economic, social, and cultural rights. However, this should not be regarded as denigrating the importance and indivisibility of cultural rights from other human rights. It is implicit in this Article's analysis that ESRs must be fulfilled through culturally specific and appropriate policies, and that cultural rights enshrined in instruments like the International Covenant on Economic, Social and Cultural Rights (ICESCR) are inviolable and indivisible. Indeed, the enforcement of the rights to culture and religion can lead to stronger and more secure socioeconomic entitlements, such as the articulation of indigenous or customary land rights.<sup>9</sup> This Article focuses on ESRs because these rights are most closely aligned to projects of development and are thus most often argued to be outside the bounds of transitional justice. It seeks to critique and clarify such arguments.

## I. THE GRADUAL INCLUSION OF ECONOMIC AND SOCIAL RIGHTS

Transitional justice is concerned with achieving broad notions of justice, and maintaining peace and stability following a period of widespread human rights abuses and, usually,<sup>10</sup> a political transition.<sup>11</sup> Transitional justice mechanisms (truth commissions, prosecutions of human rights violations, reparations programs, vetting processes, memorials, and so on) tend to evaluate past wrongs against the standards and norms established by human rights and international humanitarian law.<sup>12</sup> Early instantiations of transitional justice focused on violations of civil and political rights

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9. See, e.g., U.N. Hum. Rts. Comm., Views: Communication No. 1457/2006, paras. 7.6–7.7, Commc'n 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009); Ctr. for Minority Rights Dev. v. Kenya, Commc'n 276/2003, (2009) A.H.R.L.R. 75, para. 209.

10. Compare, for example, Morocco's Equality and Reconciliation Commission, which was implemented by royal decree of King Mohammad IV in 2004 after five years on the throne. Dahir (Royal Decree) no. 1.04.42 10 of April 2004 approving Statutes of the Equity and Reconciliation Commission, available at [http://www.ier.ma/article.php3?id\\_article=1395](http://www.ier.ma/article.php3?id_article=1395).

11. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003) ("Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." (citation omitted)).

12. Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006) [hereinafter Roht-Arriaza, *The New Landscape*]; Evelyne Schmid & Aoife Nolan, 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice, 8 INT'L J. TRANSITIONAL JUST. 1, 3–4 (2014) (noting that the field of human rights, along with international criminal law and international humanitarian law, is the most frequently invoked normative framework invoked by transitional justice scholars and practitioners) (citing U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Rep. of the Secretary-General*, para. 9, U.N. Doc. S/2004/616 (Aug. 23, 2004)).

at the expense of examining economic or social wrongs.<sup>13</sup> For instance, Argentina's National Commission on the Disappearance of Persons (known by its Spanish acronym, CONADEP) focused on disappearances, assassinations, and the treatment of those detained by the Argentine military.<sup>14</sup> The truth commissions of Chile (focusing on deaths, disappearances, and kidnappings),<sup>15</sup> El Salvador ("serious acts of violence"),<sup>16</sup> and Uruguay (enforced disappearances)<sup>17</sup> also gave most of their attention to violations of bodily integrity, leaving ESRs relatively unaddressed.<sup>18</sup> Similarly, the enabling legislation of South Africa's Truth and Reconciliation Commission limited the definition of "victim" to those who suffered gross human rights violations including killing, abduction, or torture, effectively relegating the structural economic violence of the apartheid system to be considered only as context.<sup>19</sup>

#### A. Understanding the Dynamics of Past Conflict and Atrocity

Many commentators recognize that focusing on violations of bodily integrity or political rights risks distorting understandings of the nature of past conflicts and violence.<sup>20</sup> While ideology, entrenched ethnic divisions, or other political grievances will often be a factor, many conflicts can count among their causes discontent regarding resource allocation or poor economic management, which directly impact socioeconomic rights.<sup>21</sup> For instance, the mass demonstrations that lead to large-scale

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13. Sharp, *Addressing*, *supra* note 1, at 781–83; *see also* Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266, 267 (2008) ("The literature, institutions and international enterprise of transitional justice historically have failed to recognize the full importance of structural violence, inequality and economic (re)distribution to conflict, its resolution, transition itself and processes of truth or justice seeking and reconciliation." (citation omitted)).

14. *See generally* Emilio Crenzel, *Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 173 (2008).

15. Law No. 355, Abril 25, 1990, para. 1, DIARIO OFICIAL [D.O.].

16. U.N. Comm'n on the Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador*, 11, U.N. Doc. S/25500 (1993).

17. Or "las desapariciones forzadas" in the original text. Resolución de la Presidencia de la República No. 858/200, pfo. 1, Diario Oficial [DO] No. 25.853, 9 de Agosto de 2000 (Uru.).

18. Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice*, 26 HARV. HUM. RTS. J. 149, 169–70 (2013) [hereinafter Sharp, *Interrogating*].

19. Sharp, *Addressing*, *supra* note 1, at 793; Dustin N. Sharp, *Economic Violence in the Practice of African Truth Commissions and Beyond*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION, *supra* note 3, at 79, 86 [hereinafter Sharp, *Economic*]; Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21 SOC. & LEGAL STUD. 171, 175–76 (2012).

20. Miller, *supra* note 13, at 266; Sharp, *Addressing*, *supra* note 1, at 782–83; Sharp, *Interrogating*, *supra* note 18, at 170–71; Chandra Lekha Sriram, *Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION, *supra* note 3, at 27, 35; *cf.* Ruben Carranza, *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?*, 2 INT'L J. TRANSITIONAL JUST. 310, 330 (2008) ("[T]he exclusion of corruption and economic crimes from transitional justice mechanisms does not necessarily mean that the role of these violations in abuse and conflict is being diminished. A popular view is that transitional justice is meant to address one part of the problem with the hope that it can contribute to the solution of the whole.").

21. *See, e.g.*, Naomi Roht-Arriaza, *Reparations and Economic, Social, and Cultural Rights*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION, *supra* note 3, at 109, 110 [hereinafter Roht-Arriaza, *Reparations*] ("The underlying causes of armed conflict tend to be structural and resource related as often

violence in Tunisia,<sup>22</sup> Egypt,<sup>23</sup> and Yemen<sup>24</sup> all had pressing socioeconomic concerns at their base, including poverty, unemployment, and corruption. Socioeconomic grievances also led to the 1932 massacre in El Salvador of over 30,000 peasants and farm-laborers: The victims had sought to revolt because of concerns regarding land distribution and stark socioeconomic inequality.<sup>25</sup>

Rule by dictatorial or rights-violating regimes will also often lead to widespread economic and social deficiencies and stark societal inequality,<sup>26</sup> or may even involve positive breaches of social and economic rights. For instance, education can be co-opted by the government and used as a propaganda tool, and populations can be forcibly displaced or subjected to famine.<sup>27</sup> Thus, ESR violations can be as devastating on populations as violations of bodily integrity<sup>28</sup> or other civil and political rights—indeed, the division between these two characterizations of right violations becomes harder to discern in instances of forcible displacement and the use of mass starvation, given the physical impacts on victims that inevitably result. Consideration of such factors merely as background or context reinforces the myth that socioeconomic issues will be resolved over time,<sup>29</sup> or with the advent of democracy;<sup>30</sup> it also obfuscates the direct and immediate obligations that arise from state duties to respect, protect, and fulfill ESRs.

### B. Preventing Recurrence and Fostering Stable Transitions

Ignoring ESRs does not only distort historical narratives: It also risks leaving certain causes of past violence unaddressed. This impedes the type of structural or

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as ideological.”); *cf.* Waldorf, *supra* note 19, at 175 (challenging the assumption that economic and social rights (ESRs) can have a dominant role in causing conflict).

22. Eric Andrew-Gee, *Making Sense of Tunisia*, NEW REPUBLIC, Jan. 17, 2011, <http://www.newrepublic.com/article/world/81611/making-sense-tunisia> (describing the causes of the protests as corruption, unemployment, economic stagnation, and restrictions on freedom of the press).

23. Agence France-Presse, *Egypt Braces for Nationwide Protests*, HERALD, Jan. 25, 2011, <http://www.herald.co.zw/egypt-braces-for-nationwide-protests/> (noting that the first day of protests that led to the sacking of President Mubarak was dubbed “the day of revolt against torture, poverty, corruption and unemployment” (internal quotation marks omitted)).

24. Malika Bilal, *Yemen: Bloody Protests and Broken Agreements*, AL JAZEERA (Dec. 27, 2011), <http://www.aljazeera.com/indepth/spotlight/aljazeeratop102011/2011/12/2011122593511542382.html> (describing protests “against government corruption, unemployment and woeful economic conditions”).

25. Dermot Keogh, *El Salvador 1932: Peasant Revolt and Massacre*, 6 CRANE BAG, no. 2, 1982, at 7, 7.

26. Roht-Arriaza, *Reparations*, *supra* note 21, at 113.

27. Such breaches were recorded by Timor-Leste’s commission. CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE: EXECUTIVE SUMMARY 124, 125, 161 (2005) [hereinafter CAVR EXECUTIVE SUMMARY]. Another infamous example is the use of famine and starvation by Stalin in Soviet Ukraine in 1933. *See, e.g.*, TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 24–25 (2010).

28. *See, e.g.*, CAVR EXECUTIVE SUMMARY, *supra* note 27, at 44 (finding that of the 102,800 people who died under Indonesia’s rule, 18,600 (18%) were killed while roughly 84,200 (82%) died because of hunger or illness, and noting that the number of deaths due to hunger and illness “exceed[s] the total that would be expected if the death rate due to hunger and illness had continued as it was in the pre-invasion peacetime period”).

29. Miller, *supra* note 13, at 268.

30. *Id.* at 276.

systemic change required in a transitional context<sup>31</sup> and undermines the ability of governments and transitional justice programs to prevent recurrence of human rights violations. A failure to address systemic causes of, and the role of inequality in, conflict and systemic human rights abuses not only leaves open the possibility of renewed violence;<sup>32</sup> it may actively contribute to the precariousness of peace by reinforcing existing socioeconomic injustices, which can intensify social dissatisfaction.<sup>33</sup> Ignoring socioeconomic issues may also impede efforts to foster stable transitions. For instance, a recent report noted the national perception that the difficulties of Mali's transition out of civil war stem from a "lack of good governance, including in the sectors of justice, education, and health".<sup>34</sup> The International Crisis Group also recently emphasized that the fostering of a stable transition in the Central African Republic required the prioritization of "economic recovery and resource management."<sup>35</sup> At the same time, there may be limits to the ability of transitional justice to contend with widespread poverty and other issues of development. Exactly how transitional justice can grapple with issues of poverty and state failures to fulfill ESRs is considered in the following Subpart.

### C. *The Increasing Justiciability of Breaches of Economic and Social Rights*

One explanation for the initial reluctance to consider ESRs by transitional justice institutions is tied to inherited biases and conceptions of hierarchies between different types of human rights.<sup>36</sup> These still exist despite authoritative characterizations of all human rights as "universal, indivisible and interdependent and interrelated."<sup>37</sup> This perceived hierarchy is based in part on the provision in the ICESCR for progressive achievement, to the maximum of a State's available resources, of the rights contained therein,<sup>38</sup> as opposed to the ostensibly more tangible responsibilities imposed by the International Covenant on Civil and Political

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31. *See id.* at 280–81 ("The failure to include economic concerns in transitional justice mechanisms tends to make transition into a political rather than economic story, limiting knowledge of the economic underpinnings of conflict, narrowing the story of regime change and quelling discussion of development plans by quarantining them within the state and the executive rather than making them part of the transitional justice conversation.").

32. *Id.* at 287–90; *see also* Sharp, *Addressing, supra* note 1, at 783 (arguing that "'never again' has little meaning if the self-imposed blind spots of the field distort our understanding of the conflict").

33. *See* Miller, *supra* note 13, at 286 (arguing that a reparations scheme that is employed without a deep consideration of the underlying economic drivers of conflict will not lead to structural change or resolution of the fundamental origins of the conflict).

34. VIRGINIE LADISCH, INT'L CTR. FOR TRANSITIONAL JUSTICE, POSSIBILITIES AND CHALLENGES FOR TRANSITIONAL JUSTICE IN MALI 4 (2014), available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Mali-Assessment-2014.pdf>.

35. Int'l Crisis Grp., *Central African Republic: A Transition at Risk*, INT'L CRISIS GRP. BLOG (Oct. 7, 2014), <http://blog.crisisgroup.org/africa/2014/10/07/central-african-republic-a-transition-at-risk>.

36. Sharp, *Addressing, supra* note 1, at 796; *see also* Waldorf, *supra* note 19, at 173 ("[T]ransitional justice has been heavily influenced by human rights and, as such, has replicated that discipline's longstanding legalistic bias towards civil and political rights . . ."); *cf.* Schmid & Nolan, *supra* note 12, at 2–3 (responding to and critiquing traditional views of transitional justice, which tend to minimize the import of economic and social rights).

37. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, para. 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

38. ICESCR, *supra* note 6, art. 2, para. 1.

Rights.<sup>39</sup> However, the ICESCR still creates obligations for States. Specifically, the duty to “take steps” is an immediate and concrete obligation.<sup>40</sup> In addition, States parties have duties to respect, protect, and fulfill economic, social, and cultural rights (ESCRs).<sup>41</sup> The obligation to respect prohibits state interference with individuals’ exercise or enjoyment of ESCRs.<sup>42</sup> The obligation to protect requires States to prevent third parties from violating those rights.<sup>43</sup> The obligation to fulfill requires States to take appropriate steps toward the full realization of ESCRs, which includes obligations for both immediate and progressive action.<sup>44</sup>

ESR obligations are also increasingly justiciable: They are enshrined in some States’ constitutions,<sup>45</sup> or constitutional jurisprudence,<sup>46</sup> as well as in some regional human rights regimes.<sup>47</sup> In addition, the recent Optional Protocol to the ICESCR creates a process for individual communications to the Committee on Economic, Social and Cultural Rights.<sup>48</sup> There exist many other international instruments in which ESCRs are enshrined,<sup>49</sup> as well as the provision for similar rights under customary international law<sup>50</sup> and international humanitarian law.<sup>51</sup> The increasing

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39. See International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 172 [hereinafter ICCPR] (requiring that each State Party to the Covenant protect the rights provided for by the Covenant and undertake measures to ensure their protection).

40. Comm. on Econ., Soc. & Cultural Rights, Rep. on its 5th Sess., Nov. 26–Dec. 14, 1990, annex 3, at 83, U.N. Doc. E/1991/23 (1991) (“[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”).

41. Comm. on Econ., Soc. & Cultural Rights, Rep. on its 24th Sess., Nov. 13–Dec. 1, 2000, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000) (“Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights.”).

42. *Id.*

43. *Id.*

44. See Schmid & Nolan, *supra* note 12, at 6 (outlining examples and methods that States can use to realize their obligations).

45. See, e.g., CONSTITUTION, art. 43 (2010) (Kenya) (right to health, adequate housing, food, water, social security, and education); CONSTITUTION OF THE REPUBLIC OF NAMIBIA, art. 20 (right to education); S. AFR. CONST., 1996, arts. 22 (freedom of trade, occupation, and profession), 26 (right to adequate housing), 27 (right to health care, food, water, and social security), 29 (right to education).

46. See, e.g., Narayan v. Bihar, A.I.R. 1989 S.C. 348, 354–55 (India) (implying right to health from right to life); Tellis v. Bombay Mun. Corp., A.I.R. 1986 S.C. 180, 189–90 (India) (implying right to “livelihood” and, effectively, adequate shelter from the right to life).

47. See African Charter on Human and Peoples’ Rights, *opened for signature* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, arts. 14 (right to property), 15 (right to work), 16 (right to health), 17 (right to education), 21 (right to free disposal of wealth and natural resources); Association of South East Asian Nations [ASEAN], *ASEAN Human Rights Declaration*, 21st Summit (Nov. 19, 2012), arts. 27 (right to work), 28 (right to adequate standard of living), 29 (right to health), 30 (right to social security), 31 (right to education).

48. Optional Protocol to the International Covenant on Econ., Soc. and Cultural Rights, G.A. Res. 63/117, art. 2, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) (effective May 2013).

49. See Sharp, *Addressing*, *supra* note 1, at 795 n.49 (citing various intergovernmental documents incorporating economic, social, and cultural rights (ESCRs)).

50. U.N. Comm. on Econ., Soc. & Cultural Rts., Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, para. 12, U.N. Doc. E/C.12/1/Add.69 (Aug. 31, 2001).

51. *Id.*; see Duthie, *supra* note 3, at 185 (“[U]nlawful interference with people’s health, housing, food, water, or education, [] can constitute the crimes of willful killing, unlawful deportation or transfer,



number of forums in which individuals can bring claims related to breaches of their ESRs clearly indicates one way in which such rights can be addressed by transitional justice programs. Given this development, and the concreteness of obligations created by instruments like the ICESCR, it becomes less tenable to argue that including ESRs in transitional justice mechanisms is unrealistic or implausible. Other arguments against incorporating ESRs in transitional programs are addressed in Part II, below. Before considering such arguments, the Article, in the following Subpart, explores the complexity of determining which types of ESR violations would be most appropriately included within mandates of transitional justice processes.

*D. Determining Which Types of Economic and Social Rights Must Be Included*

Transitional justice mechanisms can no longer turn a blind eye to the violation of ESRs. To do so not only perpetuates anachronistic conceptions of ESRs as lower on the hierarchy of rights, it also distorts findings and misaligns policies, which has implications for the right to truth and for efforts to avoid recurrence of violence. To downgrade or ignore ESRs is to fail to capitalize on the unique opportunity that periods of transition present for reinvention and reform of a State's legal culture and rule of law; rejecting the prospect of strengthening a population's ESRs may also taint the legitimacy of the State's juridical culture. Indeed, as discussed below, truth commissions are increasingly considering issues of socioeconomic injustice.<sup>52</sup> At the same time, transitional justice mechanisms, or the government entities creating them, will need to prioritize which types of ESR violations will be focused on. Some issues related to ESRs may require sustained and long-term attention and policy to be properly understood and addressed, and may thus not be suited to intensive attention by transitional justice mechanisms. Others will be sufficiently discrete and remediable to be effectively addressed by a transitional justice program. It will often thus be appropriate for such mechanisms to be given broad mandates, within which they can determine specific priorities and areas of focus.

More precise delineations as to what should fall within, and outside of, transitional justice mandates will depend on the specific context, including the nature of past rights violations, and the resource constraints of the institution.<sup>53</sup> As Dustin Sharp has pithily observed, "[T]here are no easy answers, only trade-offs that must be carefully analyzed."<sup>54</sup> What can realistically be considered as fodder for a truth commission or other transitional justice process thus merits discussion. In the following Part, this Article considers arguments concerning the limitations or incapacities of transitional justice in dealing with ESRs. In Part III, it goes on to explore examples of transitional justice mechanisms that effectively identified and responded to ESR violations, or that have had the effect of better fulfilling ESRs.

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collective punishment, pillage, destruction of property, attacking cultural property, or starvation . . .").

52. See *infra* Part III.A.

53. See, e.g., Sharp, *Economic*, *supra* note 19, at 106 (noting that "while the work of some truth commissions is starting to broaden, it is not clear that the budgets and time allocated . . . have increased commensurately").

54. Dustin N. Sharp, *Conclusion: From Periphery to Foreground*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION, *supra* note 3, at 289, 294.

## II. LIMITATIONS OF INCLUDING ECONOMIC AND SOCIAL RIGHTS

### A. *The Wrong Tools*

The most convincing reasons advanced for limiting consideration of ESRs by transitional justice mechanisms tend to focus on tactics and efficacy—on transitional justice’s ability to foster any amount of meaningful socioeconomic change—rather than on arguments of principle or doctrinal coherence. The first argument concerns development, rather than specifically addressing breaches of ESRs, but is nonetheless relevant given that populations in need of development assistance are usually beset by violations of ESRs.<sup>55</sup> Societies emerging from authoritarianism or conflict are often affected by poverty, damaged infrastructure, and low levels of governance and social capital.<sup>56</sup> Such problems can be characterized as within the bounds of the project of development, rather than of transitional justice. Transitional justice and development will interact in many different ways, but ultimately, so the argument goes, the tools of transitional justice are not suited to addressing developmental shortcomings.<sup>57</sup> The pursuit of economic development (characterized by economic growth distribution)<sup>58</sup> or human development (defined as the enlargement of people’s choices)<sup>59</sup> are both long-term projects, requiring decades of applied policy consideration. Transitional justice in a given country, on the other hand, tends to have a relatively short lifespan.<sup>60</sup> Truth commissions, for instance, generally have one shot at making recommendations for systemic reforms, and they cannot revise their recommendations for socioeconomic policies as conditions on the ground change.<sup>61</sup> Many transitional justice mechanisms also require a certain level of development to operate.<sup>62</sup> Transitional justice may thus struggle to achieve long-lasting socioeconomic development, which weakens the utility of including state failures to fulfill ESRs within transitional justice mandates.

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55. Pablo de Greiff, *Articulating the Links between Transitional Justice and Development: Justice and Social Integration*, in *TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS* 28, 29 (Pablo de Greiff & Roger Duthie eds., 2009) (“[A] good number of transitional societies face immense development challenges, and a good number of developing countries face abiding ‘justice deficits’ concerning massive human rights abuses in their pasts.”).

56. *Id.* at 29–30.

57. *See id.* at 30–31 (addressing some issues regarding developmental problems in transitional regimes); *see also* Duthie, *supra* note 3, at 201 (“[Traditional justice] measures are facing different kinds of political, legal, and practical challenges and constraints; measures that were initially designed to deal with a narrow set of civil and political rights violations cannot necessarily deal as effectively with economic and social rights violations without being adapted, without changes in international and national law, and without a minimum level of coherence with broader development interventions.”).

58. de Greiff, *supra* note 55, at 33–34.

59. *Id.* at 49 (quoting U.N. DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT* 1990, at 1 (1990)).

60. Waldorf, *supra* note 19, at 179; *see also* Schmid & Nolan, *supra* note 12, at 19 (discussing another scholar’s view that “transitional justice is inherently concerned with . . . short-term change,” among other factors).

61. *See* Waldorf, *supra* note 19, at 176–77.

62. *Id.* at 30–31 (“[T]rials require operative courts; reparations programs require, among other things, resources to distribute; even the mildest form of institutional reform, vetting, requires institutions strong enough to withstand having personnel removed.”).

### B. *Insufficient Resources*

A second argument concerns the fact that transitional justice usually operates in contexts where state resources are severely limited.<sup>63</sup> Transitional justice mechanisms are stretched to their limits even without considering breaches of ESRs, the investigation of which may require different skills and expertise. Expanding the mandate to include ESRs without a corresponding increase in funding thus risks overburdening transitional justice,<sup>64</sup> diluting its efficacy. For instance, truth commission findings risk being less concrete, their analysis overly general, and their recommendations “utopian” and without distinct mechanisms for achieving the desired results.<sup>65</sup> Studies have also shown that in jurisdictions where economic crimes can be prosecuted, authorities still tend to prioritize the prosecution of more traditional crimes.<sup>66</sup> The gist of this argument, then, is not that transitional justice is necessarily unable to have a practical effect on questions of inequality and development, but that if it were to attempt to do so, it would risk neglecting more conventional transitional justice endeavors, such as deterring future atrocities and upholding the dignity of victims of physical or sexual violence.

This argument has even more force where beneficiaries of past socioeconomic injustice remain in positions of power: In seeking to protect their economic interests, they may obstruct or undermine transitional justice processes aimed at altering the status quo.<sup>67</sup> The following Subpart responds to the arguments discussed in Subparts A and B, providing reasons why they should not lead to the complete exclusion of ESRs within transitional justice programs.

### C. *Responses to ‘Limitation’ Arguments*

The arguments raised in Subparts A and B above do not provide a sufficient foundation for the per se freezing out of ESRs from transitional justice. Several issues, in addition to the above discussion of the binding nature of state obligations with regards to ESRs, need to be considered. First, breaches of the obligation to respect and protect ESRs will not usually be so aspirational or long-term as to be unresponsive to transitional justice mechanisms. For instance, forced displacement (violating the right to an adequate standard of living and housing, among others)<sup>68</sup> can be the subject of truth finding and recommendations; victims can also seek restitution or compensation, and those responsible can be prosecuted or otherwise held to account.<sup>69</sup>

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63. *Id.* at 40.

64. *Id.*; Sharp, *Interrogating*, *supra* note 18, at 173.

65. de Greiff, *supra* note 55, at 40.

66. *E.g.*, Duthie, *supra* note 3, at 190–91.

67. de Greiff, *supra* note 55, at 41; Duthie, *supra* note 3, at 189–90.

68. ICESCR, *supra* note 6, art. 11, para. 1.

69. FEDERICO ANDREU-GUZMÁN, INT’L CTR. FOR TRANSITIONAL JUSTICE, CRIMINAL JUSTICE AND FORCED DISPLACEMENT: INTERNATIONAL AND NATIONAL PERSPECTIVES (2013), <https://www.ictj.org/sites/default/files/ICTJ-Research-Brief-Displacement-Criminal-Justice-Andreu-Guzman.pdf>

(“Despite the absence of the crime of forced displacement from its statute, the International Criminal Tribunal for Rwanda (ICTR) addressed displacement through the crime against humanity of “inhuman acts,” while the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) statute did include

Second, the project of remedying many civil and political rights violations will also often be a long-term or aspirational one,<sup>70</sup> yet this has not prevented such issues from being included in transitional justice mechanisms.<sup>71</sup> For instance, Timor–Leste’s Commission for Reception, Truth and Reconciliation (known by its Portuguese acronym, CAVR) made recommendations regarding the improvements of the nation’s courts, including ensuring sufficient numbers of judges and support staff,<sup>72</sup> which were aimed in part at ensuring the right to fair trial, a civil and political right.<sup>73</sup> Given Timor–Leste’s severely decimated and under-trained judiciary around that time,<sup>74</sup> such a recommendation was as long-term and aspirational as any of CAVR’s recommendations regarding ESRs. This undermines arguments that ESRs ought to be excluded from transitional justice projects because of their long-term or aspirational nature.

Third, while transitional justice measures require a baseline of development and resources to be effective,<sup>75</sup> countries that lack such resources at the time of transition ought not exclude having aims targeted at socioeconomic improvement. Governments can strategically sequence different processes aimed at remedying ESR violations so that they occur at a time where such redress or fulfillment is plausible. International financial or aid assistance can also be leveraged to increase a country’s capacity to properly address ESR violations.

Fourth, concerns that including ESR violations will dilute the impact of a transitional justice mechanism do not necessarily mean that violations of ESRs should be excluded. This would undermine the notion of all human rights being “universal, indivisible and interdependent and interrelated.”<sup>76</sup> Rather, such concerns indicate that considering all issues concerning civil and political rights and ESRs may not be possible and that determining which violations of which rights ought to be considered in detail by a transitional justice mechanism will thus depend on the particular context. The effects of breaches of ESRs can be as deleterious as breaches

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deportation and the transfer of civilians as war crimes, and deportation as a crime against humanity.”).

70. Schmid & Nolan, *supra* note 12, at 13 (giving the example of extra-judicial executions, which ought attract an immediate remedy as well as an aspiration to change the nation’s law enforcement culture over time to ensure a more effective protection of the right to life).

71. *Id.* at 18.

72. CAVR EXECUTIVE SUMMARY, *supra* note 27, at 174–76.

73. ICCPR, *supra* note 39, art. 14(1) (“[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

74. Shane Marshall, Justice, Fed. Court Austl., The East Timorese Judiciary: At the Threshold of Self-Sufficiency?, Address to the Conference of Supreme and Federal Court Judges at Darwin, Australia (Dec. 20, 2004), available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-marshall/marshall-j-20041220> (discussing Timor-Leste’s appointment of its first eight judges and two prosecutors in 2000); Shane Marshall, Justice, Fed. Court Austl., Update to The East Timorese Judiciary: At the Threshold of Self-Sufficiency?, Co-operating with Timor-Leste Conference at Victoria University in Melbourne, Australia (June 17, 2005), available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-marshall/marshall-j-20050617> (noting that in 2005 all twenty-two of Timor-Leste’s judges, as well as all prosecutors and public defenders that were assessed, failed their examinations and evaluations and were thus suspended from duty).

75. See Marcus Lenzen, *Roads Less Traveled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice, in TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS*, *supra* note 55, at 76, 103 n.13 (noting that “severe underdevelopment and resource scarcity put constraints on the implementation of transitional justice measures”).

76. *Vienna Declaration*, *supra* note 37.

of civil and political rights, and deciding which rights should or should not be included requires nuance and careful attention, rather than an inflexible, binary approach.

Fifth, even if transitional justice is completely ill-equipped to solve a socioeconomic problem, that does not mean that failures to fulfill ESRs should be ignored: Their mere acknowledgement can re-articulate state obligations and ensure that such breaches cannot be merely explained away as a problem of insufficient resources.<sup>77</sup> Further, while such problems may be regarded as coming within the bounds of development, their articulation as human rights violations provides policy makers with guidance regarding what the law requires, based on international consensus and elaboration by human rights bodies and experts. Conceiving of individuals as rights holders, as opposed to beneficiaries of development programs, also reaffirms their dignity and agency, and empowers them to shape their own development and assert their rights.<sup>78</sup>

Finally, when targeting embedded patronage networks and other sources of corruption, the precariousness of peace must be taken into account.<sup>79</sup> Where vetting or prosecution of corrupt economic actors poses a significant risk of re-igniting conflict or campaigns of atrocity, the type of mechanism used to address ESR violations should be carefully considered. Reparations measures stand as the most likely candidate for an undisruptive and immediate response to past ESR violations, but future vetting or prosecution programs, or structural reforms, should not be ruled out. The incremental transitional justice advances, with the help of significant civil society activity, in Argentina and Morocco illustrate that measures regarded as risking destabilization at one point in time may become more plausible after the passing of time and the gradual change of power dynamics and governance structures.<sup>80</sup>

### III. EFFECTIVE WAYS OF INCLUDING ECONOMIC AND SOCIAL RIGHTS WITHIN TRANSITIONAL JUSTICE MANDATES

#### A. *Truth Finding*

Truth commissions can play multiple roles with regard to violations of ESRs. First, the mandates of truth commissions often call for the scrutiny of systemic or

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77. See Schmid & Nolan, *supra* note 12, at 18 (arguing that similar inability to fulfill civil and political rights, such as a failure to achieve sustainable rule of law reforms following a period in which extrajudicial executions were prevalent, do not mean that transitional justice is ill-equipped to consider those rights violations, and extending this logic to economic and social rights and socio-economic development).

78. Philip Alston, *The Two Words That Scare the World Bank*, WASH. POST, Nov. 7, 2014, [http://www.washingtonpost.com/opinions/philip-alston-the-world-bank-treats-human-rights-as-unmentionable/2014/11/07/9091dafa-65da-11e4-9fdc-d43b053ecb4d\\_story.html](http://www.washingtonpost.com/opinions/philip-alston-the-world-bank-treats-human-rights-as-unmentionable/2014/11/07/9091dafa-65da-11e4-9fdc-d43b053ecb4d_story.html) (“[R]ights language recognizes the dignity and agency of all individuals and is intentionally empowering.”).

79. Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT’L L. (forthcoming 2015) (on file with author).

80. *Id.*

structural causes of atrocity, which will naturally invite consideration of ESRs and socioeconomic conditions.<sup>81</sup> This also aligns with the right of victims and society in general to the truth about past human rights violations.<sup>82</sup> The right to truth has achieved *lex lata* with regard to “serious” human rights violations,<sup>83</sup> such as torture and disappearances, and should also extend, at least as a matter of *lex ferenda*, to knowing the truth of breaches of ESRs. Truth commissions are, then, in a good position to reveal the workings of socioeconomic injustice.

Thus far, the types of ESR violations considered by truth commissions generally fall within the duties to respect or protect such rights. CAVR fostered important revelations, using the terminology of ESRs,<sup>84</sup> regarding forced displacement and famine,<sup>85</sup> as well as the use of education for propaganda,<sup>86</sup> among others. Chad’s commission did not characterize economic violence as breaches of economic rights, but it did uncover how the State routinely seized assets of political prisoners, passing them on to members of the State’s secret police force (the DDS), regime loyalists, and even the DDS itself when funds ran low.<sup>87</sup> Sierra Leone’s commission documented looting and extortion,<sup>88</sup> and Liberia’s commission drew links between endemic corruption and the limitation or removal of educational and other socioeconomic opportunities, as well as considering land issues.<sup>89</sup>

Broader issues of development and social marginalization fitting within state failures to fulfill ESRs have also been included in truth commission findings. Timor–Leste’s CAVR found that Indonesia’s “overriding preoccupation with security,” its “authoritarian style of government,” and its “close collaboration with special interests,” led it to breach its duty to fulfill ESRs.<sup>90</sup> Similarly, the Kenyan Truth,

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81. de Greiff, *supra* note 55, 35–36.

82. See, e.g., Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 177 (July 29, 1988) (noting that the State has an obligation to perform an “effective search for the truth”); El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263, 333 para. 191 (discussing the applicability of the right to truth).

83. Gonzales v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/V/II, doc. 69 para. 193 (2011) (holding that in the context of a repeated violation of the right to life, “[a] critical component of the right to access information is the right of the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation”).

84. CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE, pt. 2, para. 130 [hereinafter CAVR REPORT] (explaining the difference between economic, social, and cultural rights in contrast with political and cultural rights).

85. See *id.* pt. 7.3, para. 3 (“Often displacement is in effect a form of arbitrary collective punishment, and as such is associated with violations of a range of human rights, civil and political as well as economic, social and cultural.”).

86. See *id.* pt. 7.9, para. 122 (“In addition to the poor facilities and teaching, a fundamental problem with the education system under the Indonesians was what was taught. Rather than focusing on basic learning needs, the curriculum was explicitly oriented towards pro-Indonesian propaganda.”).

87. Sharp, *Economic*, *supra* note 19, at 92–93 (citing the Commission d’Enquête du Ministère Chadien de la Justice and Les Crimes et Détournements de l’ex- Président Habré et de Ses Complices).

88. *Id.* at 96–97 (citing SIERRA LEONE TRUTH & RECONCILIATION COMM’N, 2 WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 35 (2004)).

89. *Id.* at 100 (quoting REPUBLIC OF LIBER. TRUTH & RECONCILIATION COMM’N, 2 CONSOLIDATED FINAL REPORT 16–17 (2009)).

90. CAVR EXECUTIVE SUMMARY, *supra* note 27, at 141 (“[T]he Commission has also found that the Indonesian State failed to realise the economic and social rights of the East Timorese people to the

Justice and Reconciliation Commission noted that ESRs created a duty to fulfill minimum core obligations, a duty which was “not only a normative but . . . also a practical standard.”<sup>91</sup> While the Commission did not go on to expressly articulate breaches of the duty to fulfill, it found widespread instances of marginalization, whose indicators—public infrastructure, employment, education, health, housing, access to land, water, sanitation, and food security—overlapped with ESR standards.<sup>92</sup> The type of marginalization that communities experienced was found to vary, depending on the area: Provinces lacking natural resources received less government assistance, while those that had resources suffered government mismanagement<sup>93</sup> or exclusion from development projects.<sup>94</sup>

A second role that truth commissions can play is to characterize socioeconomic marginalization as violations of ESRs, in addition to constituting issues of development. This reframes the issue as one involving breaches of governmental obligations, the content of which has often already been considered and articulated by leading human rights jurists and experts.<sup>95</sup> Using rights language also provides civil society with a platform for advocacy,<sup>96</sup> and can protect public interest organizations from being delegitimized as subversive for seeking structural changes.<sup>97</sup> One commentator argues that the Guatemalan Commission on Historical Clarification’s recommendations for progressive tax reform and increased spending on human development would have been more difficult for the government to ignore

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maximum extent possible, and that at the end of the occupation, East Timor’s development still lagged well behind that of even the poorest Indonesian provinces.”)

91. TRUTH, JUSTICE AND RECONCILIATION COMM’N, KENYA, 2B REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION para. 33 (2013) [hereinafter TJRC REPORT]. The Commission’s mandate was to “establish an accurate, complete and historical record of violations and abuses of human and economic rights” and to “[i]nquire into and establish the reality of otherwise of perceived economic marginalisation of communities and make recommendations on how to address the marginalisation.” *Id.* para. 16. The Liberian Truth Commission was the only other commission at the time whose mandate included ESRs. *Id.* para. 18.

92. KENYA TRANSITIONAL JUSTICE NETWORK, SUMMARY: TRUTH, JUSTICE AND RECONCILIATION COMMISSION REPORT 14–15 (2013) [hereinafter KENYA SUMMARY], available at <http://www.acordinternational.org/silo/files/kenya-tjrc-summary-report-aug-2013.pdf>

93. TJRC REPORT, *supra* note 91, para. 8 (noting testimonies that described how the Central Province’s fortunes “dwindled under the then President Moi”), para. 10 (“[A] sense of marginalisation exists even in regions regarded as relatively more endowed in resources than others.”), para. 14 (“While Kajiado is perhaps rightly ranked as the richest county (based largely on asset-based assessment), its residents have some of the lowest levels of access to social goods such as education, health, water and sanitation and physical infrastructure such as roads and can rightly claim marginalisation. In the Commission’s view, however, this phenomenon seems to present a case of mismanagement of resources or outright corruption. Resources that could improve the socio-economic condition of locals have either not been tapped, or have been diverted to other extraneous issues.”).

94. KENYA SUMMARY, *supra* note 92, at 14–15.

95. See, e.g., Chris Albin-Lackey, *Corruption, Human Rights, and Activism: Useful Connections and Their Limits*, in JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION, *supra* note 3, at 139, 140–41 (distinguishing “positive” governmental human rights obligations from “negative” obligations).

96. Cf. Sharp, *Addressing*, *supra* note 1, at 803 (“[I]f framed properly, [...] recommendations [addressing socioeconomic inequalities] might nevertheless serve as a strong lobbying platform for civil society actors who wish to press for reforms.”).

97. Cf. Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUST. 331, 351 (2008) (arguing that truth commissions enable people to advocate for structural change with less fear of prosecution).

if they were framed as rights violations.<sup>98</sup> It must be noted that while using rights language is certainly not detrimental to the prospects that reforms will be adopted, truth commission articulation of ESR violations is unlikely to be the silver bullet that motivates governmental action. Even truth commission recommendations regarding civil and political rights are often not implemented.<sup>99</sup> Political will is the necessary ingredient, and using the language of rights and violations can help to catalyze civil society as well as increasing pressure on, and shifting the will of, those exercising political power.

A third function of truth commissions is to make recommendations for reform to prevent or minimize recurrence of ESRs violations. Such recommendations are more likely to be effective when based on the sort of deep understanding of past events that commissions can possess after months or years of public inquiry. While understanding past violations is not in itself sufficient to be able to prevent recurrence,<sup>100</sup> it is an important starting point. Truth commissions cannot offer sustained monitoring and adjustment of socioeconomic policies necessary for long-term development,<sup>101</sup> but when they are staffed by appropriately qualified commissioners, they can set into action mechanisms that increase the chances that policies and programs will address ESRs. Thus, truth commission recommendations can address failures to respect and protect ESRs, and can sometimes also set into motion government programs and policies to address failures to fulfill them, such as reforms designed to decentralize government decision-making or facilitate participatory budgeting by communities. Having established that truth commissions can indeed play an important role with regard to violations of ESRs, this Article, in the next Subpart, considers what this might look like in practice; specifically, it explores the question of whether a separate commission would be best placed to consider violations of ESRs, or whether it would be preferable to have a single truth commission that manages a mandate including civil and political, as well as economic and social, rights.

### *B. A Separate Commission Focusing on Economic and Social Rights?*

The U.N. Office of the High Commissioner for Human Rights has noted that consideration of ESRs requires a different set of skills and expertise than those needed to properly address traditional grave breaches of human rights.<sup>102</sup> Given the potential concerns of diluting a truth commission's mandate, or the over-stretching of its resources, one alternative is for the investigation of ESRs to be undertaken by a separate body, such as a marginalization and social justice commission or a separate arm of a truth commission, which possesses the necessary technical expertise to appropriately respond to such violations. Because ESRs demand a different skill set,

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98. *Id.* at 350–51.

99. *See, e.g.,* Duthie, *supra* note 3, at 196–97 (discussing numerous instances where truth commission recommendations concerning various rights were ignored).

100. *Cf. de Greiff, supra* note 55, at 36 (“[U]nderstanding the dynamics leading to violations may be a necessary but not a sufficient condition for changing those dynamics . . .”).

101. *See supra* Part II.A.

102. Office of the U.N. High Comm’r for Hum. Rts., *Rule-of-Law Tools for Post-conflict States*, 9, U.N. Doc. HR/PUB/06/1 (2006).



a more technocratic body might be best suited to understanding past causes of economic and social injustice. It may also be able to develop sophisticated policies, such as tax concessions or other complex financial arrangements that better leverage a State's available resources to provide redress for violations of ESRs, including failures to fulfill them.

Various countries have created commissions to deal with the challenges posed by widespread poverty. However these have generally been outside of the transitional justice context, and are usually not staffed by development economists or other independent experts on socioeconomic policy. For example, Illinois's Commission on the Elimination of Poverty was made up of local and state public representatives, and members of civil society organizations concerned with homelessness, poverty, health, and food security.<sup>103</sup> In contrast, the Commissioners of Scotland's Poverty Truth Commission include individuals who have experienced poverty in their own lives as well as government and civil society representatives with experience in policy issues including employment and poverty.<sup>104</sup> Lastly, the National Anti-poverty Commission of the Philippines is staffed by the heads of government agencies and representatives from different stakeholder groups, including farmers, indigenous people, women, and non-government organizations and is of a different nature.<sup>105</sup> It has existed for more than ten years, and evaluates and monitors the government's anti-poverty program development and funding.<sup>106</sup> These government-backed bodies can be contrasted with more temporary, civil society-generated poverty truth commissions in the United States, that seek to catalyze government action on poverty.<sup>107</sup>

The prospect of having a separate, more ESRs-focused commission presents a dilemma: On the one hand, such expertise is needed to make the most of the scarce resources available for transitional justice; on the other hand, those resources would be consumed more quickly if two bodies, each with their own set of staff and processes, operated in tandem. Implementing a separate poverty commission would involve serious tradeoffs, including limiting the extent to which the truth regarding civil and political rights can be pursued. Having a separate commission for ESRs could also reinforce anachronistic human rights hierarchies and perpetuate the myth

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103. *Commission Members*, COMM'N ON THE ELIMINATION OF POVERTY, <http://www.illinois.gov/poverty/Pages/members.aspx> (last visited June 15, 2015).

104. *The Poverty Truth Commission: Commissioners*, FAITH COMMUNITY SCOT., <http://www.faithincommunityscotland.org/poverty-truth-commission/commissioners/> (last visited June 15, 2015) ("[Our commissioners] include the Scottish Government, Glasgow City Council, faith communities, students and school leavers, community activists, people involved in the criminal justice system, representatives of political parties, academics, refugees, advice services, business leaders, carers and volunteers.").

105. Letter from President of the Philippines to Secretary Jose Eliseo M. Rocamora, Nat'l Anti-Poverty Comm'n (Jan. 9, 2012), available at [http://maps.napc.gov.ph/drupal/sites/default/files/documents/NAPC\\_SR\\_Appointment.pdf](http://maps.napc.gov.ph/drupal/sites/default/files/documents/NAPC_SR_Appointment.pdf).

106. *Service Charter*, NAT'L ANTI-POVERTY COMM'N, <http://maps.napc.gov.ph/drupal/about/servicecharter> (last visited June 15, 2015).

107. See, e.g., JAMES EDWARD BETLER III, REMAKING TRANSITIONAL JUSTICE IN THE UNITED STATES: THE RHETORICAL AUTHORIZATION OF THE GREENSBORO TRUTH AND RECONCILIATION COMMISSION 137 (2013) (noting that the Poor People's Economic Human Rights Campaign held a three-day commission in Cleveland, Ohio in 2006, and its commissioners included international and domestic commissioners, while the Union Theological Seminary's Poverty Truth Commissions had been staffed mainly by religious figures).

of economic and social rights as being of secondary importance. For this reason, including both sets of rights within the mandate of a truth commission, or having a separate but related ‘arm’ of a commission that is charged with making recommendations regarding prevention of ESR violations, is preferable to having a distinct commission.

A separate commission would also require detailed policies regarding how it would interact with its counterpart, civil-and-political-rights-focused commission to avoid institutional conflict. Sierra Leone<sup>108</sup> and Peru<sup>109</sup> each experienced institutional difficulties between their truth commissions and courts, including conflicts as to which institution’s proceedings should take priority and failures of one institution to pursue investigations referred to it by the other. The operation of two commissions may be easier to manage than the interface between a truth commission and a court because there will be less divergence in processes. Nonetheless, it is foreseeable that some of the institutional difficulties that occurred in Sierra Leone and Peru could occur in such a setting. This is not fatal to the idea of having two separate commissions, but rather requires a careful approach to policy and procedure. Incorporating a poverty commission as a separate arm of the commission could potentially reduce (but not eliminate) the potential for institutional conflict by limiting the barriers between the different truth finding endeavors. It might also reduce duplicated expenditures by combining resources and sharing facilities and support staff. In addition, there will be more opportunities to share institutional knowledge, including being privy to testimony from both arms of the commission.

Given that transitional justice contexts will usually be plagued by resource shortages, and that additional mechanisms tend to bring added institutional complexity and potential for conflict, a separate commission for ESRs will not always be a plausible option. The efforts of truth commissions in Timor–Leste and Kenya also indicate that properly staffed commissions can productively address both sets of rights. A more cost-effective way of including technical socioeconomic solutions to resource shortages may be to encourage the appearance of expert witnesses at truth commission proceedings, or to employ consultants to assist with the design of economic or budgetary recommendations and mechanisms, and with other areas outside the expertise of commission members.

### C. Litigation

Breaches of the duty to respect and protect ESRs, including large-scale violations, have been litigated in varying jurisdictions. The Inter-American Court of Human Rights in *Ituango Massacres v. Colombia*<sup>110</sup> found instances of forced labor<sup>111</sup>

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108. See generally Ari Bassin & Paul van Zyl, *The Story of Samuel Hinga Norman in Sierra Leone: Can Truth Commissions and Criminal Prosecutions Coexist after Conflict?*, in HUMAN RIGHTS ADVOCACY STORIES 229 (Deena R. Hurwitz et al. eds., 2009).

109. E.g., Eduardo González Cueva, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 12, at 70, 83–85 (discussing the processes of truth commissions in transitional justice cases).

110. Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

and, in relation to forcible displacements, violation of the right to property.<sup>112</sup> Remedies granted included ordering the State to guarantee safe conditions for those who were forcibly displaced, to establish a housing plan for their benefit, to memorialize the violations, and to pay pecuniary and non-pecuniary compensation to named victims.<sup>113</sup> The inclusion of ESRs in state constitutions<sup>114</sup> provides another means of litigation, namely through domestic constitutional claims.

In addition, international criminal tribunals have successfully prosecuted conduct that violated ESRs, including the rights to work, to an adequate standard of living, and to health.<sup>115</sup> For example, in *Prosecutor v. Brđanin*, the International Criminal Tribunal for the Former Yugoslavia held that Bosnian Serb authorities persecuted Bosnian Muslims and Bosnian Croats by inflicting a series of socioeconomic deprivations on them. Specifically, the cumulative effect of the authorities' withholding of medical care and denial of the victims' rights to employment, freedom of movement, and proper judicial process "for the very reason of their ethnicity"<sup>116</sup> was held to constitute the international crime of persecution. Other tribunals have convicted defendants for the crime against humanity of enslavement<sup>117</sup> and have characterized "subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement", each of which violate ESRs, as "deliberate[ly] inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part," thus constituting genocide.<sup>118</sup>

Litigation through international human rights bodies, national constitutional courts, and international criminal courts has an important role to play in stopping impunity and compelling States to compensate victim groups, especially for state failures to respect or protect those rights. Such cases have a remedial role for victims and, in theory, a deterrent role for future potential perpetrators. Addressing such issues on a structural level, however, including state failures to fulfill ESRs, will generally require policy shifts or truth commission recommendations for institutional and budgetary reform.<sup>119</sup> Another transitional justice tool that can remedy ESR

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111. *Id.* para. 168.

112. *Id.* para. 183. The right to property, while not included in the ICESCR, has been described by the Independent Expert on the right of everyone to own property alone as well as in association with others as "enhancing both personal dignity and fostering socio-economic well-being, and is thus treated as an economic and social right for the purposes of this Article. Independent Expert, *The Right of Everyone to Own Property Alone as Well as in Association with Others*, Comm'n on Hum. Rts. para. 116, U.N. Doc. E/CN.4/1994/19 (Nov. 25, 1993) (by Luis Valencia Rodríguez).

113. *Ituango Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 148, paras. 379, 390, 404, 407, 408.

114. *See supra* note 45 and accompanying text.

115. ICESCR, *supra* note 6, arts. 6, 11 and 12.

116. Case No. IT-99-36-T, Judgement, para. 1048 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); *accord* OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, TRANSITIONAL JUSTICE AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS, at 33-34, U.N. Doc. HR/PUB/13/5, U.N. Sales No. E.14.XIV.3 (2014) [hereinafter OHCHR].

117. *E.g.*, *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgement, paras. 2091, 2102, 2116 (Special Court for Sierra Leone Mar. 2, 2009).

118. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, para. 506 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998); *accord* OHCHR, *supra* note 116, at 35-36.

119. *See* OHCHR, *supra* note 116, at 44-45 ("Institutional reform is a key dimension of transitional justice because it has the potential to trigger structural change. However, it is one of the most under

violations is the distribution of individual or collective reparations, which are considered respectively in the following Subparts.

#### *D. Reparations*

Reparations are an intuitive remedy for failures to respect or protect ESRs because they involve the transfer of goods, money, or other services to victims, which can directly impact on those victims' socioeconomic position.<sup>120</sup> They can also enhance the fulfillment of ESRs by improving access to public services. Reparations are thus a useful option for fulfilling the right of victims of ESRs violations to a remedy.<sup>121</sup> Reparations can include compensation or restitution of land, which can increase a recipient's economic capacity,<sup>122</sup> and scholarships or increased access to health services, which can remedy violations of the right to education or to health. Reparations for gross violations of civil and political rights usually include access to goods and services, which has the corollary of bolstering victims' ESRs and capacity for development.<sup>123</sup> Collective reparations, considered below, can also address these rights on a community level; large-scale reparations such as constructing or expanding hospitals, schools, or vital infrastructure can remedy violations of the rights to health, education, water, and so on. Reparations may also expose deficiencies that affect more than the immediate pool of victims, potentially acting as a catalyst for demands for improvement on a national scale.<sup>124</sup>

There are limitations to resorting to individual reparations as a means of remedying ESR violations. Firstly, including ESRs within the mandate of a reparations program, which will already be chronically under-resourced, will expand the pool of victims and thus further dilute the available remedies, minimizing their restorative potential.<sup>125</sup> The gravity of this limitation depends on the breadth of rights to be included and the number of persons affected. For instance, a victim whose land was illegally confiscated can have his or her right to property vindicated by restitution to the land or, where that is not possible, compensation. However, where the government has breached the right to health or education of a majority of the population by denying it adequate services (whether by failing to respect, protect, or fulfill those rights), there is little that a reparations scheme can do to remedy that violation for all. Reparations programs are generally too small<sup>126</sup> and are focused on discrete rights violations, rather than widespread inequality.<sup>127</sup>

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researched and unexplored areas.”).

120. de Greiff, *supra* note 55, at 37; Duthie, *supra* note 3, at 172.

121. Cf. Naomi Roht-Arriaza & Katharine Orlovsky, *A Complementary Relationship: Reparations and Development*, in *TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS*, *supra* note 55, at 170, 171 (discussing the reasons for and advantages of granting reparations in truth commissions).

122. See, e.g., de Greiff, *supra* note 55, at 37 (noting that reparations that redistribute property rights can positively affect victims' socioeconomic well-being).

123. OHCHR, *supra* note 116, at 56.

124. See, e.g., de Greiff, *supra* note 55, at 37–38 (noting that various truth commissions made recommendations that would have benefited more than just the direct victims of the previous regimes).

125. *Id.* at 40.

126. de Greiff, *supra* note 55, at 39.

127. Sriram, *supra* note 20, at 44.

A second limitation of employing reparations to address violations of ESRs is that they might distort perspectives of systemic problems that require government-administered, and -monitored, policies of economic redistribution or market reform. Reparations may interfere with a State's duty to fulfill ESRs by masking a continuing lack of redistribution, leaving more structural issues in the background and focusing on individual instances of socioeconomic harm.<sup>128</sup> Reparations programs aimed at individual victims may also conflict with, or crowd out discussion of, programs aimed at reducing poverty more generally,<sup>129</sup> potentially contributing to the continuation of inequality or marginalization of specific groups,<sup>130</sup> and denying the suffering of victims of those less tangible social or economic injustices.<sup>131</sup> While these risks are very real, they can generally be mitigated by reflective and strategic government policies and robust civil society engagement and advocacy. This is preferable to an either/or approach, given that ESRs and the right to remedy are both inviolable and indivisible.

While reparations are unlikely to foster macroeconomic development directly, they do have a useful role to play in rehabilitating victims. This in turn can enable "the (re)emergence of victims and survivors as actors with the initiative, motivation, and belief in the future that drive sustainable economic activity."<sup>132</sup> That reparations cannot cure poverty ought not mean that they have no role to play. Rather, this should inform exactly which socioeconomic issues are included within the bounds of reparation schemes. Thus, Peru's Truth and Reconciliation Commission aspired to adopt a broad approach to socioeconomic injustice but ultimately separated narrow violations (which it addressed) from broader concerns regarding nationwide poverty and social problems (which it did not).<sup>133</sup> It did, however, make recommendations for collective reparations for regions that had been marginalized and that suffered increased poverty as a result of the long period of violence.<sup>134</sup> The next Subpart explores how these types of collective reparations, along with strategic uses of decentralization and participatory budgeting, can be employed at a community or regional level to meaningfully address violations of ESRs, including failures to fulfill ESRs.

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128. Miller, *supra* note 13, at 278, 280.

129. *See id.* at 284 (noting that reparations programs may redistribute power from autocratic to democratic institutions, but "[b]y definition" do not redistribute wealth to individuals).

130. Mariclaire Acosta & Esa Ennelin, *The "Mexican Solution" to Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE*, *supra* note 12, at 110–11 (giving an example of Mexico's lack of progress in punishing human rights abuses by the Mexican military regardless of the creation of a Special Prosecutor's Office to investigate these issues).

131. *See* Miller, *supra* note 13, at 285 (stating that granting aid to a limited class of perceived victims can increase "violence springing from resentment on the part of those not categorized as victims").

132. de Greiff, *supra* note 55, at 173.

133. Lisa Magarrell, *Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice*, 22 WINDSOR Y.B. ACCESS JUST. 85, 95 (2003) ("[Peru's Comprehensive Reparation Plan (PIR)] cannot and should not be considered as one more instrument of social policy. The PIR does not seek to resolve problems of poverty, exclusion and inequality, which are structural in nature and respond to the overall operation of the political and economic system." (quoting COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, INFORME FINAL para. 2.2.2.1 (2003), as translated by the author of that article)).

134. CRISTIÁN CORREA, REPARATIONS IN PERU: FROM RECOMMENDATIONS TO IMPLEMENTATION 5–7, (2013), available at [http://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Peru\\_Reparations\\_2013.pdf](http://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf).

### *E. Collective Reparations*

Collective reparations are forms of distribution of public goods or services that are designed for the benefit of all members of a region, group, or community, rather than for specific individual victims.<sup>135</sup> Collective reparations can address past ESR violations, and can be used to fulfill ESRs where recipient communities are in need of improvements in social or economic conditions. Whereas individual reparations seek to acknowledge harms to individual victims, collective reparations address collective harms and seek to restore social solidarity.<sup>136</sup> For instance, in Peru collective reparations were regarded as a key tool in addressing the historic marginalization of many rural and indigenous communities in the Andes and the Amazon, whose support networks, cultural identities, and local economies were broken down by years of systematic violence.<sup>137</sup>

Examples of collective reparations include allocation or restitution of land to communities for collective ownership and use, improvement of public services and infrastructure, restitution of religious or cultural sites, financial projects aimed at generating industry or commerce for victim groups, increased access to psychosocial support, exhumations of mass grave sites,<sup>138</sup> and memorials.<sup>139</sup> Additional collective reparations measures include decentralization or devolution of government decision-making and participatory budgeting programs, which are discussed in the following two Subparts of this Article. Such measures are especially attractive when the number of potential victims suffering breaches of economic or social rights is so large as to render the amount of money that would be payable as individual reparations so small as to be insignificant or even offensive to those receiving the reparation.<sup>140</sup> Collective reparations often constitute measures that the government is already duty-bound to provide: For instance, the Peruvian Truth Commission's Integral Reparations Program included recommendations to build a hospital,<sup>141</sup> which drew controversy by those arguing that the right to health demanded such measures regardless of the transitional justice context.<sup>142</sup> Nonetheless, collective reparations stand as one means of seeking to address past failures to fulfill ESRs in specific communities or regions.

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135. Roht-Arriaza & Orlovsky, *supra* note 121, at 189-90.

136. *Id.* at 189.

137. CORREA, *supra* note 134, at 11.

138. Roht-Arriaza & Orlovsky, *supra* note 121, at 190.

139. Such as the special memorial constructed for traders in Ghana, who were brutalized, both physically and economically. Sharp, *Economic*, *supra* note 19, at 95 (citing GHANA NATIONAL RECONCILIATION COMM'N, 2 FINAL REPORT 42 (2005)).

140. *See* Duthie, *supra* note 3, at 191 (discussing the practical difficulties of providing pecuniary reparations in situations of widespread economic rights violations); *see also* Roht-Arriaza & Orlovsky, *supra* note 121, at 192 (identifying both the practical advantages and the benefits to individual victims of collective reparations).

141. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, INFORME FINAL para. 2.2.3.2 (2003).

142. CORREA, *supra* note 134, at 13; Laplante, *supra* note 97, at 352.

*F. Decentralization*

It is often the case that members of certain communities or regions experience greater marginalization and other socioeconomic wrongs than in other areas. In order to remedy this, such regions will require policy changes or interventions that are attuned to their needs. Where a government's services are provided by a centralized bureaucracy, usually based in the State's capital, the effects of past marginalization risk remaining unaddressed and even perpetuated. Truth commissions, civil society, and some post-transition governments have sought to remedy this problem by decentralizing decision-making—that is, giving increased control and authority to local government or community structures—for socioeconomic projects and policies.<sup>143</sup> Encouraging or mandating mechanisms for redistribution that decentralize decision-making can foster socioeconomic improvement and encourage the fulfillment of ESRs by enabling regions or communities to decide on which development projects and services are most needed without interference by the national government. More localized decision-making benefits from a more intimate knowledge of local conditions and needs, and can also empower local actors and community members.

The examples of Morocco and Peru show how effective decentralization can be in a transitional justice context. In Morocco, collective reparations were provided to eleven regions previously excluded from development programs.<sup>144</sup> Local councils determined how certain reparations funds would be spent, based on their constituents' priorities,<sup>145</sup> thus overcoming the past neglect of a centralized bureaucracy. A similar decentralization of collective reparations took place in Peru, where municipal bodies were given autonomy to determine how to use local and national government funding.<sup>146</sup> While some regions failed to benefit from the opportunity of shaping their own development programs, others consulted with local communities to determine budget priorities which better met local needs.<sup>147</sup> Providing reparations funding at the municipal level creates the potential for the decentralization of service provision,<sup>148</sup> and for policies, which can address the socioeconomic issues that may be unique to specific regions. It bears noting that in the case of Peru decentralization was based on areas most affected by violence,<sup>149</sup> rather than those judged to have the greatest need for economic assistance. This creates a conceptual discord, as decentralized funding and economic development projects are being employed to remedy widespread violence and violations of civil and political rights, rather than to address the socioeconomic problems for which they were originally designed.<sup>150</sup> Nonetheless, decentralization of the use of collective

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143. Roht-Arriaza & Orlovsky, *supra* note 121, at 184.

144. Waldorf, *supra* note 19, at 172.

145. See, e.g., BIX GABRIEL ET AL., TRANSFORMING SITES OF DETENTION: A REVIEW OF AND ROADMAP FOR REPARATIONS AND MEMORIALIZATION IN MOROCCO 9–11 (2013), available at <http://www.sitesofconscience.org/wp-content/uploads/2013/01/FINAL-MOROCCO-REPORT1.pdf> (noting the roles of local and regional governments in the implementation of reparations in Morocco).

146. Roht-Arriaza, *Reparations*, *supra* note 21, at 120.

147. Roht-Arriaza & Orlovsky, *supra* note 121, at 184.

148. *Id.*

149. Roht-Arriaza, *Reparations*, *supra* note 21, at 120.

150. Roht-Arriaza & Orlovsky, *supra* note 121, at 191.

reparations can ensure region-specific spending, which can help to remedy socioeconomic marginalization and strengthen protections of ESRs.

### *G. Participatory Budgeting and Oversight*

Participatory budgeting, closely linked to decentralization, is another potential mechanism for fostering economic and social change, and for fulfilling the ESRs within specific communities. It entails creating a mechanism for community members, through a representative, deliberative process, to decide how public funds designated for a community or region will be spent.<sup>151</sup> It is most effective when combined with a degree of oversight or monitoring by community members into how the projects decided upon are implemented.<sup>152</sup> This Subpart considers examples of participatory budgeting in the transitional justice settings of Guatemala, Peru, and Bolivia.

The likelihood of participatory budgeting succeeding is maximized where the country's national government does not seek to interfere or undermine the process. One example of governmental interference is Guatemala's decentralization reforms, which were outlined in the 1996 Peace Accords before being codified in 2002.<sup>153</sup> The Guatemalan government appeared to adopt these measures mainly because of international pressure or guidance,<sup>154</sup> rather than as part of a good faith effort to give greater power to local decision-making. Consequently, it gave the participatory bodies—municipal councils—mainly administrative obligations, rather than a meaningful opportunity to participate in decision-making.<sup>155</sup> This undermined their potential to alter government spending in ways that would maximize the benefit to communities.

Participatory budgeting policies in Peru and Bolivia have been more successful. Peru's participatory budgeting laws were initiated by President Alejandro Toledo in the context of the democratization of Peru following the rule of President Alberto Fujimori,<sup>156</sup> and were supported by the Peruvian Truth and Reconciliation Commission.<sup>157</sup> The process was lauded for engaging civil society in the debate over the expenditure of public resources, as well as increasing the focus on poverty alleviation projects.<sup>158</sup> Community participation, through election of management

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151. M.A. Hordijk, *Peru's Participatory Budgeting: Configurations of Power, Opportunities for Change*, 2 OPEN URBAN STUD. J. 43, 43 (2009).

152. See, e.g., *id.* at 53 (comparing the oversight processes of Peru and Brazil's participatory budgeting programs and concluding that even when the oversight process is perceived as weak it nonetheless "enables civil society in general to monitor government's progress" and "offers important opportunities to increase citizens' participation in local decision making").

153. Benjamin Goldfrank, Presentation to the Latin American Studies Association Meeting: Lessons from Latin American Experience in Participatory Budgeting 7 (Mar. 2006), <http://www.internationalbudget.org/themes/PB/LatinAmerica.pdf>.

154. *Id.* at 26–27.

155. *Id.* at 27.

156. Stephanie McNulty, *An Unlikely Success: Peru's Top-Down Participatory Budgeting Experience*, J. PUB. DELIBERATION, Dec. 30, 2012, art. 4, at 2.

157. Laplante, *supra* note 97, at 354.

158. See, e.g., McNulty, *supra* note 156, at 1 (characterizing Peru's engagement of civil society organizations in the debate as to how to allocate public resources, as well as the increased focus on



committees, led to quick implementation of community-defined projects, most of which targeted socioeconomic needs of communities.<sup>159</sup> At a local level, the Bolivian town of Curahuara de Carangas also benefitted from participatory budgeting, which has reinvigorated indigenous institutions, respect for women,<sup>160</sup> civic associations, and a focus on long-term development and public works and programs.<sup>161</sup>

Despite these successes, some commentators lament that Peru's use of collective reparations as a means of addressing ESRs has occurred at the expense of according reparations processes with a significant degree of meaning and symbolism.<sup>162</sup> Apart from victim confusion about whether such projects were reparative or merely development projects, some members of national government also characterized reparations as tools for addressing the harms caused by terrorism, rather than also addressing the state's culpability for past violations.<sup>163</sup> This illustrates the need for clear and consistent messaging from governments regarding the purpose of participatory budgeting and collective reparations. While exhibiting some pathologies, participatory budgeting programs have the potential to empower and dignify victims, to redress breaches of human rights, and to fulfill ESRs at a local or regional level, especially in situations where specific geographical areas have previously been marginalized.

#### H. Vetting

A final tool that can be employed in the transitional justice context to remedy breaches of state duties to respect and protect ESRs, and to avoid recurrence of breaches, is the strategic use of vetting procedures. Vetting is usually understood as the process of ensuring that public officials personally responsible for gross violations of human rights do not continue to serve in state employment.<sup>164</sup> For instance, in Bosnia and Herzegovina, close to 24,000 law enforcement officials were screened for involvement in mass atrocities.<sup>165</sup> However, where breaches of ESRs were rife, or were linked to the past conflict, vetting those guilty of ESR violations, including non-state actors, can be an effective means of ensuring non-recurrence and of

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poverty-reduction projects, as a "success"); cf. Goldfrank, *supra* note 153, at 33 (describing in 2006 "a weak, fragmented civil society with little interest in institutionalized participation and little information about the recent laws").

159. CORREA, *supra* note 134, at 12–13.

160. Cf. *id.* at 13 (noting that "the participation of women [in participatory budgeting and implementation] has been notably low" in Peru).

161. Goldfrank, *supra* note 153, at 35.

162. Cf. CORREA, *supra* note 134, at 14 (noting a study in which "58 percent of those surveyed did not identify community reparations projects implemented in their communities as reparations").

163. *Id.* at 14.

164. Independent Expert, *Promotion and Protection of Human Rights: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, principle 36(a), U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (by Diane Orentlicher); see generally Alexander Mayer-Rieckh, *Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 180 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007).

165. Mayer-Rieckh, *supra* note 164, at 188–91.

strengthening the rule of law. This tactic was employed in Liberia in 2003, following the conclusion of its second Civil War.<sup>166</sup>

The Liberian Truth and Reconciliation Commission found that “root causes” of the civil war included poverty, endemic corruption, and historical disputes over land distribution, all of which undermined access to education, justice, and socioeconomic opportunities.<sup>167</sup> Research has revealed that Liberia’s infamous President during the conflict, Charles Taylor, granted timber concessions to increase political strongholds and patronage, to line his own pockets,<sup>168</sup> and even in exchange for arms.<sup>169</sup> The president of one such company, Oriental Timber Corporation, has faced prosecutions by Dutch authorities, which are ongoing, for his involvement in illegal arms deals and for war crimes.<sup>170</sup>

The complicit logging companies operating in Liberia during its five-year civil war, in addition to fueling conflict, also contributed to the violation of the ESRs of individuals and communities. These violations constitute instances of governmental failures to protect ESRs. Individuals were forcibly removed from their land,<sup>171</sup> violating their rights to an adequate standard of living, including rights to suitable housing and food, among others. The companies, emboldened by the lack of government supervision over their activities, also committed widespread violations of national logging regulations, such as clearcutting and the cutting of undersized trees.<sup>172</sup> This led to serious environmental effects, such as land erosion and the destruction of natural fauna habitats, potentially imperiling the land-based livelihoods of local communities.<sup>173</sup> In addition, the logging companies’ egregious instances of tax evasion—companies paid only 2 to 3% of all tax due—was described by the Liberian Truth and Reconciliation Commission as widespread and systematic.<sup>174</sup> This affected the government’s available resources for development projects, albeit in circumstances where such money may not have been so used.<sup>175</sup> Finally, the logging companies breached contractual obligations to local communities

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166. REPUBLIC OF LIBER. TRUTH & RECONCILIATION COMM’N, *supra* note 89, at 18.

167. *Id.* at 16–17.

168. JOHN WOODS ET AL., INVESTMENT IN THE LIBERIAN FOREST SECTOR: A ROADMAP TO LEGAL FOREST OPERATIONS IN LIBERIA 1 (2008), available at <http://www.forest-trends.org/documents/index.php?pubID=519> (“[Oriental Timber Corporation] paid millions into Charles Taylor’s personal bank account; all for which they received tax credit.”).

169. Stephanie L. Altman et al., *Leveraging High-Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forest Initiative in Liberia’s Transition to Stability*, in HIGH-VALUE NATURAL RESOURCES & POST-CONFLICT PEACEBUILDING 337, 340 (Päivi Lujala & Siri Aas Rustad eds., 2012).

170. Press Release, Global Witness, Global Witness Welcomes Dutch Court Decision to Retry Timber Baron Guus Kouwenhoven for Crimes Committed during Liberian War (Apr. 21, 2010), <http://www.globalwitness.org/library/global-witness-welcomes-dutch-court-decision-retry-timber-baron-guus-kouwenhoven-crimes>.

171. REPUBLIC OF LIBER. TRUTH & RECONCILIATION COMM’N, *supra* note 89, at 289–90.

172. *Id.* at 290.

173. *See id.* (“[F]orests that are clear cut will not naturally regenerate, rendering the area useless for future forestry.”).

174. *Id.*

175. Indeed, liability may not have accrued for breaches of ESRs where circumstances (such as a civil war) exist that render it materially impossible for a state to comply with its international obligations. INT’L LAW COMM’N, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS art. 23 (2001), reprinted in G.A. Res. 56/83, annex, U.N. Doc. A/Res/56/83 (Jan. 28, 2002).

in the logging areas, which obliged the companies to build hospitals, schools, and infrastructure, and to hire local individuals as unskilled laborers, further impacting local individuals' rights to health, education, and work.<sup>176</sup> While the fulfillment of those rights remains the responsibility of the State, this discussion illustrates the impacts that non-state actors can have on ESRs.

The Liberia Forest Initiative (LFI), a partnership between the government, international organizations, and civil society organizations, was set up in 2004 to collect statements regarding abuses by logging companies and their security forces during the civil war.<sup>177</sup> It then developed vetting processes<sup>178</sup> as part of broader reforms of the timber industry to encourage transparency and equitable and sustainable use of Liberia's forests.<sup>179</sup> A review of all timber concessions was undertaken by a committee staffed by government officials, local civil society organizations, United Nations staff, and LFI partners; this produced findings that all of the seventy existing concessions had been granted illegally.<sup>180</sup> Twelve companies who had previously held concessions were found to have directly participated in the nation's conflict, traded arms for timber, or otherwise aided and abetted social instability.<sup>181</sup> The LFI profited from a newly installed government that was willing to institute the necessary reforms to set up a robust system aimed at preventing future recurrence of conflict, which had previously been fueled and financed by "conflict timber" as well as "blood diamonds."<sup>182</sup> The government declared all of the existing timber concessions null and void, and it embarked on creating a new process for granting concessions.<sup>183</sup> According to the new process, a company that has been suspended or debarred, for example because of criminal convictions or failures to pay tax, is ineligible to bid for future tenders,<sup>184</sup> and individuals with significant interests in companies involved in logging in Liberia prior to 2006 are required to file sworn statements setting out their involvement, and to cooperate with the government in recouping lost funds caused by illegal activity.<sup>185</sup>

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176. REPUBLIC OF LIBER. TRUTH & RECONCILIATION COMM'N, *supra* note 89, at 290 ("[T]he University of Liberia granted 284,000 acres of University forest to [Oriental Trading Company], in exchange for \$2 million USD in renovations to the University of Liberia and 50% of profits, according to President Taylor. No payments were ever made.").

177. *About the Liberia Forest Initiative*, FOOD & AGRIC. ORG., <http://www.fao.org/forestry/lfi/29021/en/> (last visited June 15, 2015).

178. Duthie, *supra* note 3, at 189.

179. Altman et al., *supra* note 169, at 337.

180. *See id.* at 344-45 (noting that no Liberian timber concession granted met all four criteria necessary to maintain the concession).

181. *Id.* at 345. While not constituting ESR violations per se, the companies' actions had severe economic and social consequences, as discussed below.

182. Altman et al., *supra* note 169, at 340.

183. *Id.* at 337.

184. *See, e.g.,* WOODS ET AL., *supra* note 168, at 4 ("Firstly, companies must not be suspended or debarred from bidding, for example, because of tax arrears or criminal convictions. Secondly, the company must demonstrate that it is incorporated; involved with logging; has a main office in Monrovia; the officers/directors have not been penalized for violating corporate- or forestry-laws, and have not declared bankruptcy; and that the company is in good standing in payment of taxes, social security, forest- and trade-fees.").

185. *Id.*

Commercial vetting can also impact the integrity of a country's legal system, and should thus be contemplated with caution. For instance, opportunistic members of a post-conflict government may seek to vet economic actors and repudiate existing government contracts for improper purposes such as granting favors or encouraging new patronage networks. This could adversely impact a country's economy, as investors perceive a lack of commercial certainty and legal integrity. A country could also face arbitration or litigation. A vetted company may seek to sue a country for breach of an investment contract or for protection from state expropriations of their investments pursuant to international investment or trade treaties<sup>186</sup> that ensure the rights of corporations to wide-reaching standards like "fair and equitable treatment."<sup>187</sup> Litigation for breaches of investment can lead to large compensation orders against States,<sup>188</sup> which can seriously deplete public funds available for socioeconomic services. This underlines the importance of carrying out vetting programs through transparent and principled processes.<sup>189</sup> In this regard, the LFI's engagement with a broad range of types of organizations helped to ensure a robust and principled vetting process. To avoid litigation, such programs should also be designed so as to meet the requirements for legal repudiation of such contracts and with the goal of exposing illegal and corrupt practices, which can better protect the country from being sued by the investor under investment or trade treaties.<sup>190</sup>

While the LFI's vetting policy is linked to the past civil conflict, it is illustrative of the role vetting can play in excluding individuals or corporations against which credible allegations of corruption, tax evasion,<sup>191</sup> or other economic violence exist. Such violations affect a State's ability to respect, protect, and fulfill ESRs by eroding state revenue and denying affected landholders and occupiers due process. When coupled with broader sector reforms, vetting will often have a productive role to play

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186. *E.g.*, Central America-United States Free Trade Agreement arts. 10.7, 10.16, Aug. 5, 2004, 43 I.L.M. 513.

187. *See, e.g.*, North American Free Trade Agreement art. 1105, Dec. 17, 1992, 32 I.L.M. 289 (guaranteeing investors "treatment in accordance with international law, including fair and equitable treatment"); Lise Johnson and Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INTL ARB. 361, 379 (2013) ("A number of [investor-state dispute settlement] cases have gone further and determined that when states contract with foreign investors, the *existence* of the regulatory framework gives rise to an *implied* promise that the investment will not be impacted by subsequent regulatory change." (emphasis in original))

188. For instance, Pac Rim Cayman LLC is currently suing the state of El Salvador for \$300,000 in compensation after the government refused to grant the company permission to commence a gold mine. *Pac Rim Cayman LLC v. Republic of El Sal.*, ICSID Case No. ARB/09/12 (2009).

189. While a principled process in itself will not immunize a State from the prospect of investor-state dispute settlement, the transparent process in Liberia's case revealed the primary motivation for the country's vetting was the illegal and corrupt practices of corporate actors. *See* REPUBLIC OF LIBER. TRUTH & RECONCILIATION COMM'N, 2 CONSOLIDATED FINAL REPORT 336-37, 372 (2009). This could enliven an emerging defense for host States, based on a company's involvement in corrupt practices. *See, e.g.*, Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, INVESTMENT TREATY NEWS (Oct. 19, 2012), <https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/> (discussing the agreement of Siemens, A.G. not to enforce a \$200 million arbitral award against Argentina after the company was found to be heavily implicated in an international practice of bribing public officials).

190. *See* Yackee, *supra* note 189 (noting the "potential benefits of a corruption defense" for host States through the example of *Siemens, A.G.*).

191. The seventy logging companies in Liberia were later found to be "US\$64 million in tax arrears." WOODS ET AL., *supra* note 168, at 2.

in preventing the future mismanagement of a nation's environmental resources, and the depletion of its tax reserves. This example also illustrates the overlap of, and thus the need for greater coordination and interfacing between, the fields of transitional justice and business and human rights. The unique opportunity of transitional contexts to redefine legal cultures should be used not only to address state human rights obligations, but also to set out appropriate legal protections and regulatory programs to ensure that business activities do not adversely affect the ESRs of community members. The prospect of extending the obligations of businesses with regard to human rights beyond those set out in the 2011 Guiding Principles,<sup>192</sup> upon which a United Nations Working Group has been tasked to begin consulting,<sup>193</sup> may also create additional challenges and opportunities for the field of transitional justice.

### CONCLUSION

It is anachronistic to consider ESRs as outside the bounds of transitional justice. Doing so risks skewing understandings of past atrocities, which in turn affects transitional justice's ability to prevent their recurrence. This Article has sought to contribute to the field of transitional justice by reinforcing the indivisibility of ESRs, and by analyzing some of the broader transitional justice mechanisms that States can employ to meet their ESR obligations during transitional periods. Determining which types of rights should or should not be included in a particular case will depend on the facts on the ground and the capacities of the specific transitional justice mechanism concerned. However, such decisions should not be guided by erroneous notions of ESRs as being less important than civil and political rights. Government failures to respect and protect ESRs are generally discrete enough to be included, where relevant, in the mandates of truth commissions, prosecutions, reparations programs, and vetting processes. Breaches of state obligations to fulfill human rights in specific communities or regions can be addressed in some instances: Truth commissions can acknowledge such failures and recommend appropriate reforms; reparations can remedy the effects of failures to fulfill ESRs on a limited scale; and collective reparations and decentralized governance processes can empower communities to more actively direct the course of their development and respond to socioeconomic issues that may have been ignored by previous national government policies. Similarly, vetting processes can improve the government's ability to fulfill ESRs by excluding public and private actors whose practices eroded public funds, damaged socioeconomic infrastructure and services, or otherwise negatively affected a population's ESRs. Such breaches should therefore not be automatically excluded from truth commission mandates or other transitional justice procedures. Widespread or nationwide failures to fulfill ESRs, on the other hand, may be more difficult for transitional justice mechanisms to address. Nonetheless, transitional contexts present unique opportunities for reinvention of legal and political cultures. To automatically exclude consideration of ESRs—even state

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192. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

193. H.R.C. Res. 26/22, para. 7, U.N. Doc. A/HRC/RES/26/22 (July 15, 2014).

obligations to fulfill ESRs—at such a moment in a nation’s history is to miss an important opportunity for the improvement of a nation’s socioeconomic conditions and the strengthening of its commitment to all human rights. Ultimately, transitional justice can no longer ignore that ESRs articulate non-negotiable and clearly defined standards, which often hold the key to stable and sustainable transitions.