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# ‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice

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## Abstract<sup>1</sup>

Increasing numbers of academics and practitioners are employing the language of economic and social rights (ESR) when conceptualizing the aims, scope and implementation mechanisms of transitional justice. Their contributions have added to an evolving debate on the boundaries of transitional justice. However, when employing rights language, the current debate on the economic and social dimensions of transitional justice frequently suffers from terminological and conceptual confusion. Problematically, it is not unusual for the claims made by transitional justice commentators with regard to ESR to be founded on apparent misconceptions about both the legal framework and the existing scholarship relating to ESR. Addressing these misconceptions in terms of four key dichotomies and suggesting the way forward, we prepare the ground for a more effective debate on the desirability and feasibility of incorporating ESR into transitional justice processes. In doing so, we assert that such a debate must be based on an accurate understanding of ESR and the obligations they impose. We conclude by demonstrating how inclusion of ESR considerations in transitional justice does not necessitate rethinking transitional justice as a whole.

**Keywords:** human rights, economic and social rights, structural violence

## Introduction

The indivisibility and interrelatedness of all human rights is a well-established element of international human rights law<sup>2</sup> – a fact that has been reflected in UN actors’ emphasis on the equal importance of economic, social, cultural, civil and

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<sup>2</sup> See, e.g., ‘Vienna World Conference on Human Rights: Vienna Declaration and Programme of Action,’ UN Doc. A/CONF.157/23 (12 July 1993), para. 5.

political rights in processes of transitional justice.<sup>3</sup> Despite this, economic and social aspects of past abuses have historically been neglected both in the theoretical literature relating to such processes and in practice.<sup>4</sup> Yet scholars and practitioners increasingly question transitional justice's neglect of socioeconomic considerations. Over the past few years, an ever-growing number of authors have engaged in an important and increasingly complex debate about whether transitional justice should and/or can incorporate economic and social concerns.<sup>5</sup> More recently, the ongoing transitions in the 'Arab Spring' countries have nurtured the discussions as to whether transitional justice efforts should address violations of economic and social rights (ESR),<sup>6</sup> economic inequalities, corruption or other socioeconomic considerations. After all, Mohammed Bouazizi, 'the man who set himself and Tunisia on fire,'<sup>7</sup> was not protesting against civil and political rights abuses, but against the authorities confiscating his unlicensed vegetable cart and hence his means to realize his economic livelihood. In Egypt, the motto of the 2011 revolution was 'Bread, Freedom, Social Justice.'<sup>8</sup> Pablo de Greiff, the special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, has pointed out that 'a common feature of these recent transitions is the prominent role that claims relating to economic rights occupy in these transitions.'<sup>9</sup> As discussed below, interest in and support for the inclusion of 'economic and social dimensions of transitional justice'<sup>10</sup> has grown over recent years, as has exploration of the potential drawbacks.

Against this backdrop, we argue that it is vital to take a closer look at the framing of the main claims made in the debate with regard to addressing socioeconomic

<sup>3</sup> See, e.g., 'Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice' (March 2010) [hereinafter 'Guidance Note of the Secretary-General']. This article will not deal with cultural rights because the particular challenges posed by such rights (as opposed to ESR) have not generally been given adequate attention by transitional justice scholars and deserve further research. See, e.g., Office of the High Commissioner for Human Rights (OHCHR), 'Integrating Cultural Rights in Transitional Justice Strategies in Post-Conflict Societies,' 25 March 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/Integratingculturalrightsinpost-conflictsocieties.aspx> (accessed 7 July 2014).

<sup>4</sup> For instance, socioeconomic considerations are almost totally absent in two of the most influential works on transitional justice: Ruti G. Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal* 16 (2003): 69–94; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

<sup>5</sup> This article views transitional justice as 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.' Guidance Note of the Secretary-General, supra n 3 at 2.

<sup>6</sup> 'Economic and social rights' and 'socioeconomic rights' are used interchangeably in this article.

<sup>7</sup> Rania Abouzeid, 'Bouazizi: The Man Who Set Himself and Tunisia on Fire,' *Time Magazine*, 20 January 2011.

<sup>8</sup> Egyptian Centre for Economic and Social Rights et al., *Joint Submission to the Committee on Economic, Social and Cultural Rights on the Occasion of the Review of Egypt's 4th Periodic Report at the 51st Session* (November 2013), 5.

<sup>9</sup> Pablo de Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence,' UN Doc. A/HRC/21/46 (9 August 2012), para. 17.

<sup>10</sup> This is the term used by the Essex Transitional Justice Network, University of Essex, 'Economic and Social Dimensions of Transitional Justice,' <http://www.essex.ac.uk/tjn/research/economic-and-social-dimensions.shtm> (accessed 7 July 2014).

issues in the context of transitional justice. A discursive analysis of recent literature shows that the employment of rights language in the debate on economic and social issues in transitional justice is often done in a problematic way. Specifically, the claims made by transitional justice scholars with regard to ESR – whether arguing for or against paying more attention to socioeconomic issues in transitional justice – frequently appear to be founded on misconceptions about both the substantive content and the existing scholarship relating to ESR.<sup>11</sup> In exploring these misconceptions in terms of four dichotomies commonly but incorrectly assumed by participants in the debate on the role of ESR and broader socioeconomic issues in transitional justice, we argue that, while speaking of ‘rights,’ many scholars and practitioners in fact seem to be referring to broader concepts than the established legal meaning and content of ESR. ESR are only one aspect of the economic and social dimensions of transitional justice. However, in the debate on the desirability and feasibility of including a socioeconomic dimension to transitional justice, the distinction between ESR and broader socioeconomic issues often gets lost, with problematic implications for both opponents and proponents. We assert that inaccurate references to ESR undermine the persuasiveness of those commentators’ arguments about the role that ESR should play vis-à-vis transitional justice processes. Furthermore, we argue that an effective debate on the desirability of incorporating ESR into transitional justice processes is only possible where this is based on an accurate understanding of ESR and the obligations they impose.

Our concerns are not solely focused on the impact of such misunderstandings and misapplications on transitional justice scholarship. We believe that the advancement and/or perpetuation of inaccurate and outdated views of ESR threatens to undermine the progress made with regard to economic and social human rights recognition, discourse and research over the past decades. Transitional justice has considerable potential to contribute to the realization of such rights if it is able to adequately engage with the legal concepts they entail. We therefore argue that rights language must be used only where appropriate, and consistent with existing ESR standards.

This article is written from the perspective of legal ESR scholars. We do not take a stance on whether or when legalist approaches to transitional justice are suitable; rather, we address situations in which, for better or worse, human rights law norms are invoked as relevant normative standards. Indeed, together with international criminal law and international humanitarian law, existing international human rights law remains the most frequently invoked normative

<sup>11</sup> This concern is echoed in a recent OHCHR publication that states that ‘lack of knowledge among transitional justice stakeholders of economic, social and cultural rights and of the mechanisms available to protect them constitutes [a] challenge’ for a nuanced assessment of the pros and cons of including these rights into transitional justice endeavours. Office of the High Commissioner for Human Rights (OHCHR), ‘Transitional Justice and Economic, Social and Cultural Rights,’ <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf> (accessed 7 July 2014), 53.

framework of transitional justice scholarship and policy making.<sup>12</sup> We work from the premise that the limitations of transitional justice approaches based on human rights law must be fairly acknowledged,<sup>13</sup> but that when language referring to legal standards is employed, this terminology should be understood correctly and used appropriately in order to maximize the potential benefits of the human rights framework for transitional justice.

As regards structure, in the next section we outline what ESR actually *are* in terms of substantive content and the obligations imposed by the international ESR framework. Having set the normative scene, we then turn to the transitional justice scholarship context. We briefly retrace the current debate on economic and social issues and rights in transitional justice and set the scene for our discussion of the problematic use of rights language by some transitional justice commentators. In this core section of the article we identify four inaccurate dichotomies that illustrate the terminological problems in relation to this debate and outline the consequences and risks of inaccurate references to ESR. We then present our conclusions and suggestions for the way forward.

## Starting as We Mean to Go On: Identifying What ESR Are

When human rights lawyers speak of ESR, they refer to a set of legal obligations contained in a wide range of sources, including international human rights treaties,<sup>14</sup> regional human rights treaties<sup>15</sup> and a plethora of domestic constitutional or legislative instruments. The best-known and longest-established treaty at the international level is the International Covenant on Economic, Social and Cultural Rights (ICESCR). As with civil and political rights, it is generally accepted that the legal obligations under ICESCR continue to apply in times of armed conflict.<sup>16</sup> As in other areas of public international law, a violation of

<sup>12</sup> See, e.g., the statement of the UN Secretary General that ‘the normative foundation for [the UN’s] work in advancing the rule of law [in postconflict societies] is the Charter of the United Nations itself, together with . . . international human rights law; international humanitarian law; international criminal law; and international refugee law.’ ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,’ UN Doc. S/2004/616 (23 August 2004), para. 9. A widely used scholarly definition of transitional justice refers to the idea that transitional justice is ‘aimed directly at confronting and dealing with past violations of human rights and humanitarian law.’ Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice,’ in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 2.

<sup>13</sup> For our reflections on the limitations and potential of human rights law related to ESR, see, ‘Assessing the Damage and Moving Forward’ below.

<sup>14</sup> See, e.g., the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child or the Convention on the Rights of Persons with Disabilities.

<sup>15</sup> For an overview of the protection of ESR in regional human rights instruments, see, Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).

<sup>16</sup> See, e.g., ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,’ Advisory Opinion, 2004 ICJ 136, para. 106. On the approach of the UN Committee on Economic, Social and Cultural Rights to ESR obligations during armed conflicts, see, Evelyn Schmid, ‘Socio-Economic and Cultural Rights and Wrongs after Armed Conflicts: Using the State

an international legal norm under ICESCR is defined as the noncompliance of the state<sup>17</sup> with a binding obligation.<sup>18</sup> The relevant conduct must be attributable to that state and it must be verified that there are no circumstances precluding wrongfulness, such as a situation in which it is materially impossible for the state to perform the obligations.<sup>19</sup>

It is beyond the scope of this article to provide an exhaustive account of ESR; rather, we simply present an overview of such rights and the obligations they impose.<sup>20</sup> Different ways have been suggested over time to categorize the obligations imposed by ESR, especially those under ICESCR. These have included conceptualizing ESR obligations in terms of those which are immediate and those which are progressive; defining the duties imposed by such rights into obligations of conduct and obligations of result; and employing the 'tripartite typology' of 'respect, protect and fulfil' to delineate state duties.

The latter typology is the approach most commonly used to classify ESR.<sup>21</sup> The obligation to respect prohibits the state from interfering with existing enjoyment of rights, for instance by arbitrarily destroying food or water sources. The obligation to protect tasks the state with ensuring that nonstate actors do not interfere with people's enjoyment of ESR, such as by adopting and enforcing legislation to protect against abuses in the workplace by private companies. The obligation to fulfil implies that state parties are obliged to do whatever it takes to overcome obstacles to the full enjoyment of the right in question, including both the immediate and progressive duties it imposes. As such, ESR imposes a combination of positive and negative obligations.

The most frequently discussed and analysed ESR provision is Article 2(1) of ICESCR, which requires that state parties

take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] 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.

Reporting Procedure before the UN CESCR More Effectively,' *Netherlands Quarterly of Human Rights* 31(3) (2013): 241–271.

<sup>17</sup> Some have suggested that not only states but also nonstate actors can directly violate human rights norms. See, e.g., Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations,' *International Review of the Red Cross* 88(863) (2006): 491–523; Manisuli Ssenyonjo, 'The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' *International Journal of Human Rights* 12(5) (2008): 725–760.

<sup>18</sup> ILC Articles on State Responsibility, Annex to General Assembly Res. 56/83 (12 December 2001), art. 12.

<sup>19</sup> Ibid.

<sup>20</sup> For an overview of ESR obligations under ICESCR, see, e.g., Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Antwerp: Intersentia, 2003).

<sup>21</sup> For more on the origins and comparative practice in relation to the typology, see, Ida E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?' *Human Rights Law Review* 5(1) (2005): 81–103.

This article has been enormously influential in relation to framings and interpretations of ESR obligations at the regional and national levels.<sup>22</sup> While Article 2(1) emphasizes progressive realization, the provision also gives rise to immediate obligations. The requirement to ‘take steps,’ the prohibition on deliberate retrogressive measures and the requirement that states satisfy the minimum core content of ESR are just some of the immediate obligations that the provision has been construed as imposing.<sup>23</sup>

Looking at the linkage between ESR and transitional justice in practice, it is often relatively straightforward to assess compliance with the obligations to respect and protect ESR, as well as the obligation of nondiscrimination, in the context of identifying and assessing violations during a past armed conflict or situation of widespread violence. Clear examples would include state-sponsored displacement or dispossession. More complex (and frequently more resource-dependent) obligations, such as those to fulfil and to progressively realize ESR, also resonate with transitional justice experiences. For instance, where a conflict situation has resulted from a previous failure to fulfil the ESR of a particular group in terms of what is required by ICESCR, then it may be desirable to pay attention to such fulfilment deficits in transitional justice processes and programming. Alternatively, where a conflict has resulted in deliberate state devastation of the infrastructure necessary to realize ESR (e.g., hospitals, schools, factories providing work opportunities), resulting in a decline in the enjoyment of those rights, the obligation to remedy such retrogressive measures may serve to inform the scope and content of transitional justice measures.

There are undoubtedly aspects of ESR law that would benefit from further conceptualization.<sup>24</sup> However, at this point there is a well-established ESR framework and a vast supporting literature, which clarifies many of the parameters of such rights and makes it possible to identify violations thereof. While the controversies and limitations pertaining to ESR should be acknowledged, those who use human rights law as a relevant normative framework – that is, many, if not most, transitional justice scholars and practitioners<sup>25</sup> – need to recognize that ESR are legal rights that impose a wide range of normative obligations within contemporary international human rights law.

<sup>22</sup> For more on the influence of art. 2(1) on regional standards, see, Langford, *supra* n 15. For examples of national constitutional provisions that have been influenced by that provision, see, secs. 26 and 27 of the South African Constitution and those of Latin American states that have incorporated ICESCR into their constitutional hierarchies (e.g., Argentina and Colombia).

<sup>23</sup> See, e.g., Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3: The Nature of States Parties’ Obligations,’ UN Doc. E/1991/23 (1990).

<sup>24</sup> See, e.g., the minimum core obligation, discussed in Katharine G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content,’ *Yale Journal of International Law* 33(113) (2008): 113–175.

<sup>25</sup> See, Roht-Arriaza, *supra* n 12.

## Economic and Social Issues and Rights in Transitional Justice: A Debate Growing in Size and Contestation

We now retrace the origins and parameters of the current debate on economic and social dimensions of transitional justice. In 2006, Louise Arbour, then high commissioner for human rights, delivered a speech at New York University in which she advocated for more attention to ‘economic and social justice for societies in transition.’<sup>26</sup> Arbour unequivocally urged the ‘integration’ of economic, social (and cultural) rights into ‘the transitional justice framework’<sup>27</sup> and highlighted how a range of transitional justice mechanisms have dealt – and might deal – with ES(C)R.<sup>28</sup>

Before Arbour’s call, some had already criticized truth commissions for narrowly focusing on civil and political rights abuses. The earliest such critique came from South African nongovernmental organizations (NGOs) that regretted the decision of the South African Truth and Reconciliation Commission (TRC) to focus on politically motivated killings, torture and detention and its failure to engage with the widespread socioeconomic aspects of apartheid.<sup>29</sup> Their concern was echoed in the work of researchers working in other transitional justice situations.<sup>30</sup> *IJTJ* dedicated its 2008 special issue to ‘transitional justice and development’ and was crucial in terms of crystallizing academic debate in this area.<sup>31</sup> Researchers and practitioners interested in gendered analyses of existing transitional justice endeavours also joined the debate, pointing out how the almost exclusive focus on rape and other forms of direct sexual violence failed to recognize the full range of abuses committed against women and girls in situations of violence. For many, this implied that transitional justice should pay more attention to ESR<sup>32</sup> – a concern echoed in a 2013 general

<sup>26</sup> This wording is taken from the title of the lecture. Louise Arbour, ‘Economic and Social Justice for Societies in Transition,’ Center for Human Rights and Global Justice, New York University School of Law.

<sup>27</sup> *Ibid.*, 7.

<sup>28</sup> *Ibid.*

<sup>29</sup> University of the Western Cape’s Community Law Centre et al., ‘Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social and Cultural Rights to the Commission’s Mandate, 18 March 1997,’ <http://www.justice.gov.za/trc/hrvtrans/submit/esc6.htm> (accessed 7 July 2014).

<sup>30</sup> E.g., International Center for Transitional Justice, *Reparations in Theory and Practice* (September 2007); Lisa Laplante, ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,’ *International Journal of Transitional Justice* 2(3) (2008): 331–355.

<sup>31</sup> ‘Transitional Justice and Development,’ special issue of *International Journal of Transitional Justice* 2(3) (2008). For a later examination of linkages between transitional justice and development, see, Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

<sup>32</sup> E.g., Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006), 46, where it is argued that more emphasis on socioeconomic rights could ‘make a difference’ for women in relation to their access to reparations. See also, UN Women, *A Window of Opportunity: Making Transitional Justice Work for Women* (2010), 20, stating that ‘most [reparations] programmes have implicitly



recommendation of the UN Committee on the Elimination of Discrimination against Women.<sup>33</sup>

Arbour's speech had a galvanizing effect on UN policy, scholarship and practice in the area of transitional justice.<sup>34</sup> Today, the UN Secretariat at the highest level explicitly endorses the inclusion of ESR as well as of broader socioeconomic considerations in rule of law reforms and transitional justice.<sup>35</sup> In 2009, in a Human Rights Council resolution adopted by consensus, that body underlined the importance of ensuring that 'violations of all human rights, including economic, social and cultural rights, are addressed.'<sup>36</sup>

Yet, arguments on the desirability of including socioeconomic issues in transitional justice have not found favour with all transitional justice practitioners and scholars. Around the time of the *IJTJ* special issue in 2008, the first notes of caution and unease emerged. In her editorial for the special issue, Rama Mani expressed concern about the limited capacity of transitional justice initiatives to address socioeconomic considerations,<sup>37</sup> a worry that has been expressed by others as well.<sup>38</sup> More recently, Lars Waldorf argued that the 'shift in transitional justice discourse and practice with respect to economic and social rights' is deeply problematic.<sup>39</sup> His conclusion that 'transitional justice should avoid directly addressing past socio-economic wrongs'<sup>40</sup> is indicative of the fact that the debate on socioeconomic dimensions of transitional justice has not only grown in size but also grown in contestation.

Despite the lack of consensus on the desirability of including socioeconomic considerations in attempts to deal with the legacies of past abuses, ESR-related developments in the policy and scholarly literature have been accompanied by changes in the practice of transitional justice. In particular, more and more truth commissions have begun to examine ESR and broader socioeconomic issues,

discriminated against women . . . They have also neglected the range of socio-economic violations women disproportionately experience during conflict.'

<sup>33</sup> Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations,' UN Doc. CEDAW/C/GC/30 (18 October 2013), esp. paras. 48–52 and 76.

<sup>34</sup> In particular, the OHCHR organized an expert workshop 'on experiences of transitional justice processes in dealing with violations of economic, social and cultural rights,' resulting in OHCHR, supra n 11.

<sup>35</sup> Guidance Note of the Secretary-General, supra n 3.

<sup>36</sup> 'Human Rights Council Resolution on Transitional Justice and Human Rights,' UN Doc. A/HRC/RES/12/11 (12 October 2009), para. 18 and preamble.

<sup>37</sup> Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development,' *International Journal of Transitional Justice* 2(3) (2008): 253–265.

<sup>38</sup> See, e.g., Mark A. Drumbl, 'Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development' (New York: International Center for Transitional Justice, 2009). See also, 'Old Misconceptions that Die Hard' below.

<sup>39</sup> Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,' *Social and Legal Studies* 21(2) (2012): 171.

<sup>40</sup> Ibid.

including those of Peru,<sup>41</sup> Sierra Leone<sup>42</sup> and Timor-Leste.<sup>43</sup> In several countries, debates on prospective truth commissions to examine topics related to ESR are ongoing.<sup>44</sup>

The 2013 report of the Truth, Justice and Reconciliation Commission (TJRC) of Kenya illustrates the growing trend of truth commissions paying more attention to ESR. The Kenyan experience also serves as a useful example and starting point for the purposes of our argument that the increasing openness towards ESR continues to be accompanied by an often problematic use of rights language. Although the TJRC made laudable efforts to address ESR in some parts of the report,<sup>45</sup> the report generally resembles those of earlier commissions insofar as it contains little specific legal analysis of ESR violations.<sup>46</sup> Rather, the TJRC views ESR violations as synonymous with the collective ‘economic marginalisation’ of specific regions.<sup>47</sup> While marginalization is a concept that can be related to many ESR violations and problems, the two concepts are neither conceptually nor terminologically congruent.<sup>48</sup> With this example in mind, we next address specific key misconceptions about ESR reflected in the work of some contemporary transitional justice scholars and practitioners.

## Old Misconceptions that Die Hard

In light of the discussion thus far, it is clear that controversy in relation to the socioeconomic dimensions of transitional justice is one of the main challenges to the ‘initial conceptual boundaries of transitional justice.’<sup>49</sup> The claims made by both those who argue in favour of and those who argue against exploring these issues in postconflict and postauthoritarian contexts deserve to be taken seriously.

<sup>41</sup> For more on the Peruvian truth commission, see, ‘Old Misconceptions that Die Hard’ below.

<sup>42</sup> The Sierra Leonean commission listed various socioeconomic abuses as ‘violations’ and formulated a range of recommendations relating to many of the identified socioeconomic rights violations. Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, vol. 2 (October 2004).

<sup>43</sup> The commission in Timor-Leste identified violations of ESR and emphasized the need to examine the relevant legal instruments related to ESR alongside those related to other human rights. Commission for Reception, Truth and Reconciliation Timor-Leste, *Chega!* (October 2005), parts 7 and 2, Annex A (esp. paras. 128–132).

<sup>44</sup> An overview of past experiences is contained in OHCHR, supra n 11. In Argentina, Congress is considering the possibility of establishing a commission to examine aspects related to ESR. See, ‘Se presento el proyecto para investigar los delitos económicos de la última dictadura,’ *Página12*, 8 April 2014, <http://www.pagina12.com.ar/diario/elpais/1-243635-2014-04-08.html> (accessed 7 July 2014). See also the newly adopted truth commission bill in Nepal: Pranab Kharel, ‘Parliament Passes TRC Bill,’ *eKantipur*, 26 April 2014, <http://www.ekantipur.com/2014/04/26/headlines/Parliament-passes-TRC-bill/388765/> (accessed 7 July 2014).

<sup>45</sup> For the strongest parts of the report, see, Truth, Justice and Reconciliation Commission of Kenya, *The Final Report of the Truth, Justice and Reconciliation Commission* (May 2013), esp. vol. 2B and the treatment of the importance of ESR for women in vol. 2C.

<sup>46</sup> *Ibid.*, vol. 4, ch. 1.

<sup>47</sup> *Ibid.*, vol. 1, para. 107. The TJRC defines marginalization as discrimination between groups in the distribution of social goods and services. *Ibid.*, vol. 2B, para. 44.

<sup>48</sup> See, ‘Starting as We Mean to Go On: Identifying What ESR Are’ above.

<sup>49</sup> Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,’ *Human Rights Quarterly* 31(2) (2009): 359.

Yet, while we are sympathetic to – and enthusiastic about – interest in exploring the potential of paying more attention to social and economic dimensions in transitional justice, we believe there is a serious problem with how some commentators have been using ESR terminology. Based on an analysis of the ways in which various authors have framed the question of whether socioeconomic issues and/or ESR should be included in transitional justice endeavours, we found that, although many commentators rely on rights language when framing their claims with regard to the interrelationship between socioeconomic issues and transitional justice processes, such terminology has frequently been misapplied to concepts that do not correspond to ESR. In criticizing the use of ESR terminology, our aim is not to denigrate the work of those commentators whose work we include in this article (many of whom are not lawyers), but rather to provide support and clarification to those participating in the debate around socioeconomic dimensions of transitional justice.

The ways that many authors have used ESR language in the debate on the role of ESR and broader socioeconomic issues in transitional justice can be summarized in four inaccurate dichotomies: 1) discrete versus structural, 2) short term versus long term, 3) simple versus complex and 4) violations/abuses versus background issues. As we will demonstrate, this suggests that many commentators rely on assumptions about ESR based on outdated notions of a ‘rights divide,’ in terms of which ESR are inherently different from civil and political rights.<sup>50</sup> As such, much of the literature fails to recognize normative and practical progress in international human rights law. In the words of Arbour, ‘old misconceptions die hard.’<sup>51</sup> We now consider each misconception in detail.

## Discrete versus Structural

In our analysis of the use of ESR terminology in transitional justice literature and practice, we observed a tendency to view ESR violations as necessarily structural while considering civil and political rights violations to be discrete abuses. Numerous commentators who participate in the debate on the role of ESR in transitional justice do not, or do not exclusively, write about the relatively narrow legal concept of ESR. Rather, they appear to aim to address much broader socioeconomic issues, such as the causes of a conflict. By including ESR in transitional justice, it is sometimes assumed that we would automatically be able to address root causes of widespread violence,<sup>52</sup> address ‘deep-rooted

<sup>50</sup> For a similar view, see, Ruben Carranza, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?’ *International Journal of Transitional Justice* 2(3) (2008): 310–330; Dustin N. Sharp, ‘Introduction: Addressing Economic Violence in Times of Transition,’ in *Justice and Economic Violence in Transition*, ed. Dustin N. Sharp (New York: Springer, 2014).

<sup>51</sup> Arbour, *supra* n 26 at 6.

<sup>52</sup> This tendency is, for instance, visible in *ibid.* See also, Laplante, *supra* n 30 at 333, where she appears to regard ‘structural violence’ (which she describes as ‘referring to the entrenched socio-economic conditions that cause poverty, exclusion and inequality’) as being primarily concerned with ESCR. The tendency to assume an inherent relationship between addressing ESR and tackling root causes is also apparent in an early paper by one of the authors of this article: Evelyne

inequities<sup>53</sup> and/or achieve distributive justice. We should pay more attention to ESR in transitional justice processes because 'it is necessary to address the root causes of the conflict.'<sup>54</sup>

Such views are premised on the idea that ESR violations are inherently structural while civil and political rights violations are not. In other words, there seems to be a tendency to assume that ESR violations automatically relate to entrenched, systemic issues rooted in institutions and practice, while civil and political rights can be addressed independently of these. Some, for instance, presume that redressing ESR abuses is an exclusively structural endeavour and equate ESR violations with 'historically constructed inequalities.'<sup>55</sup> Others present the debate between civil and political rights and ESR in transitional justice as one between a focus on direct versus structural violence.<sup>56</sup> In a number of contributions, ESR violations are contrasted with wide-ranging concepts such as 'structural exclusions and inequalities.'<sup>57</sup>

The risk of this approach is that it ignores that many ESR violations occur during conflict and that such violations can be discrete rather than structural. This is particularly so in relation to violations pertaining to the state's obligations to respect and protect (rather to fulfil) ESR. There is still a tendency in the literature on transitional justice and ESR to conceptualize ESR as imposing obligations that can be progressively realized over time, with an overemphasis

Schmid, 'Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice,' *Praxis: The Fletcher Journal of Human Security* 24 (2009): 5–28.

<sup>53</sup> Ismael Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies,' *International Journal of Transitional Justice* 3(2) (2009): 177. To some extent, this dichotomy is also visible in the first report of the special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who opposes 'claims against corruption and in favour of economic opportunities' with 'violations of civil and political rights.' De Greiff, supra n 9 at para. 17.

<sup>54</sup> Susanne Buckley-Zistel, 'Connecting Transitional Justice and Development' (paper presented at the conference 'The Contribution of Civil Society and Victim Participation in Transitional Justice Processes,' Marburg, Germany, 2 December 2009).

<sup>55</sup> Waldorf, supra n 39 at 172. Also using the same expression, see, Muvingi, supra n 53 at 164.

<sup>56</sup> Carranza, supra n 50 at 313–315, equates the 'hesitation to address violations of socioeconomic rights' with a lack of engagement with 'structural violence' and 'mass poverty and socioeconomic concerns.'

<sup>57</sup> In the theoretical article that opened the 2008 *IJTJ* special issue, Zinaida Miller provides an astute analysis of the discursive neglect of 'the economic' in transitions. Yet, her treatment of ESR reveals that she assumes that ESR violations necessarily or primarily relate to structural violence. Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice,' *International Journal of Transitional Justice* 2(3) (2008): 266–291. A similar presumption is evident in Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal,' *International Journal of Transitional Justice* 2(3) (2008): 378–397, in which the author contrasts civil and political rights with wide-ranging concepts of 'structural exclusions and inequalities.' In the same vein, Muvingi, supra n 53 at 163–164, contrasts 'civil and political rights protections' with 'past social and economic exclusions and exploitation,' broad socioeconomic 'factors' and 'grievances' or 'historically constructed socio-economic inequalities.'

on the positive obligations imposed by such rights.<sup>58</sup> This is not consistent with the ESR normative framework, however.<sup>59</sup>

An example of such a misunderstanding of ESR obligations is demonstrated in a 2014 article criticizing Arbour for having located civilian starvation and destruction of homes and property as economic, social and cultural rights violations.<sup>60</sup> This legal qualification would be unsuitable because the ‘language of socioeconomic rights violations . . . obscures the direct nature of harms . . . in terms of constituting negative, often deliberate, rights violations,’<sup>61</sup> adding that ‘socioeconomic rights remain focused on issues of fulfilment, rather than direct deprivations.’<sup>62</sup> The problem with such a critique is that it underappreciates the nonprogrammatic aspects of ESR and assumes that ESR violations would always have to be violations of positive duties. This is incompatible with both the wording of ICESCR<sup>63</sup> and the work of the UN Committee on Economic, Social and Cultural Rights, which makes clear that ESR impose both positive and negative obligations.<sup>64</sup>

When armed forces burn houses, destroy crops, loot healthcare infrastructure or poison drinking water, these are violations of ESR that are neither structural nor relevant to the positive programmatic obligations imposed by those rights. Similarly, when private companies engage in discriminatory dismissals (as happened, for instance, in the former Yugoslavia)<sup>65</sup> and if state authorities do not address and remedy such practices, the state violates its obligation to protect the right to work.<sup>66</sup> An exclusive focus on programmatic ESR obligations also obscures the fact that some conflict-related ESR violations can squarely be considered discrete instances of physical violence, for example when state health facilities refuse life-saving treatment to those who oppose the authorities, or

<sup>58</sup> For instance, Larissa van den Herik writes that ESR obligations are more difficult to take into account in mainstream transitional justice processes than civil and political rights because ‘they generally spell out positive obligations’ and addressing omissions is more difficult than establishing responsibility for acts of commission. Larissa van den Herik, ‘Economic, Social and Cultural Rights – International Criminal Law’s Blind Spot?’ in *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges*, eds. Eibe Riedel, Gilles Giacca and Christophe Golay (Oxford: Oxford University Press, 2014), 350.

<sup>59</sup> See, e.g., Committee on Economic, Social and Cultural Rights, supra n 23, and ‘General Comment No. 15: The Right to Water,’ UN Doc. E/C.12/2002/11 (2003), arts. 11 and 12, which make it clear that ESR impose a range of negative, positive, immediate and progressive obligations.

<sup>60</sup> Diana Sankey, ‘Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice,’ *International Journal of Transitional Justice* 8(1) (2014): 121–140.

<sup>61</sup> *Ibid.*, 124–125.

<sup>62</sup> *Ibid.*, 123. While note 5 acknowledges that ‘there is some recognition of negative deprivations’ within a UN General Comment, it is not clear to us why it is objectionable to describe such deprivations as violations of ESR.

<sup>63</sup> See, e.g., arts. 13(3) and (4) ICESCR.

<sup>64</sup> See, Committee on Economic, Social and Cultural Rights, supra n 23.

<sup>65</sup> *Prosecutor v. Krajišnik*, Judgment, Case No. IT-00-39-T (27 September 2006), para. 708.

<sup>66</sup> For more on the obligation to protect, see, Aoife Nolan, ‘Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the “Obligation to Protect,”’ *Human Rights Law Review* 9(2) (2009): 225–255.

when people are forcibly evicted and left without means to sustain themselves in hostile environmental conditions.<sup>67</sup>

Furthermore, many civil and political rights violations have structural components. Such 'structural violations' of civil and political rights may occur in a conflict context where a justice system operates discriminatorily or members of particular groups are systematically subject to detention or harassment. It is thus clear that the dividing line between structural abuses and discrete ones is not between civil and political rights and ESR, whether in the transitional justice context or otherwise.

### Short versus Long Term

Some of those who view the inclusion of ESR in transitional justice as necessarily entailing engagement with structural socioeconomic challenges also tend to assume that redressing ESR abuses requires long-term approaches while civil and political rights abuses can be dealt with through short-term strategies. Waldorf portrays transitional justice as 'inherently short-term, legalistic and corrective.'<sup>68</sup> In his view, this automatically means that 'it should focus on accountability for gross violations of civil and political rights.'<sup>69</sup> Yet, this conclusion is unconvincing if one considers that redress for specific violations of civil and political rights is frequently assumed to be long term, whereas specific ESR violations can be addressed in a summary, corrective way through targeted measures that are limited in time.<sup>70</sup>

We agree with Waldorf that 'the remedying of socio-economic injustices is a long-term political project,'<sup>71</sup> but the same can be said about the remedying of civil and political injustices. Consider a discrete instance of an extrajudicial execution by a state official – a typical example of an abuse considered to constitute a violation of civil and political rights. The redress of this abuse is usually accompanied by an aspiration that it will lead to institutional change in law enforcement over time and hence more effective protection of the right to life. The same would be true in the case of building schools used by particular minority groups where such schools were destroyed by nonstate actors with the state's blessing, resulting in the right to education being violated.

A key feature of every transitional justice project, any 'short-term' instance of redress in individual cases is intended to contribute to a renegotiation of the relationship between the (post)transitional state and its citizens and to

<sup>67</sup> We agree with Sharp on this point: it is not accurate to portray civil and political rights abuses as 'physical violence' and ESR violations as 'economic violence.' Many conflict-related ESR violations can harm physical integrity and can thus be considered 'physical violence.' Sharp, *supra* n 50.

<sup>68</sup> Waldorf, *supra* n 39 at 179.

<sup>69</sup> *Ibid.*, 179.

<sup>70</sup> For a similar view, see, Amanda Cahill-Ripley, 'Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights,' *Netherlands Quarterly on Human Rights* 32(2) (2014): 181–213.

<sup>71</sup> Waldorf, *supra* n 39 at 179.

nonrecurrence. It does not matter whether such redress relates to violations of civil and political rights or to ESR.

### Simple versus Complex

Given the wide variety of both ESR and civil and political rights violations, it is also inaccurate to view the redress of civil and political rights violations as unvaryingly more straightforward than the redress of ESR violations. It is not clear, for example, why remedying the destruction of people's homes in armed conflict should be inherently more complex than redressing disappearances or other civil and political rights abuses. Relatedly, it can be complex to identify some civil and political rights violations in armed conflict, such as whether or not an instance of detention in a noninternational armed conflict was arbitrary.

The simple versus complex dichotomy illustrates the dangers of lumping together ESR and broader socioeconomic considerations. For instance, if one mistakenly assumes that redressing ESR is necessarily and exclusively about 'the reduction of longstanding inequality,'<sup>72</sup> it follows that this will be extremely complex. As Frank Haldemann and Rachele Kouassi explain,

Advocates of a narrow reading of transitional justice usually make an instrumental case for excluding [economic, social and cultural] rights. By expanding transitional justice to broad social and economic concerns, they argue, we risk freighting it with expectations so overstretched and impractical as to make the whole project meaningless.<sup>73</sup>

In other words, including ESR in transitional justice would be too complex and inherently impractical. Such a view fails to recognize, however, that addressing many violations of ESR can be relatively straightforward.<sup>74</sup> For instance, while determining the full scope of the maximum resources available to a state may require a complex analysis of tax and fiscal policy, the scope of the obligation to gather disaggregated data on ESR enjoyment across society is much clearer.<sup>75</sup> Similarly, while determining the permissibility of retrogressive measures in the achievement of ESR in the context of conflict may be a challenging exercise,<sup>76</sup> the

<sup>72</sup> Ibid.

<sup>73</sup> Frank Haldemann and Rachele Kouassi, 'Transitional Justice without Economic, Social and Cultural Rights?' in *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges*, eds. Eibe Riedel, Gilles Giacca and Christophe Golay (Oxford: Oxford University Press, 2014), 514. Similarly, Miller explains that criticisms of the inclusion of ESR and broader economic issues in transitional justice are commonly based on capacity arguments, which in turn rely on views that such issues are inherently more complex than civil and political rights abuses. Miller, *supra* n 57.

<sup>74</sup> A similar point is made in OHCHR, *supra* n 11.

<sup>75</sup> For more on determining the full scope of the obligation of the state to make use of its maximum available resources, see, Radhika Balakrishnan, Diane Elson and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights,' in *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, ed. Aoife Nolan, Rory O'Connell and Colin Harvey (Oxford: Hart, 2013).

<sup>76</sup> See the analysis in Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-International Armed Conflicts* (Leiden: Brill, 2013).

same is not true of compliance with the right to housing in the forced eviction of people from their homes.<sup>77</sup> In turn, it cannot be assumed that addressing (at least some) ESR violations would necessarily be more prone to overstretching transitional justice mechanisms and inflating expectations than would be the case with regard to other human rights breaches.

### Violations versus Background Issues

Another problematic dichotomy that we have encountered in the literature is a tendency to discuss ESR not as part and parcel of past violations but from the perspective of consequences of other abuses or as daily life concerns. In other words, when ESR abuses are considered, they are sometimes not analysed on their own terms, but rather as a secondary consequence of civil and political rights violations and/or simply presented as daily needs of victims. This underscores the tendency within transitional justice work to view civil and political rights abuses as the forefront issues, with ESR abuses constituting their context and consequences.<sup>78</sup> For instance, by focusing on a narrow set of abuses, the South African TRC placed ‘the everyday violence of poverty . . . in the background of truth and reconciliation’ and featured the daily life experience of apartheid as the context to violations of civil and political rights rather than as the crime itself.<sup>79</sup> The Peruvian Truth and Reconciliation Commission did not examine violations of ESR as part of past abuses, but explored socioeconomic factors as a cause of the conflict – an approach that has been criticized for relegating socioeconomic issues to the background rather than ‘presenting them as rights violations.’<sup>80</sup> While a number of commentators and truth commissions have attempted to contest this perception of socioeconomic issues,<sup>81</sup> we believe that remnants of this tendency are still apparent.

Controversies around the interpretation of empirical data on survivors’ transitional justice preferences illustrate how ESR-related issues are sometimes

<sup>77</sup> See, Committee on Economic, Social and Cultural Rights, ‘General Comment No. 7: The Right to Adequate Housing (art. 11.1 of the Covenant): Forced Evictions,’ UN Doc. E/1998/22 (20 May 1997), annex IV.

<sup>78</sup> Sharp notes, ‘To the extent that transitional justice has dealt with economic issues, these concerns have been treated as little more than useful context in which to understand the perpetration of physical violence.’ Sharp, supra n 50 at 2. This tendency is apparent in Waldorf’s article, in which he opposes ‘everyday injustices rooted in historical inequalities’ with ‘the extraordinary injustices of gross human rights abuses,’ assuming that ESR pertain to the former. Waldorf, supra n 39 at 175.

<sup>79</sup> Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections,’ *Third World Quarterly* 29(2) (2008): 284.

<sup>80</sup> Laplante, supra n 30 at 335.

<sup>81</sup> In a recent analysis of the ‘limited examples’ where commissions have ‘engaged in some way with economic and social rights,’ Cahill-Ripley outlines how the work of the Timor-Leste Commission in particular ‘marks the beginning of foregrounding of [ESR], even if not seen through to specific remedy or reparations. It signifies a move away from economic and social rights violations as background or contextual information.’ Cahill-Ripley, supra n 70 at 186 and 207. For reflections on implications of ‘moving beyond seeing ESC rights as simply background conditions,’ in particular for reparations programmes, see, Naomi Roht-Arriaza, ‘Reparations and Economic and Social Rights after Violent Conflict,’ in supra n 12.



portrayed as a matter of background information rather than as part of the abuses that could be considered for inclusion in transitional justice processes. According to the findings of two well-known population surveys (conducted in northern Uganda and in Cambodia), victims stated that their most immediate concerns in postconflict situations were the availability of food, security and education, as well as restoring livelihoods.<sup>82</sup> Phuong Pham et al. conclude that ‘the need for food and peace is far more pressing’ than the desire for justice.<sup>83</sup> In doing so, they apparently assume that ‘justice’ and concerns related to healthcare, education or other socioeconomic aspects are distinct concepts that do not overlap. Based on these surveys, others have concluded that victims’ emphasis on socioeconomic considerations implies that victims did not want such issues addressed by transitional justice arrangements.<sup>84</sup> However, such an interpretation of victims’ views on the connection (or lack thereof) between urgent and daily needs and ‘justice’ is far from inevitable. Rather, it is reflective of a conceptualization of ESR as needs included in the backdrop to transitional justice endeavours, rather than as rights.

Although it is certainly true that many civil and political rights violations are coimbricated with, or result in, ESR breaches, it is inaccurate to reduce ESR abuses to issues of contextual background and/or daily needs while presenting civil and political rights as violations and hence as the result of adverse human agency. Conceptualizing ESR obligations ‘merely’ as ramifications of other abuses or as daily needs results in a failure to recognize that ESR abuses concern legal rights. In turn, this fails to acknowledge that existing international human rights law can be relevant and used to address at least some economic and social concerns related to the situations that transitional justice strives to address.

## Assessing the Damage and Moving Forward

The improper use and misunderstanding of ESR language and concepts is not only an irritant to ESR advocates, it also negatively affects the quality of the arguments made both in favour of and against the inclusion of ESR and broader socioeconomic considerations in transitional justice, for two reasons.

First, there is a pressing need to ensure that participants in the debate on socioeconomic considerations in transitional justice have a way to assess whether they are talking about the same thing – and whether that thing is ESR. This is important as transitional justice commonly incorporates legal norms

<sup>82</sup> Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover and Adrian di Giovanni, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda* (New York: International Center for Transitional Justice and Human Rights Center, 2005); Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley, CA: Human Rights Center, 2009). According to the authors of the latter survey, ‘While respondents viewed accountability as important and frequently wanted to see former Khmer Rouge tried and punished for past crimes, justice was not a priority for most respondents. Rather respondents said their priorities were jobs (83%), services to meet basic needs including health (20%), and food (17%)’ (p. 34).

<sup>83</sup> Pham et al., 2005, *supra* n 82 at 39.

<sup>84</sup> Waldorf, *supra* n 39.

and mechanisms. In turn, it has to engage with rights as they are – as legal standards – or, alternatively, use different vocabulary. Lack of a nuanced understanding of ESR and the obligations they impose undermines the quality of the argument, whether for or against more attention being paid to ESR.

Second, as noted above, misconceptions about the nature of ESR result in a failure to engage adequately with the obligations imposed by ESR, particularly negative ones. Failure to take into account the full range of ESR-related obligations inhibits transitional justice from making full use of existing legal standards even when these standards are adequate and provide at least some potential for the development of transitional justice processes.<sup>85</sup>

This article has not argued for or against the inclusion of ESR in transitional justice processes. Rather, we are concerned that those debating the issue should engage properly with the content and existing literature and jurisprudence on ESR. If transitional justice is to engage with ESR issues, it needs to conceptualize and apply the relevant terms accurately. After all, arguments for and against more attention being paid to economic and social issues in transitional justice cannot be properly addressed until we know what exactly an author is arguing that transitional justice mechanisms should, or should not, be taking on. The current debate in transitional justice scholarship bears a strong resemblance to long-standing debates on the justiciability of ESR. In the past, some argued that courts would be overwhelmed if they had to deal with ESR. Many assumptions about the (alleged) nature of ESR and the institutional capacity of different bodies have been challenged and disproved by practice – the same is likely to be true if we see ESR being applied in transitional justice processes.<sup>86</sup> Similarly, accurate use of the relevant legal concepts is necessary to clarify the expectations of what an invocation of ESR can realistically achieve.

Those who advocate for more attention to ESR in transitional justice should acknowledge the limitations of human rights law in bringing about rapid and sustainable social change, whether or not the focus is on civil, political, cultural, economic or social rights.<sup>87</sup> It is unrealistic to expect that the inclusion of ESR will resolve the full extent of the socioeconomic challenges a postconflict or postauthoritarian society faces. As noted, some authors have concluded that the inclusion of ESR is not advisable as it would unavoidably lead to unrealistic

<sup>85</sup> On the danger of making over-hasty assumptions about the irrelevance of existing law in this context, see chap. 2 in Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge: Cambridge University Press, forthcoming).

<sup>86</sup> For key discussions on the legitimacy and efficacy of the courts dealing with ESR, see, e.g., Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal,' New York University School of Law, Center for Human Rights and Global Justice Working Paper No. 15 (2007); Langford, *supra* n 15; Fons Coomans, ed., *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Cambridge: Intersentia, 2006).

<sup>87</sup> For a key treatment of the ability of law to bring about social change, see, e.g., Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Justice?*, 2nd ed. (Chicago: University of Chicago Press, 2008). For discussions of the ability of the legalization and judicialization of ESR to bring about social change, see, e.g., Roberto Gargarella, Pilar Domingo and Theunis Roux, eds., *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate, 2006).

expectations above and beyond those for civil and political rights. However, this view does not sufficiently appreciate the deeply pragmatic nature of key elements of ESR law, for instance the acceptance that states' ability to fully realize ESR will be limited by resource availability. Furthermore, such a view ignores the reality that there is necessarily a strongly aspirational element to all rights, including civil and political rights, in situations where such rights are not fully realized. It is undoubtedly correct that reliance on ESR norms will never be able to single-handedly abolish poverty, remedy structural disadvantage or ensure socioeconomic development. That does not mean that they have no contribution to make towards such broader goals. No one would seriously argue that transitional justice strategies aimed at redressing extrajudicial killings or detentions – classic civil and political rights abuses – should be written off as failures simply because they cannot by themselves achieve sustainable rule of law reform. The same is true and must be acknowledged when debating the potential inclusion of ESR in transitional justice.

But what does the debate on the role of socioeconomic issues in relation to transitional justice say about the state of transitional justice as it stands? With the emergence of the debate on economic and social issues in transitional justice, some have suggested that transitional justice as such needs to be rethought.<sup>88</sup> The underlying assumption appears to be that paying more attention to socioeconomic issues would require a paradigm shift within transitional justice. This would be necessary due to the historic focus of transitional justice normative frameworks and mechanisms on civil and political rights-related issues and violations.

For those who perceive the debate on the inclusion of socioeconomic issues in transitional justice as a debate on the normative limits of that area, it follows naturally that the conceptual boundaries of the term would have to be rethought if we were to pay more systematic attention to ESR. Paige Arthur, for instance, implies that those spearheading 'the effort to get social and economic rights recognised as equal counterparts to civil and political rights'<sup>89</sup> necessarily favour an inherently different conception of transitional justice as a whole, that is, one that departs from a conceptualization of transitional justice focusing on claims to justice 'that prioritise legal-institutional reforms and responses – such as punishing leaders, vetting abusive security forces, and replacing state secrecy with truth and transparency.'<sup>90</sup>

<sup>88</sup> An illustrative example of this link between the debate on economic and social issues and a potential reconceptualization of transitional justice is the title of a recent volume: Gaby Oré Aguilar and Felipe Gómez Isa, eds., *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Cambridge: Intersentia, 2011). See also Haldemann and Kouassi, *supra* n 73.

<sup>89</sup> Arthur, *supra* n 49 at 342.

<sup>90</sup> *Ibid.*, 321–322: "Dealing with the past," in [the context of those transitions which "spearheaded the effort to get social and economic rights recognised as equal counterparts to civil and political rights"], meant something quite different from current, transitional justice evocations of it."

In a similar vein, some have considered the term ‘transformative justice’ as an alternative to transitional justice – one that would enable us to pay more attention to socioeconomic issues in addressing the legacies of an abusive past.<sup>91</sup> Waldorf concludes from his finding that ‘transitional justice in its current form is ill-suited to addressing socio-economic wrongs’<sup>92</sup> that ‘one option would be to re-conceptualise transitional justice,’ citing Wendy Lambourne, who calls for ‘a transformative justice model of transitional justice that brings together economic justice along with legal, psychosocial, and political justice in an effort to transform both structures and relations.’<sup>93</sup> However, Waldorf shares Lambourne’s concerns that such a model might ‘include too much... thus becoming analytically overstretched and impractical.’<sup>94</sup>

Matthew Evans, arguing in favour of ‘transformative justice,’ puts forward that transitional justice is inherently concerned with truth commissions, trials and amnesties, institutional reform, bodily integrity, civil and political rights and short-term change.<sup>95</sup> He assumes that it is obvious that these concerns only have minor overlap with what he conceptualizes as the concerns of ‘transformative justice,’ including socioeconomic rights.<sup>96</sup>

But does the inclusion of some ESR considerations in transitional justice automatically mean that we need to rethink the term, as suggested by Waldorf and Evans? We would argue no. First of all, transitional justice is not conceptualized uniformly. Second, and more important, the specific definitions accorded to transitional justice are not understood uniformly.

The ‘classic’ definition of transitional justice proposed by Ruti Teitel defines transitional justice ‘as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.’<sup>97</sup> It is perfectly conceivable to include ESR, even within that narrow definition. As mentioned in the introduction, the UN secretary-general defines transitional justice as ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses.’<sup>98</sup> There is no reason why a consideration of ESR within the context

<sup>91</sup> A debate on suggestions to use the term ‘transformative justice’ is beyond the scope of this article, but the proposed adjective ‘transformative’ has interesting philosophical implications for the concept of justice as such, including in situations outside transitions. For proponents of the term, see, Paul Greedy and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice,’ *International Journal of Transitional Justice* 8(3) (2014): 339–361.

<sup>92</sup> Waldorf, *supra* n 39 at 179.

<sup>93</sup> *Ibid.*, 179, citing Wendy Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence,’ *International Journal of Transitional Justice* 3 (2009): 46.

<sup>94</sup> Lambourne, *supra* n 93 at 46.

<sup>95</sup> Matthew Evans, ‘Land, Socio-Economic Rights and Transformative Justice’ (paper presented at the conference ‘Land Divided: Land and South African Society in 2013, in Comparative Perspective,’ Cape Town, South Africa, 24–27 March 2013).

<sup>96</sup> *Ibid.*

<sup>97</sup> Teitel, *supra* n 4 at 69.

<sup>98</sup> Guidance Note of the Secretary-General, *supra* n 3.

of attempts to redress a legacy of past abuses could not be accommodated within the scope of that second mainstream definition of transitional justice.<sup>99</sup>

A crucial point must be made here. Transitional justice scholarship and practitioners will ultimately decide whether to embrace or reject ESR. However, literature relating to the definition of transitional justice must not be allowed to undermine existing ESR standards. If perpetuated in international scholarship and discourse, the problems identified above with regard to misuse and misunderstanding of ESR standards do not simply have implications for transitional justice, they may also pose serious risks to the advances made with regard to the economic and social human rights recognition and discourse that has taken place over the past two and a half decades. These include the establishment of international complaints mechanisms enabling UN treaty-monitoring bodies to address complaints with ESR,<sup>100</sup> as well as an ever-greater rate of constitutionalization and judicial enforcement of ESR at the regional level and in domestic jurisdictions.<sup>101</sup>

Misapprehensions in transitional justice work may impact on existing understandings of ESR and perpetuate outdated and erroneous conceptions. For instance, the tendency of transitional justice scholarship to frame civil and political abuses in terms of violations of rights yet to fail to do the same with regard to ESR violations plays into the hands of, and provides ammunition to, those who argue that ESR are not ‘real rights’ but mere aspirations.<sup>102</sup> If the long-term aspirations and the expectations placed on transitional justice need rethinking, this is the case independent of the debate surrounding ESR protection and implementation.

Finally, the terminological problems identified in this article also hamper the prospects of transitional justice making a promising and important contribution to the practical implementation of ESR. It is worth pointing out the significant benefits that a coherent debate on economic and social dimensions of transitional justice could have for the respect and recognition of ESR. ‘Transitional moments’ can present unique opportunities for reform in a state’s approaches to these rights. As in Nepal or Guatemala, for instance, a fresh look at policies affecting the protection of ESR is sometimes explicitly included in the official transitional

<sup>99</sup> Many have also ignored the interesting detail that the UN secretary-general’s definition does not refer to violations of human rights law, but simply refers to ‘abuses.’ This means that the UN definition allows for an even broader conceptualization than one that would include considerations of past ESR violations.

<sup>100</sup> See the General Assembly’s adoption of the optional protocols establishing communications procedures in relation to the rights contained in ICESCR (OP-ICESCR) and the Convention on the Rights of the Child (OP3-CRC). OP-ICESCR entered into force in 2013, OP3-CRC in 2014.

<sup>101</sup> Langford, *supra* n 15.

<sup>102</sup> For a similar view, see Sharp, *supra* n 50.

justice agenda.<sup>103</sup> In many countries, constitutional and domestic legal arrangements are renegotiated when societies attempt to address legacies of an abusive past, thus creating opportunities for increased protection of ESR at the domestic level. Transitional justice scholars and practitioners inputting into such reforms potentially have a key role to play in determining the extent to which ESR are understood and taken seriously in the arrangements reached in a society that decides to tackle a legacy of widespread disrespect for human rights. A considered and accurate use of ESR language and concepts by transitional justice practitioners and scholars can thus contribute significantly to the enjoyment of ESR in practice.

<sup>103</sup> See, for instance, the preamble of the Comprehensive Peace Agreement Concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) (signed 21 November 2006), [www.usip.org/files/file/resources/collections/peace\\_agreements/nepal\\_cpa\\_20061121\\_en.pdf](http://www.usip.org/files/file/resources/collections/peace_agreements/nepal_cpa_20061121_en.pdf) (accessed 7 July 2014); Pushpa Kamal Dahal 'Prachanda,' 'Address at the UN General Assembly,' UN Doc. A/63/PV.11 (26 September 2008); Guatemala's Agreement on a Firm and Lasting Peace (signed 29 December 1996), 36 ILM 315, in particular art. 6.