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Transitional justice and liberal post-conflict governance: Synergies and symmetries, frictions and contradictions

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Part II: Transitional Justice and the Invisibility of the Economic

Chapter II: Addressing Economic Violence in Times of Transition¹

An increasing consensus has arisen at the level of practice, policy, and theory that the various mechanisms of transitional justice should be mobilized as part of a response to violent conflict and must serve as a pillar of postconflict peacebuilding.² More than ever, the question is not whether there will be some kind of transitional justice, but what the timing, modalities, and sequencing might be and which of the mechanisms from the transitional justice “toolbox”—including trials, truth commissions, vetting and lustration, reparations, and broader institutional reform—will be put in place. Together with demobilization, disarmament, and reintegration of ex-combatants, security sector reform, broader “rule of law” programs, and elections, transitional justice initiatives have become a routine part of the postconflict checklist.³ Viewed from an historical perspective, the emergence of this transitional justice consensus some twenty years after the term was coined is nothing short of remarkable.⁴

Despite the seeming consensus as to the necessity to “do something,” the increasingly privileged place of justice in international affairs and postconflict reconstruction begs some very important questions: *justice for what, for whom, and to what ends?*⁵ In particular, while there is increasing momentum behind the notion that the tools of transitional justice must be marshaled in response to large-scale human rights atrocities and *physical violence*—including murder, rape, torture, disappearances, and

¹ This dissertation chapter was published as a contribution to my edited volume: Dustin Sharp, ed., *Justice and Economic Violence in Transition* (New York: Springer, 2014). That contribution in turn was adapted from an article I first published in the *Fordham International Law Journal* 35, no. 3 (2012): 780-814.

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

³ See International Crisis Group, *Liberia and Sierra Leone: Rebuilding Failed States*, Africa Report no. 87 (Dakar/Brussels: International Crisis Group, December 2004), 9 (criticizing a mechanistic “operational checklist” approach to postconflict peacebuilding in which the international community assumes it can safely withdraw after rote implementation of a series of initiatives: deployment of peacekeeping troops, disarmament, demobilization and reintegration of ex-combatants, the repatriation and return of refugees and internally displaced persons, security sector and judicial reform, transitional justice initiatives, and, finally, a first election).

⁴ For an interesting discussion of how this seeming consensus masks a deeper politicization and debate, see generally Bronwyn Anne Leebaw, “The Irreconcilable Goals of Transitional Justice,” *Human Rights Quarterly* 30, no. 1 (2008): 95.

⁵ See Nagy, “Transitional Justice as a Global Project,” 280–86 (employing the categories of when, whom, and what in order to challenge the “standardization” of field of transitional justice). For a discussion of the idea that it may not always be the case that we need to “do something” in the transitional justice context, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2011), 183-205.

other crimes against humanity—the proper role of transitional justice with respect to *economic violence*—including violations of economic and social rights, corruption, and plunder of natural resources—is far less certain. Indeed, historically, economic violence and economic justice have sat at the periphery of transitional justice work.⁶ 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.⁷

In recent years, the need to address economic violence in times of transition has been the subject of increasing attention by academics, policymakers, and a handful of truth commissions, yet for the most part ignorance of economic violence continues to be one of the principle blindspots of the field of transitional justice. While the blindspots of transitional justice mirror historic divisions and hierarchies within international human rights law, they also parallel the liberal international peacebuilding consensus in which Western liberal market democracy is assumed to be the wished-for end product of postconflict reconstruction and a “package” of interventions is tailored to suit.⁸ This parallel suggests that despite some thirty years of evolution, the field of transitional justice has not moved far from its origins in which the “transition” in question was assumed to be a transition to a Western-style liberal market democracy.

As the field of transitional justice moves beyond its historic origins in the wave of democratic transitions in Eastern Europe and Latin America in the 1980s and 1990s, and away from its roots in law and legalism, to a United Nations (UN)-sanctioned global phenomena tied to peacebuilding and conflict prevention more generally, the almost exclusive emphasis on civil and political rights and justice for physical violence appears increasingly untenable. As has been noted by Zinaida Miller, such an emphasis leads to a distorted narrative of conflict premised on the notion that economics and conflict can be neatly separated.⁹ When seen through this lens, conflicts become one dimensional, when in reality they are a messy and complicated mix of political, social, economic, and cultural factors. Compounding matters, relegating economic issues to the background of transitional justice concern serves to limit and bias the range of policies imagined to be necessary in the wake of conflict. Because poverty and economic violence can be associated with the onset of conflict, exacerbated by conflict, and continue afterwards as a legacy of conflict, failure to strike a better balance between a range of justice concerns in transition is unlikely to generate policies and interventions that respond to “root

⁶ See Louise Arbour, “Economic and Social Justice for Societies in Transition,” *New York University Journal of International Law and Politics* 40, no. 1 (2007): 4 (discussing why “economic, social, and cultural rights have not traditionally been a central part of transitional justice initiatives”).

⁷ See Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 275-76.

⁸ See Roland Paris, “Peacebuilding and the Limits of Liberal Internationalism,” *International Security* 22, no. 2 (1997): 56; see also Chandra Lekha Sriram, “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,” *Global Society* 21, no. 4 (2007): 580-81.

⁹ See Miller, “Effects of Invisibility,” 268.

causes” and may serve to obfuscate and legitimate very serious human rights abuses.¹⁰ The language of “never again” has little meaning if the self-imposed blindspots of the field distort our understanding of the conflict and limit our range of possible solutions.

While greater inclusion of economic issues within the transitional justice agenda therefore seems necessary, it also raises difficult questions that have yet to be worked out at the level of theory, policy, and practice. For example, some would find unobjectionable the idea that transitional justice mechanisms should address accountability for egregious violations of economic and social rights that rise to the level of war crimes.¹¹ In many ways, such a narrow approach to questions of economic violence would but mirror the traditional modalities of transitional justice that have tended to focus on accountability for egregious violations of physical integrity. Yet the question arises as to whether transitional justice should also engage deeper issues of distributive justice and structural violence that predate conflict and which may have in part helped to precipitate it. If we find ourselves focusing on issues of deep-rooted structural violence, is this the proper work of the field of transitional justice, or should it be left to the work of “development” and longer-term political and social processes?¹² In sum, at what point would we be asking too much of transitional justice by suggesting that it grapple with larger and deeper dimensions of economic violence?

This chapter seeks not to answer any of these questions definitively, but argues that a more nuanced, contextualized, and balanced approach to a wider range of justice issues faced by societies in transition is necessary. To this end, this chapter proposes that one way to achieve a more balanced approach is to reconceptualize and reorient the “transition” of transitional justice not simply as a transition to democracy and the “rule of law,” the paradigm under which the field originated, but as part of a broader transition to “positive peace,” in which justice for both physical violence and economic violence receives equal pride of place.¹³ Such a reorientation would not guarantee or even

¹⁰ See Paul Collier et al., *Breaking the Conflict Trap: Civil War and Development Policy* (Washington: World Bank and Oxford University Press, 2003), 22 (arguing that civil wars are more likely in low-income countries, have disastrous effects on poverty rates, and have negative effects that persist well after formal cessation of hostilities). Collier once famously argued that over fifty percent of civil wars reignite within a period of five years of their supposed settlement. See Paul Collier and Anne Hoeffler, “On the Incidence of Civil War in Africa,” *Conflict Resolution* 46, no. 1 (2002): 17. However, both figures have been disputed by some, and revised by Collier himself. See, e.g., Astri Suhrke and Ingrid Samset, “What’s in a Figure? Estimating Recurrence of Civil War,” *International Peacekeeping* 14, no. 2 (2007): 197-98 (explaining how they and others have arrived at figures closer to twenty percent after using the Correlates of War data set, and citing Collier’s 2006 working paper, which established a twenty-three percent war recurrence rate for the first four years after the cessation of conflict).

¹¹ See Evelyne Schmid, “War Crimes Related to Violations of Economic, Social and Cultural Rights,” *Heidelberg Journal of International Law* 71, no. 3 (2011): 3, 5, 9-17.

¹² See Roger Duthie, “Transitional Justice, Development, and Economic Violence,” in this volume.

¹³ As discussed in greater detail below, the term “negative peace” refers to the absence of direct violence. It stands in contrast with the broader concept of “positive peace,” which includes the absence of both direct and indirect violence, including various forms of “structural violence” such

mandate greater emphasis on economic concerns in all cases. The notion of “positive peace” could ultimately be subjected to limiting constructions and understandings that would in effect re-impose a version of liberal international peacebuilding, and thereby exclude many economic and distributive justice issues from its purview. Nevertheless, I argue that insofar as the very idea of “positive peace” has at its core issues of structural violence, it calls upon one to attend to a broader set of concerns than has historically been considered in transitional justice practice. Reorientation around the concept could be an important step in the direction of bringing economic violence into the foreground of transitional justice practice and policy.

This chapter proceeds in three parts. The first part sets forth the traditional focus and preoccupations of transitional justice, a field which has historically been rooted in law, human rights, and the felt imperatives of a political transition to Western liberal democracy, but which is increasingly allied with broader notions of peacebuilding. The next part discusses the relationship between transitional justice and economic violence, a broad constellation of issues that have largely been excluded from transitional justice work to date. It articulates some of the arguments against inclusion of economic violence and argues that any costs are largely outweighed by the benefits. The final part examines the relationship between transitional justice and the emerging field of peacebuilding, including the critique of liberal international peacebuilding, and sets forth the heart of my argument that one way to promote greater focus on issues of economic justice in transition would be to reconceptualize the field of transitional justice as a transition to “positive peace.”

A note about terminology is in order before proceeding. In this chapter, together with others in the volume, the terms “physical violence” and “economic violence” are used as shorthand to refer to a range of phenomena. “Physical violence” refers to murder, rape, torture, disappearances, and other classic violations of civil and political rights. In contrast, “economic violence” refers to violations of economic and social rights, corruption, and plunder of natural resources. While the violence that characterizes what I call “physical violence” is often direct, “economic violence” is typically more indirect. Both terms are clearly oversimplifications. For example, not all violations of civil and political rights involve direct physical violence, and many violations of economic and social rights—hunger and starvation, for example—are arguably a form of physical violence. While most of the “physical violence” discussed in this chapter constitutes a violation of civil and political rights under international law, the concept of “economic violence” includes, but is broader than, violations of economic and social rights under international law.¹⁴ Nevertheless, as a form of shorthand, both terms constitute loose categories that are useful to a discussion of the historical emphasis and blindspots of the field of transitional justice. In addition, the conceptualization of things like corruption as a form of violence is intended to convey the very real harm and suffering that it brings to

as poverty, hunger, and other forms of social injustice. See generally Johan Galtung, “Violence, Peace, and Peace Research,” *Peace Research* 6, no. 3 (1969): 167.

¹⁴ See, e.g., chapter by Chris Albin-Lackey in this volume, which explains how corruption may in some instances be tantamount to a violation of economic and social rights under international law, while in other instances such a case may be impossible to make.

individuals and societies, akin to the devastation caused by widespread acts of physical violence.

A. The Origins and Preoccupations of Transitional Justice

Many of the practices associated with the modern field of transitional justice—trials, truth commissions, reparations schemes, and broader reform of abusive institutions—have deep historical roots.¹⁵ Nevertheless, transitional justice, as a domain of policy, practice, and academic study, has its origins in the late 1980s and early 1990s with the wave of transitions in both Eastern Europe and Latin America that followed in the wake of the end of the Cold War.¹⁶ Definitions of transitional justice vary and have evolved and broadened over time.¹⁷ Broadly speaking, “transitional justice” relates to a set of legal, political, and moral dilemmas about how to deal with past violence in societies undergoing some form of political transition.¹⁸ Arguments for the necessity of some form of transitional justice are often grounded in notions of atrocity prevention and deterrence (“never again”), nation building (building or restoring democracy and the “rule of law”), and moral necessity (just deserts).¹⁹ While the precise type of political transition to be undergone is not always made explicit, the transitional justice practice, policy, and scholarship in the 1990s largely focused on the felt necessities and dilemmas of a transition from more authoritarian forms of government to Western-style democracy, with a consequent focus on those mechanisms thought best to bring about the specific

¹⁵ For a review of the use of what have become known as the tools of transitional justice dating back to more than 2000 years ago in ancient Athens, see generally Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004). Other authors looking to the historical underpinnings of transitional justice practice identify the Nuremberg tribunal as a key juncture initiating the first “phase” of transitional justice. See Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 70.

¹⁶ See generally Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I. General Considerations* (Washington: United States Institute of Peace, 1995). While the term “transitional justice” was coined some twenty years ago, it has been argued that transitional justice did not coalesce as a distinct “field” until sometime after 2000. See Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009): 329-32 (tracing the history of the use of the term “transitional justice”); Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” *International Journal of Transitional Justice* 3 (2009): 7 (arguing that transitional justice did not emerge as a distinct field until after 2000).

¹⁷ Many of these definitions have been quite narrow and legalistic. For example, Ruti Teitel defines transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Teitel, “Transitional Justice Genealogy,” 69. For a review of how some of these definitions have broadened over time, see Nagy, “Transitional Justice as a Global Project,” 277-78.

¹⁸ See Sriram, “Justice as Peace?,” 582-83.

¹⁹ See Bell, “Interdisciplinarity,” 13 (discussing the different overlapping conceptions of the field of transitional justice).

political transition in question.²⁰ As discussed in greater detail below, the notion of transition as transition to democracy was “crucial to structuring the initial conceptual boundaries for the field.”²¹

Although a number of the concerns and preoccupations of transitional justice were similar to those of the human rights community from which many early transitional justice scholars and practitioners were drawn, including particularly concerns with accountability and impunity for massive human rights violations, the field of transitional justice distinguished itself in its attempt to balance twin normative aims: the demands of justice and accountability on the one hand, and the assumed needs of a political transition on the other.²² Thus, formative debates in the field focused on the possible dilemmas and trade-offs associated with justice in times of political transition, including the so-called peace versus justice debate.²³ Influential articles by Guillermo O’Donnell and Samuel Huntington, canonized in Neil Kritz’s seminal three-volume work, viewed the parameters of justice in times of transition to democracy as a function of a series of bargains between elite groups, with more or less justice available depending on the extent to which elite perpetrator groups were able to dictate the terms of the transition.²⁴

Although dealing with massive human rights violations while undergoing a political transition might arguably call for the range of expertise of a variety of professions and disciplines, including history, psychology, economics, education, and religion, to name only a few, early transitional justice advocates were largely drawn from the legal and human rights communities, and early transitional justice scholarship was primarily anchored in law and political science.²⁵ Today, the field of transitional justice is increasingly interdisciplinary, yet law, legalism, and human rights approaches to the

²⁰ See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 325 (arguing that transition to democracy was the “dominant normative lens” through which political change was viewed in the early years of transitional justice practice and scholarship); see also Patricia Lundy and Mark McGovern, “Whose Justice? Rethinking Transitional Justice from the Bottom Up,” *Journal of Law and Society* 35, no. 2 (2008): 273 (arguing that “[t]ransition’, as normally conceived within transitional justice theory, tends to involve a particular and limited conception of democratization and democracy based on liberal and essentially Western formulations of democracy”).

²¹ See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 326.

²² *Ibid.*, 358.

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

²⁴ See Samuel P. Huntington, “The Third Wave: Democratization in the Late Twentieth Century,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I. General Considerations*, ed. Neil Kritz (Washington: United States Institute of Peace, 1995), 65-81; Guillermo O’Donnell and Philippe Schmitter, “Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies,” in Kritz, *Transitional Justice*, 57-64.

²⁵ See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 333.

questions and dilemmas of transition continue to dominate in many ways, leading to a continued critique of the “narrowness” or “thinness” of traditional transitional justice work and calls to give greater attention to those issues often set in the background of legal and human rights discourse, including religion, culture, economics, and local tradition.²⁶

Since the birth of the field in the 1980s and 1990s, the more overt preoccupation with transition as transition to democracy has receded. Increasingly, transitional justice is associated with nation building and peacebuilding in the postconflict context more generally.²⁷ Once considered a jurisprudence of exception and deviation from rule of law standards in times of political transition, transitional justice has been normalized, institutionalized, and mainstreamed.²⁸ In attempting to trace “three generations” of transitional justice, starting with Nuremburg and moving into the present, Ruti Teitel refers to this latest phase as “steady-state” transitional justice in which the postconflict dimension of transitional justice is moving from the exception to the norm.²⁹ The “transition” in transitional justice today is “ostensibly neutral” and the goals promoted, including conflict resolution and the rule of law, are less explicitly political.³⁰ Other more recent and influential definitions of transitional justice make little use of the concepts of “transition” at all, rooting the field instead in the promotion of a number of goals, including accountability and reconciliation.³¹

²⁶ See Kora Andrieu, “Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm,” *Security Dialogue* 41, no. 5 (2010): 541 (noting the “strong and persistent influence of legalism on transitional justice”); Bell, “Interdisciplinary,” 9 (discussing the broadening of the field to include disciplines beyond law); Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34, no. 4 (2007): 417 (criticizing the legalistic penchant of transitional justice and arguing that “legalism tends to foreclose questions from other complementary disciplines and perspectives which transitional lawyers should be both *asking* and *asked*”). See generally Wendy Lambourne, “Transitional Justice and Peacebuilding After Mass Violence,” *International Journal of Transitional Justice* 3, no. 1 (2009): 28 (calling for a revalorization of local and cultural approaches to justice and reconciliation).

²⁷ Chandra Sriram, Olga Martin-Ortega, Johanna Herman, “Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice,” JAD-PbP Working Paper Series No 1. (May 2009), 13 (discussing increasing linkages between transitional justice and a broader set of peacebuilding activities).

²⁸ McEvoy, “Beyond Legalism,” 412. For an argument that the “dilemmas” of transitional justice are not exceptional, but in fact resemble those of “ordinary justice,” see generally Eric A. Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Harvard Law Review* 117, no. 3 (2003): 761.

²⁹ See Teitel, “Transitional Justice in a New Era,” 894; Teitel, “Transitional Justice Genealogy,” 89-92.

³⁰ Leebaw, “Irreconcilable Goals,” 103, 106.

³¹ For example, according to a landmark UN report, transitional justice “comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking,

The most iconic mechanisms associated with transitional justice continue to be prosecutions and truth commissions.³² Beyond this, however, the field has broadened a great deal since the early 1990s to include a range of mechanisms and practices designed to encourage reconciliation and forms of accountability far short of a prison sentence. Thus, fostering community-level dialogue between former perpetrators and survivors of human rights abuses and the construction of public memorials to preserve memory of the conflict are as much a part of transitional justice as a prosecution before a war crimes tribunal. Despite new and innovative practices around the margins, however, “steady state” transitional justice is persistently criticized for being “top-down” and “one-size-fits-all,” rote application of a mere template to contexts and situations to which it is perhaps ill-suited.³³ It is perhaps to be expected that as transitional justice becomes mainstream, scholars and practitioners attempt to deconstruct the assumptions, constructed boundaries, limitations, and blindspots implicit in the template.³⁴

After several decades of evolution, transitional justice practice and policy is today stitched together from strands of overlapping and at times competing narratives. It is, at various times, a battle against impunity rooted in human rights discourse, a set of conflict resolutions techniques related to the formation of a new social and political compact in the wake of conflict, and a tool for international intervention and state building.³⁵ The multiplicity of narratives suggests an open-textured project subject to contest and reconceptualization. At the same time, many transitional justice narratives share a common denominator of being firmly grounded in neutral, technical, and apolitical vocabularies of human rights and the rule of law that have the potential to obscure the politics of the transitional justice project itself.³⁶ The decision to use the mechanisms associated with the transitional justice template—prosecutions, truth commissions, vetting and lustration, reform of abusive security institutions—and not other mechanisms, just like the decision to focus on abuses of civil and political rights and not economic and social rights is itself a political choice with important policy consequences that have implications for distributive justice in the postconflict context. The next Part explores the relationship between transitional justice and “economic violence,” a category that subsumes a wide range of issues rarely brought to the core of transitional justice work.

institutional reform, vetting and dismissals, or a combination thereof.” See United Nations Secretary-General, “The Rule of Law and Transitional Justice,” ¶ 8.

³² See Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?,” *International Journal of Transitional Justice* 2, no. 3 (2008): 315.

³³ See, e.g., Lundy and McGovern, “Whose Justice?,” 271 (criticizing the “one-size-fits-all” and “top-down” approaches to transitional justice).

³⁴ See Dustin Sharp, “Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice,” *Harvard Human Rights Journal* 26 (forthcoming, 2013).

³⁵ Bell, “Interdisciplinarity,” 13-15.

³⁶ McEvoy, “Beyond Legalism,” 420-21 (positing that “a crude characterization of human rights in contemporary transitional justice discourses would suggest that human rights talk lends itself to a ‘Western-centric’ and top-down focus; it self-presents (at least) as apolitical; [and] it includes a capacity to disconnect from the real political and social world of transition through a process of ‘magical legalism’”).

B. Transitional Justice and Economic Violence

As the Cold War recedes in time, conflicts across the globe are increasingly intrastate in nature, less fueled by a grand global ideological battle than by local struggles for resources and control of government.³⁷ The majority of these conflicts now take place in some of the poorest countries on earth. As the reports of media, human rights, and conflict resolution organizations vividly illustrate, societies emerging from civil war and other forms of conflict are often completely devastated: civilians have been killed and traumatized; critical infrastructure—from roads and the electric grid to schools and hospitals—has been destroyed; and key institutions of governance have been hollowed out by years of conflict, corruption, and mismanagement. Despite the best efforts of local and international communities to build peace in the wake of conflict, a significant number of these conflicts will reignite in the years following their apparent settlement.³⁸

Transitional justice and international prosecutions are, of course, global phenomena. Nevertheless, for a number of reasons, both political and economic, it seems likely that much of their application in the coming years will be in the poorer countries of the global south, particularly sub-Saharan Africa.³⁹ The causes of the conflicts that lead to calls for the application of transitional justice are multiple and complex, the full extent of which is beyond the scope of this chapter. While poverty and economic violence are only pieces of this larger conflict resolution puzzle, they remain important ones, central to conflict dynamics in many countries.⁴⁰ It is against this backdrop of poverty and the persistent failure to resolve violent conflict in so many parts of the world that greater engagement with questions of economic violence by transitional justice institutions should be considered today.

³⁷ This is not to minimize the legacies of colonialism and Cold War politics, or the role of the modern-day scramble for resources in shaping many conflicts in the developing world. Indeed, there has been a persistent failure of transitional justice mechanisms to account for the effects of “outside actors” on the course of conflict. See Hayner, *Unspeakable Truths*, 75–77. There are exceptions to this trend, however, including the work of truth commissions in Chad, Chile, El Salvador, and Guatemala.

³⁸ Paul Collier et al., *Breaking the Conflict Trap*, 155.

³⁹ Indeed, the sheer number of indictments emanating from the International Criminal Court involving African countries has generated significant controversy on the continent, leading in part to an African Union vote to halt cooperation with the Court with respect to the indictment of Sudan’s Omar al-Bashir. See BBC News, “African Union in Rift with Court,” July 3, 2009, <http://news.bbc.co.uk/2/hi/africa/8133925.stm>. Although countries such as China, Israel, Russia, and the United States also would likely benefit from the application of transitional justice practices, great-power politics and Security Council vetoes continue to make this appear less likely than in the smaller, poorer countries of the world.

⁴⁰ See Paul Collier et al., *Breaking the Conflict Trap*, 20–31, 53 (arguing that civil wars are more likely in low-income countries, have disastrous effects on poverty rates, and cause negative effects which persist well after formal cessation of hostilities).

i. *Economic Violence in Transitional Justice Practice*

Violent conflict devastates both lives and livelihoods, yet ways of understanding what constitutes “violence” and who counts as a “victim” vary a great deal. From the trials at Nuremberg to the international tribunals for the former Yugoslavia and Rwanda, to truth commissions in South Africa and elsewhere, the conception of violence implicit in most transitional justice initiatives has been an exceedingly narrow one. The overwhelming focus of most transitional justice interventions across time has been on accountability for physical violence—murder, rape, torture, disappearances—and violations of civil and political rights more generally.⁴¹ A broader conception of violence that would encompass often equally devastating forms of “economic violence”—including violations of economic and social rights, endemic corruption, and large-scale looting of natural resources such as oil, diamonds, and timber—has been largely absent.

To take a famous example, under the South African Truth and Reconciliation Commission (“TRC”) Act, the category of “victim” is limited to individuals who suffered gross violations of human rights, including killing, abduction, torture, or ill-treatment.⁴² The social, economic, and political system of apartheid, in many ways the very embodiment of the concept of structural violence, was largely treated as context to instances of egregious bodily harm that became the TRC’s principal focus. When viewed through this lens, the quotidian violence of poverty and racism, and the victims and beneficiaries of the apartheid system itself, receded into the background.⁴³ As we approach two decades since the end of white rule in South Africa, apartheid has ended, but the de facto economic and social status quo has not changed to the degree many would have hoped. Poverty, inequality, and crime remain high.⁴⁴ Although transitional justice has addressed horrific forms of violence in South Africa that took place under the apartheid system, it may have also had the perverse effect of obfuscating and legitimating other abuses of power, leaving many of those who benefitted most from the apartheid economic system comfortable in the status quo.

The “constructed invisibility” of economic concerns can have serious long-term effects, both in terms of our understanding of conflict itself and in terms of the remedies thought necessary to prevent recurrence.⁴⁵ As Zinaida Miller argues, pushing economic issues to the periphery of transitional justice concerns helps to shape a distorted and one-dimensional narrative of conflict in which economics and conflict can be neatly separated.⁴⁶ At best, economic issues become part of the context, helping to explain

⁴¹ See Nagy, “Transitional Justice as a Global Project,” 284.

⁴² See Pablo de Greiff, “Repairing the Past: Compensation for Victims of Human Rights Violations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 8.

⁴³ See Nagy, “Transitional Justice as a Global Project,” 284 (discussing the standardization of transitional justice).

⁴⁴ See Patrick Bond, “Reconciliation and Economic Reaction: Flaws in South Africa’s Elite Transition,” *International Affairs* 60, no. 1 (2006): 141.

⁴⁵ See Miller, “Effects of Invisibility,” 280-87.

⁴⁶ *Ibid.*, 268.

why the physical violence that is the focus of a truth commission's work may have occurred, but are of little further policy relevance. At worst, a truth commission's work may be almost completely decontextualized, presenting a diagnosis of human rights violations that is abstracted from reality and the dynamics of social power and conflict.⁴⁷

If the dynamics that produced massive human rights violations are poorly understood, creating a distorted narrative of conflict that relegates economic issues to the background, this may in turn limit and bias the range of policies imagined to be necessary in the wake of conflict. When conflicts are viewed through a one-dimensional lens, prevention of human rights abuses becomes a simplistic function of punishment and impunity. At the same time, the emphasis on physical violence and violations of civil and political rights more generally likely means that the issues of economic violence and inequality that may have in part helped to generate the conflict will go unaddressed by the various mechanisms of transitional justice. Thus, we are more likely to see a focus on prosecution of a handful of members of abusive security services, vetting and dismissals, and perhaps more general judicial and security sector reform rather than things like affirmative action, redistributive taxation, or land-tenure reform.⁴⁸

Even where the mechanisms of transitional justice have looked to economic violence as part of their work, the human toll of economic violence rarely receives equal treatment when it comes to the recommendations and policies that are articulated as part of the work of prevention and follow-up. For example, the Commission for Reception, Truth, and Reconciliation in East Timor actually documented violations of economic and social rights in some depth, yet when it came time to decide who was a "victim" for purposes of receiving reparations, the definition was limited to victims of violations of civil and political rights.⁴⁹ Whether justified under the banner of resource constraints or not, such practices have the effect of promoting hierarchies of rights and granting de facto impunity to the architects and authors of economic violence.

Where transitional justice mechanisms do grapple with the economic impacts of conflict and abusive governments, they rarely do so using a human rights paradigm, even though many of the abuses in question may constitute violations of international law.⁵⁰ Lisa Laplante, for example, explores how truth commissions in Guatemala and

⁴⁷ Lisa Laplante, "Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework," *International Journal of Transitional Justice* 2, no. 3 (2008): 337.

⁴⁸ See Arthur, "How 'Transitions' Reshaped Human Rights," 362.

⁴⁹ See Commission for Reception, Truth and Reconciliation in Timor Leste (CAVR), *Chega!, The Report of the Commission for Reception, Truth and Reconciliation in Timor Leste, Final Report* (2005), 40-41, 140-45.

⁵⁰ Beyond the International Covenant on Economic, Social and Cultural Rights, economic, social, and cultural rights have the status of binding law in a number of international human rights treaties. Examples include the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of Persons with Disabilities; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the European Social Charter; and the African Charter on Human and Peoples Rights.

Peru exposed decades of structural violence and other socioeconomic injustices as one of the causes of wars in their countries, but did not frame their analysis or recommendations in terms of violations of economic and social rights.⁵¹ While the work of these truth commissions is important in that it can help provide “a causal connection between violence and structural inequalities,” Laplante argues that the failure to help different constituencies understand that in many instances economic violence also constitutes a violation of economic and social rights deprived “national groups a powerful lobbying tool to challenge the government’s inaction or resistance.”⁵² Without rights-based scaffolding, subsequent development programs and other initiatives targeting inequality then become mere charity or government largesse rather than responses to concrete violations of international human rights law to which individuals are entitled. By framing instances of physical violence in terms of violations of rights, yet failing to do the same with respect to violations of economic and social rights, this approach further contributes to the conception that economic and social rights are not “real rights,” but mere aspirations.

ii. Understanding the Marginalization of Economic Violence in Transition

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

International human rights discourse and practice self-consciously wraps itself in an aura of impartiality and universality. It is part of an ostensibly apolitical project, and the rights contained in the core international covenants relating to both civil and political as well as economic and social rights are repeatedly said to be “indivisible,” as per the UN mantra.⁵³ In practice, the seeming consensus regarding universality and indivisibility masks a series of deep and abiding controversies and debates relating to the proper

⁵¹ See Laplante, “Transitional Justice and Peacebuilding,” 335; see also Lisa J. Laplante, “On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development,” *Yale Human Rights and Development Law Journal* 10 (2007): 148, 159-61 (providing a more detailed analysis of the work of the Peruvian truth commission).

⁵² Laplante, “Transitional Justice and Peacebuilding,” 350.

⁵³ See World Conference on Human Rights, June 14–25, 1993, “Vienna Declaration and Programme of Action,” UN Doc. A/CONF.157/23, July 12, 1993; see also United Nations General Assembly, Resolution 55/2, “Millennium Declaration,” UN Doc A/RES/55/ 2, Sept. 18, 2000.

place of economic and social rights under international law. The Cold War roots of this debate, which split the atom of the Universal Declaration of Human Rights into two separate covenants to be championed by competing world powers are well known and will not be rehearsed here in detail.⁵⁴ Key for current purposes is the fact that the ripple effects of the implied hierarchical distinction between so-called “first generation” and “second generation” rights continue to be felt many years after the Cold War’s end.

During much of the 1990s, the “formative years” for the field of transitional justice, even the world’s largest human rights organizations, Amnesty International and Human Rights Watch, were slow to include documentation of violations of economic and social rights in their work and did so only gradually. Although some of this reluctance has been attributed to “methodological difficulties,” it is also true that a number of high-profile activists of the time, including Aryeh Neier, were publically skeptical as to whether economic and social rights were “real,” and staunchly believed that civil and political rights should be the exclusive focus of human rights organizations such as Human Rights Watch.⁵⁵ One might add that the historic ambivalence towards economic and social rights within the human rights community mirrors a similar ambivalence within mainstream justice and criminal law about social justice more generally.⁵⁶ It is perhaps not surprising, therefore, that many of the lawyers drawn into the early human rights movement may have brought this ambivalence with them. As previously discussed, many transitional justice scholars and advocates were drawn from the human rights community of this period.⁵⁷

While the implicit hierarchies of rights created by decades of human rights practice are only slowly starting to unravel,⁵⁸ the backgrounding and foregrounding of

⁵⁴ See Arbour, “Economic and Social Justice,” 6 (discussing the Cold War roots of the current status of economic and social rights).

⁵⁵ See Kenneth Roth, “Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,” *Human Rights Quarterly* 26, no. 1 (2004): 64 (explaining the particular methodological challenges associated with trying to apply a “naming and shaming” documentation strategy to violations of economic and social rights); See generally Curt Goering, “Amnesty International and Economic, Social, and Cultural Rights,” in *Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations*, eds. Daniel Bell and Jean-Marc Coicaud (Cambridge: Cambridge University Press, 2006).

⁵⁶ See Arbour, *supra* note 5, at 5.

⁵⁷ See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 333.

⁵⁸ Human Rights Watch, for example, has in recent years published a number of reports looking at the linkages between natural resources, corruption, and violations of economic and social rights. See, e.g., Human Rights Watch, *Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria*, vol. 19, no. 2(A) (New York: Human Rights Watch, January 2007), 15-18, 40-53 (contending that the local government in Rivers State, Nigeria, has violated its duty to progressively realize rights to health and education through widespread and flagrant corruption and mismanagement of oil revenues); Human Rights Watch, *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*, vol. 16, no. 1(A) (New York: Human Rights Watch, January 2004), 57-59 (arguing that, due at least in part to mismanagement and corruption, the government of Angola has impeded Angolans’ ability to enjoy their economic, social, and cultural

economic and social rights and civil and political rights in many ways mirror broader trends in human rights discourse and practice, which were also imported into transitional justice work. The following chart summarizes the various historic dichotomies and oppositions that have been broadly reflected in both human rights discourse and practice and in transitional justice policy and practice.⁵⁹

Set in the Foreground	Set in the Background
civil and political rights	economic and social rights
the public	the private
the state, the individual	the community, group, corporation
the legal	the political
the secular	the religious
the international	the local
the modern	the traditional
form, process, participation, procedure	substance
formal, institutional enforcement	informal, cultural, social enforcement

Critical literature in both transitional justice and human rights has attempted to bring elements of the background into the foreground of thinking and policy. Thus, one persistent trope in the critique of mainstream transitional justice is the need to re-emphasize local rather than international agency, and local cultural traditions of justice and reconciliation rather than Western and international approaches.⁶⁰ Similarly, there is a critique of the more technocratic and legalistic bent of mainstream transitional justice, and an effort to underscore the importance of considering local political contexts as well as the political and distributional consequences of certain approaches.⁶¹ In this way, one

rights, including healthcare and education, in violation of the government's own commitments and human rights treaties to which it is a party). This is in stark contrast to their work in the previous decade when violations of economic and social rights would only be examined to the extent that they were associated with violations of civil and political rights such as racial or gender-based discrimination.

⁵⁹ While in some ways a gross oversimplification, the implicit politics of human rights discourse and practice that is embedded in these oppositions has long been the subject of criticism. See, e.g., David Kennedy, "The International Human Rights Movement: Part of the Problem?," *Harvard Human Rights Journal* 15 (2002): 109-10 (discussing the foregrounding and backgrounding of human rights discourse); Makau Wa Mutua, "The Ideology of Human Rights," *Virginia Journal of International Law* 36, no. 3 (1996) 604-07 (criticizing the peripheral nature of economic and social rights and local and traditional approaches to justice under the mainstream Western approach to human rights thinking and practice).

⁶⁰ For a review of some of the debates regarding the incorporation of local justice mechanisms into transitional justice initiatives, see generally Roger Duthie, "Local Justice and Reintegration Processes as Complements to Transitional Justice and DDR," in *Disarming the Past: Transitional Justice and Ex-Combatants*, eds. Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf (New York: Social Science Research Council, 2009), 228.

⁶¹ See, e.g., Lundy and McGovern, "Whose Justice?," 273-74; McEvoy, "Beyond Legalism," 417-18.

might situate the emerging critique of the “constructed invisibility” of economic concerns within transitional justice as part of a wider project of resistance to mainstream transitional justice.⁶²

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

Because transition can also suggest a particular destination, it may dictate in part the exceptional measures necessary to reach the intended goal. Not only does the diagnosis affect the prescribed remedy, but our very notion of what it means to be healthy also helps determine the course or treatment. Thus, Paige Arthur queries, how might the transitional justice “toolbox” look different if the paradigmatic transitions in the 1990s were considered to be transitions to socialism rather than transitions to democracy, and largely Western forms of democracy at that?⁶³ Might there have been a greater emphasis on issues of distributive justice, including the need for progressive taxation in countries experiencing radical inequality, land-tenure reform in countries where land-based conflict has been a driver of violence, and affirmative action in countries with historically-marginalized classes? While one can only speculate, what can be said is that the notion of transition as transition to liberal Western democracy surely had a limiting and narrowing effect on the “toolbox” that exists today.

iii. Potential Objections to Greater Focus on Economic Violence in Transition

Putting these historical constructions and limitations aside, even while greater emphasis on issues of economic violence within the transitional justice agenda seems necessary, striking a better balance between physical and economic violence also raises difficult questions that have yet to be worked out at the levels of theory, policy, and practice. For example, while some would find unobjectionable the idea that transitional justice mechanisms should include in their ambit economic and social rights violations that took place during the conflict itself—a group of rebels stealing food from a village, for

⁶² For a much more detailed exploration of this point, see Dustin Sharp, “Interrogating the Peripheries.”

⁶³ See Arthur, “How ‘Transitions’ Reshaped Human Rights,” 359.

example, in violation of the laws of war, or a warlord who sold off diamonds and timber to buy weapons—should we also include broader distributive justice and structural violence issues that predate the conflict, and which may have, in part, helped to precipitate it?

We might characterize these two approaches as broad and narrow means of addressing economic violence in the transitional justice context. Taking a relatively narrow approach and looking only at the economic violence perpetrated during the conflict itself might prove to be relatively uncontroversial. Suppose, however, that in a given country there is an attempt during a transitional period to address some of the deeper legacies of abusive systems of governance, such as income inequality, the need for deeply redistributive taxation, and wide-scale land-tenure reform. Such was arguably the case in South Africa at the end of apartheid, yet it is also recognized that leaving the economic status quo largely intact was one of the “bargains” struck and the price paid for a bloodless transition.⁶⁴ While some have argued that addressing economic legacies of conflict in transition might in fact enlist more support from the general population and therefore be even more feasible than seeking accountability for violations of civil and political rights, this does not account for the role of elites.⁶⁵ A group of elites might be willing to see a handful of army officers or warlords prosecuted, but attempting radical revision of the political and economic status quo that has existed for decades might be another story. In the end, many transitions depend in some measure on the “buy-in,” or at least on the lack of resistance on the part of elite constituencies. Thus, relatively robust or broad approaches to addressing historical economic violence might create the possibility of backlash, re-animating the “peace versus justice” debate along economic lines.

While more thinking and research would be needed to predict the potential for backlash based on configurations of elites and their role in the transition itself, it should be noted that the risk of a hostile and possibly even violent response is not a dilemma unique to addressing economic violence in transition. Indeed, much has already been said about how the parameters of transition justice may be shaped by the extent to which elites and perpetrator groups dictate the terms of the transition.⁶⁶ One might note, however, that in those few instances where truth commissions have made recommendations related to addressing socioeconomic inequalities, those recommendations tend to be ignored by policy makers.⁶⁷ This may be a more likely outcome than backlash, though if framed properly, such recommendations might

⁶⁴ See Bell, “Interdisciplinarity,” 14.

⁶⁵ See Roger Duthie, “Toward a Development-Sensitive Approach to Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 307.

⁶⁶ See, e.g., Huntington, “The Third Wave,” 65-81; O’Donnell and Schmitter, “Transitions from Authoritarian Rule,” 57-64.

⁶⁷ See, e.g., Laplante, “Transitional Justice and Peacebuilding,” 350 (discussing how the Guatemalan government largely ignored key recommendations of the Guatemalan Commission on Historical Clarification, including a progressive tax system and increased state spending on human necessities).

nevertheless serve as a strong lobbying platform for civil society actors who wish to press for reforms.⁶⁸

Beyond the potential for backlash, one of the most frequently noted objections relates to the additional cost and complexity that would stem from an expansion of the mandates of transitional justice mechanisms to include economic violence.⁶⁹ It is a fact widely noted that the costs of even a narrow approach to transitional justice, particularly prosecutions, can be enormous, especially at a time when most governments, reeling from the effects of conflict, have little money to spare.⁷⁰ Compounding the cost issue is the risk of expanding the mandate of truth commissions and other transitional justice mechanisms so broadly that it will be nearly impossible to fulfill in the limited time typically allotted.⁷¹ It would seem sensible to question whether this is really the context for trying to grapple with “broad-based development or distributive justice policies that aim to redress widespread violations of the economic and social rights of poor citizens.”⁷² But while the cost and time issues are far from specious, it should be noted that many transitional justice mechanisms are already funded in part by outside actors.⁷³ It is quite possible that measures to address economic violence in the transitional justice context would find support from complementary constituencies, particularly insofar as they touch upon questions of national economic development. Some have also argued that attempting to recoup money lost to economic violence in the form of embezzlement and corruption could be one way to help fund transitional justice initiatives focusing on economic issues.⁷⁴

There are also broader concerns associated with the dilution of the transitional justice enterprise.⁷⁵ If one were to take a robust or broad approach to legacies of economic violence in times of transition, shifting the paradigm from transition to what some have called “transformation,” at what point does this better suit the work and expertise of traditional economic development actors and longer-term political and social processes?⁷⁶ Seeking accountability for violations of physical integrity alone has been a monumental task, but over several decades, this work has made an impact on the

⁶⁸ *Ibid.*, 333-34, 350.

⁶⁹ See Rama Mani, “Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development,” *International Journal of Transitional Justice* 2, no. 3 (2008): 256 (discussing the problems with the high cost of transitional justice measures in development).

⁷⁰ *Ibid.*

⁷¹ See Duthie, “Toward a Development-Sensitive Approach,” 306-07.

⁷² *Ibid.*, 299.

⁷³ *Ibid.*, 302-03.

⁷⁴ See Carranza, “Plunder and Pain,” 324-25.

⁷⁵ For a powerful articulation of some of these concerns, see generally Lars Waldorf, “Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,” *Social and Legal Studies* 21 (2012): 171-86.

⁷⁶ See Lambourne, “Transitional Justice and Peacebuilding,” 46 (advocating a “transformative” justice model of transitional justice); see also Laplante, “Transitional Justice and Peacebuilding,” 332 (arguing that truth commissions might contribute to longer-term processes of political and economic transformation).

normative and institutional global landscape.⁷⁷ That is no small achievement, and trying to do too much could risk even the modest change that has been achieved. As Naomi Roht-Arriaza has argued, “broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.”⁷⁸

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

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

C. Transitional Justice, Peace, and Peacebuilding

In the context of transitional justice debates, the concept of “peace” has at times been mobilized as one of resistance to the advance of particular transitional justice mechanisms and policies.⁷⁹ This is manifest most clearly in the so-called “peace versus justice” debate, in which some form of transitional justice, typically a prosecution, is

⁷⁷ See Naomi Roht-Arriaza, “The New Landscape of Transitional Justice,” in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 1-8. See generally Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton and Co., 2011) (discussing accountability in the context of prosecutions for human rights abuses).

⁷⁸ *Ibid.*, 2.

⁷⁹ See, e.g., Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (New York, Frank Cass, 2004).

imagined to stymie or preclude chances for a negotiated peace agreement.⁸⁰ The debate also arises when it comes to the choice as among different elements of the transitional justice “tool box,” including whether to have prosecutions or a truth commission and whether to have international prosecutions or mechanisms of accountability rooted in local tradition and custom.⁸¹ While there are an increasing number of concrete examples in which prosecutions have arguably advanced the cause of peace, and while the UN has officially embraced the notion that peace and justice are mutually complementary, the “peace versus justice” debate has proved to be an enduring one, resurfacing most recently in International Criminal Court indictments of Omar al-Bashir of Sudan and Joseph Kony of the Lord’s Resistance Army in Uganda.⁸²

The concept of peace is not part of the daily working vocabulary of many lawyers and human rights advocates who comprise the communities that provided the initial intellectual capital to the transitional justice enterprise, and few transitional justice scholars today situate their work in the context of peace or peacebuilding.⁸³ Nevertheless, the notion of peace is perhaps no more or less nebulous than the concepts of “justice,” “accountability,” “reconciliation,” and the “rule of law” that typically pepper transitional justice discourse. Although rarely defined as such, the concept of peace that is put in opposition to justice in the context of the “peace versus justice”

⁸⁰ As an example of this phenomenon, in 2003, the then chairman of the Economic Community of West African States, President John Kufuor of Ghana, urged the UN to set aside the indictment of Charles Taylor by the Special Court for Sierra Leone on the grounds that it was necessary to facilitate a negotiated settlement to Liberia’s civil war. See IRIN Humanitarian News and Analysis, “*Liberia: ECOWAS Chairman Urges UN to Lift Taylor Indictment*,” June 30, 2003.

⁸¹ Increasingly, there is a recognition that no one mechanism of transitional justice can hope to fulfill the many aspirations ascribed to it, and multiple overlapping mechanisms are thought to be necessary. For an exploration of the “truth versus justice” debate, see generally Miriam Aukerman, “Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal* 15 (2002): 39; Reed Brody, “Justice: The First Casualty of Truth?,” *The Nation*, April 30, 2001, 25. For an argument that international prosecutions can subvert local judicial and reconciliation practices while unwittingly playing into national-level politics, see generally Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics and International Affairs* 21, no. 2 (2007): 179.

⁸² See, e.g., United Nations Secretary-General, “The Rule of Law and Transitional Justice,” 1 (positing that “[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives”); Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice* (Geneva: Centre for Humanitarian Dialogue, November 2007), 8-9 (arguing that the indictment of Charles Taylor advanced the peace process in Liberia, even though it was criticized at the time as potentially undermining peace negotiations); Louise Arbour, “Justice v. Politics,” *The New York Times*, Sept. 16, 2008. (justifying her decision to indict Slobodan Milošević by showing that it ultimately advanced the cause of peace, even though it was criticized at the time for threatening the peace process).

⁸³ Andrieu, “Civilizing Peacebuilding,” 539 (noting that “few transitional justice scholars have yet situated their research in the context of peacebuilding, seeing it instead through the dominant lens of legalism and human rights”); see Lambourne, “Transitional Justice and Peacebuilding,” 29 (noting that “few researchers have analysed the relationship between justice, reconciliation and peacebuilding”).

debate is typically that of “negative peace,” meaning the absence of direct physical violence.⁸⁴ Thus, if the threat of prosecution is feared to prevent a group of rebels from signing a peace agreement, and the guns may keep firing, justice could be said to undermine (negative) peace.⁸⁵ A similarly narrow view of peace can be found when Ruti Teitel expresses the fear that as transitional justice mechanisms become increasingly associated with nation building, they will give up on the “ambitious goals of establishing the rule of law and democracy” in favor of the more modest aims of “maintaining peace and stability.”⁸⁶

The notion of negative peace that has often been employed in transitional justice discourse and debates is a much narrower concept of peace than the notion of positive peace discussed in this chapter, which involves not just the silence of AK-47s and the absence of the direct violence of hot conflict, but also the absence of more indirect forms of violence, including forms of structural violence such as poverty, corruption, radical economic, social, civil, and political inequalities, and other forms of social injustice.⁸⁷ Positive peace may well embrace, but is broader than, many of the traditional goals of transitional justice, including establishing democracy and building the rule of law. After all, there are many modern democracies in which the rule of law is firmly established that nevertheless manifest high levels of poverty and other forms of structural violence.

Without making use of the term, transitional justice advocates often seem to assume that accountability will lead to a type of positive peace.⁸⁸ Thus, for example, the concept of peace might be marshaled by the advocates for transitional justice as part of an argument that a potential amnesty agreement will not secure “lasting peace” or that the particular type of justice to be meted out by transitional justice mechanisms is necessary to “long-term peace.” It is perhaps then assumed that the transition that is set in motion will allow the type of social and economic development that may lead to positive peace. As Alexander Boraine has argued, “[t]he overall aim [of transitional justice] should be to ensure a sustainable peace, which will encourage and make possible social and economic development.”⁸⁹ More typically, however, transitional justice advocates debate issues of amnesty and prosecutions in a more legalistic idiom, asking, for example, whether there is a duty to prosecute under international law, or

⁸⁴ See Galtung, “Violence,” 167; Lambourne, “Transitional Justice and Peacebuilding,” 34.

⁸⁵ See, e.g., Jeffrey Gettleman and Alexis Okeowo, “Warlord’s Absence Derails Another Peace Effort in Uganda,” *The New York Times*, Apr. 12, 2008 (discussing the refusal of Joseph Kony, leader of a rebel group known as the Lord’s Resistance Army that is responsible for widespread human rights abuses in Uganda and neighboring countries, to attend peace negotiations due in part to indictments from the International Criminal Court).

⁸⁶ Teitel, “Transitional Justice in a New Era,” 898.

⁸⁷ See generally Galtung, “Violence,” 167 (discussing different constructions of “positive peace” and “negative peace”).

⁸⁸ See Alexander Boraine, “Transitional Justice: A Holistic Interpretation,” *Journal of International Affairs* 60, no. 1 (2006): 26.

⁸⁹ *Ibid.*

whether amnesties are compatible with international law.⁹⁰ In these discussions, broader notions of peace are often relatively absent.

i. International Peacebuilding

The concept of positive peace overlaps but is not synonymous with the evolving concept and field of peacebuilding. At the international institutional level,⁹¹ the field and practice of peacebuilding in the postconflict context evolved out of the much more limited peacekeeping operations of the Cold War in which neutrality, consent, and minimum force were considered paramount (often referred to as “first-generation” peace keeping).⁹² With the end of the Cold War, these limited operations soon gave way to more complex and multidimensional initiatives in which the UN was called upon to address underlying economic, social, cultural, and humanitarian problems inextricably linked with local politics. The seemingly inevitable involvement in increasingly complex postconflict initiatives culminated in the 2005 creation of the United Nations Peacebuilding Commission, which has been tasked with facilitating integrated approaches to postconflict reconstruction throughout the UN system and beyond.

The term “peacebuilding” was not defined as part of the Peacebuilding Commission’s creation, but has continued to evolve along with emerging policy and practice. According to a working definition adopted by the UN Secretary-General’s Policy Committee in 2007, it “involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development.”⁹³ Despite the apparent breadth of this working definition, at the level of major international institutions, including the UN and multi- and bi-lateral donors, peacebuilding today typically consists of a more-or-less standardized package of initiatives that include demobilization, disarmament, reintegration, security sector reform, broader “rule of law” initiatives, elections, and, increasingly, the various mechanisms of

⁹⁰ See generally Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100, no. 8 (1991): 2537 (discussing the duty to prosecute or grant amnesty under international law).

⁹¹ I distinguish here between what I am calling peacebuilding at the “international institutional level,” which emanates from the United Nations and other international institutions, and the various types of interpersonal, community-level, and “track-two” peacebuilding that are done by individuals, religious groups, and NGOs.

⁹² Some refer to three different generations of peace keeping, which evolved in quick succession in the early 1990s. See, e.g., Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), 238. Others, such as Roland Paris, distinguish between “traditional peace keeping” and “peace operations.” See Roland Paris, “Peacekeeping and the Constraints of Global Culture,” *European Journal of International Relations* 9, no. 3 (2003): 448-50.

⁹³ United Nations Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (New York: United Nations, 2008), 18.

transitional justice.⁹⁴ In this way, transitional justice initiatives have become a routine part of the “postconflict checklist” that is associated with liberal international peacebuilding.⁹⁵

ii. Using a Positive-Peace Paradigm

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

Anchoring the field of transitional justice in the concept of positive peace could potentially have at least three positive effects. First, it would likely broaden the approach from a relatively narrow and legalistic one focused on physical violence and civil and political rights to one that would also grapple, where appropriate, with questions relating to legacies of economic violence. Second, as the achievement of positive peace is a long-term endeavor, the notion of justice for positive peace implies preventative strategies that look beyond the confines of an unspecified political transition. In doing so, transitional justice mechanisms may be conceptualized more holistically and implemented in ways that build synergies with broader development and peacebuilding initiatives associated with postconflict reconstruction.⁹⁶

Third, the notion of justice for positive peace suggests that the determination of the modalities and mechanisms of transitional justice should be grounded in a context-based inquiry into the particular roots and drivers of the conflict in question. This stands in contrast to a package of mechanisms drawn from a toolbox of “best practices” with some sort of predetermined political endpoint, be it elections or democracy, or based on a more abstract set of deontological goals, including accountability and just deserts. Best practices, packages, and toolboxes in one country might have little relevance to building positive peace in another. For example, Paige Arthur has speculated that while many of the dominant themes and responses to violence of mainstream transitional justice

⁹⁴ See Nagy, “Transitional Justice as a Global Project,” 280 (noting various transitional justice initiatives associated with peacebuilding).

⁹⁵ See Andrieu, “Civilizing Peacebuilding,” 538 (describing how transitional justice has become “an apparatus within the wider peacebuilding ‘package’”); Sriram, “Justice as Peace?,” 585 (arguing that “responses to recent mass atrocities or human rights abuses are now an integral part of peacebuilding by bilateral donors, regional organisations, and international institutions such as the United Nations and the World Bank”).

⁹⁶ For a more detailed look at potential connections between transitional justice and development, see *generally* Duthie, “Transitional Justice, Development, and Economic Violence”; Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

evolved out of the Latin American experience, these responses might not be optimal for countries with “different histories, cultures, and positions within the world economy.”⁹⁷ Many countries in Africa with a history of neopatrimonial government, corruption, and very weak state institutions might need to focus on a different set of issues through a different set of mechanisms.⁹⁸ Focusing on positive peace as the ultimate goal of the mechanisms of transitional justice could be one way to refocus attention on the context-specific interventions needed to move in that direction.

A paradigm shift in the direction of positive peace would not dictate a broad or narrow approach to economic violence in transition, or even ensure that economic violence would be addressed at all. As with all transitional justice mechanisms and modalities, the needs and limits of the context would have to be considered. Depending on the context, addressing economic violence might not always be necessary, or even desirable. As Chandra Lekha Sriram argues, simply presuming that more justice necessarily generates or equates to more peace is potentially problematic.⁹⁹ This presumption should be avoided with respect to both mainstream transitional justice and a more holistic form of traditional justice that would also grapple with legacies of economic violence.

iii. The Critique of Liberal International Peacebuilding

In attempting to ground the field of transitional justice in a paradigm of positive peace, it is important to be wary of limiting constructions in which the notion of positive peace would simply be reshaped to fit and support existing practices and paradigms. Despite the potentially expansive nature of the field and concept of peacebuilding as discussed above, a trenchant critique has been that actual peacebuilding practice, if not theory as well, tends to reflect a paradigm of liberal internationalism in which faith in market economies and Western-style liberal democracy is conceived as the unique pathway to peace.¹⁰⁰ Because many developing countries have little experience with democracy, the emphasis on elections, democracy, and free markets associated with the typical package of postconflict peacebuilding interventions can be both dangerous and destabilizing.¹⁰¹ In a number of ways, the critique of liberal international peacebuilding parallels the critique of mainstreamed transitional justice, in which the transition is implicitly conceived of as a transition to Western liberal democracy and elements of economic violence and social justice are moved to the periphery.¹⁰²

These historic constructions of the fields of transitional justice and peacebuilding illustrate how the concepts of peace, peacebuilding, and justice can be marshaled in

⁹⁷ Arthur, “How ‘Transitions’ Reshaped Human Rights,” 360.

⁹⁸ *Ibid.*, 361.

⁹⁹ Sriram, “Justice as Peace?,” 580.

¹⁰⁰ See Paris, “Peacebuilding and the Limits,” 56; see also Sriram, “Justice as Peace?,” 580.

¹⁰¹ For this reason, Roland Paris advocates what he calls “institutionalization before liberalization,” which would prioritize strengthening institutions and regulations before any rush to elections. See Paris, “Peacebuilding and the Limits,” 57-58.

¹⁰² For a more elaborate discussion of this point, see generally Sriram, “Justice as Peace?,” 579.

ways that are both limiting and expansive; ways that can empower but also can obfuscate hierarchies of power and further perpetuate inequalities. Thus, any attempt to build the notion of transitional justice as transition to positive peace requires special attentiveness to these dynamics. Nevertheless, one might argue that the benefit of the positive-peace paradigm is not that it offers a concrete goal that is any more precise or less subject to being co-opted than “justice,” “democracy,” “reconciliation,” or the “rule of law.” In the end, these may all be “essentially contested concepts.”¹⁰³ At the same time, because the very core import of the concept of positive peace calls upon one to attend to a broader set of concerns than has historically been the practice of both liberal international peacebuilding and mainstreamed transitional justice, it may offer a better starting point than existing paradigms.

D. Conclusion

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

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

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

¹⁰³ Bell, “Interdisciplinarity,” 27.