
Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice

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Abstract¹

This article argues that the field of transitional justice – in both its institutional and scholarly aspects – has historically excluded issues of economic inequality, structural violence, redistribution and development. It seeks to combine a conceptual critique with concrete institutional examples in an effort both to highlight the theory/practice relationship within the field and to anchor theoretical claims in particular examples. The first part of the article briefly describes the chronological and regional iterations of transitional justice in light of its nature as a global enterprise. The second part of the article examines the constructed invisibility of economic questions in the literature and institutions, suggesting that exclusion derives from particular patterns: ignoring the issues altogether, treating inequality or structural violence as contextual background rather than central issues in transition, or reducing economic concerns to a narrowed discussion of reparations. The final section outlines three possible costs of economic invisibility: (1) an incomplete understanding of the origins of conflict; (2) an inability to imagine structural change due to a focus on reparations; and (3) the possibility of renewed violence due to a failure to address the role of inequality in conflict.

Introduction

Recent decades have brought with them not just dramatic changes in global and national political and economic arrangements but also a set of mechanisms that claim the ability to help states make the leap from one regime to another: the instruments of transitional justice. Both practical tools and a discursive project, transitional justice mechanisms simultaneously construct and are constituted by new regimes in the aftermath of significant social change. Trials, truth commissions and other transitional ‘tools’ are utilized explicitly to enforce the norms of a new liberal state (the rule of law, the defeat of impunity, the strengthening of democratic institutions) and to memorialize a violent past in the service of creating a peaceful future.

Transitional justice as both literature and practice offers more than just a set of neutral instruments for the achievement of the goals of justice, truth and reconciliation. It also serves to narrate conflict and peace, voice and silence, tolerable

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structural violence and intolerable physical atrocity. Ultimately, transitional justice is a definitional project, explaining who has been silenced by delineating who may now speak, describing past violence by deciding what and who will be punished and radically differentiating a new regime in relation to what actions were taken by its predecessor. Despite its claims to exposure, revelation and memorialization, the project of transitional justice may simultaneously perpetuate invisibility and silence. The literature, institutions and international enterprise of transitional justice historically have failed to recognize the full importance of structural violence,² inequality and economic (re)distribution to conflict, its resolution, transition itself and processes of truth or justice seeking and reconciliation.

Three areas of economic concern to 'transitional' or postconflict societies need to be examined from a semichronological perspective: (1) the economic roots and consequences of the conflict that transitional justice institutions seek to narrate, prosecute and overcome; (2) the economic liberalization that accompanies political transition in many transitional contexts, often constituting a lack of significant socioeconomic redistribution of resources in the postconflict state; and (3) the connected development plans of the new government for the future. None of these issues historically have been given adequate attention in the transitional justice institutions and literature, although each has been tentatively addressed in certain contexts and by particular scholars.

The reason might be that none appears self-evidently related to transitional justice. An argument might be made that each category is in some sense beyond the literal mandate or conceptual apparatus of the field, and that to include past economic repression, a present without redistribution or a future inability to overcome longstanding national inequality would dilute the purposes and possible achievements of transitional justice institutions. Surely, it is impossible for transitional instruments to cope with both the prosecution and memorialization of mass atrocities and the complicated business of redistributing wealth or creating a development plan for the new dispensation. Implicit within this argument, however, is the assumption that the instruments, and their inclusion or exclusion of economic considerations, have no practical effect on the questions of inequality, redistribution or development. While this line of argumentation may not go so far as to assume apolitical justice mechanisms (although the increased legalism of transitional justice can bring with it an assumption of neutral technocratic institutions), it does ignore the distributional effects of the instruments themselves. To effect a binary separation between the economic and justice realms by barring

² Johan Galtung, 'Violence, Peace, and Peace Research,' *Journal of Peace Research* 6(3) (1969): 167–191. Although some scholars have asserted that the term 'structural violence' may be so broad as to be both conceptually and empirically indeterminate (see, for example, Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004)), its relevance in this case derives from its ability to draw 'our attention to unequal life changes, usually caused by great inequality, injustice, discrimination, exclusion, and needlessly limiting people's physical, social, and psychological wellbeing.' Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (West Hartford, CT: Kumarian Press, 1998), 105.

discussion of the former in the latter reveals a particular politics practiced in the constitution of the new posttransition state.

In an effort to better understand the historical exclusion of economic questions from the field, as well as to outline the costs of omission, this article outlines some methods by which attention to the economic dimensions of conflict and transition has been suppressed and offers a list of some of the stakes involved. In doing so, it seeks to combine a conceptual critique with concrete institutional examples in an effort both to highlight the theory-practice relationship within the field and to anchor its theoretical claims in particular examples. The first part of the article briefly describes the chronological and regional iterations of transitional justice in light of its nature as a global enterprise. The second part examines the constructed invisibility of economic questions in the literature and institutions. The third part outlines possible costs of this invisibility.

Transitional justice mechanisms define key issues related to the past which must be resolved. By leaving economic development, issues of resource distribution or inequality of power or wealth to separate courts or to executive control, transitional justice institutions implicitly tell society that development and conflict may be separated in a fair fashion and that inequality itself is not to be prosecuted or amnestied. In one sense, this might simply echo the limitations of human rights discourse more generally, in which questions of socioeconomic rights are consistently underplayed while those of civil and political rights are emphasized, or where redistribution is generally backgrounded for the sake of punishing clearly defined crimes under a standard of individual accountability.

The effects have a deeper reach than simply a repetition of the problems of human rights. Both conflict and transition are entrenched as stories of political and legal change and of physical violence rather than as tales of economic liberalization or structural violence. The mandate of a commission or the list of crimes to be tried at a court means that, to some degree, the decision about what story to tell is predetermined, as is the manner of addressing the conflict (and sustainably resolving it for the future). Although a government may separately pursue development options, the redistribution of land or other plans for economic change, the argument here is that the divorce of those strategies from transitional justice mechanisms allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based. It suggests that inequality is a question of time or development rather than the entrenched ideology of elites, as well as that the need to memorialize the past does not require the narration of past economic oppression.

Transitional Justice: a Global Enterprise

In order to comprehend the literature on transitional justice, we must first interrogate the terminology used to define the diffuse field it describes. The notion of transitional justice is attached alternately to a definition of periods of state

transition and to a common list of institutions. As Chandra Sriram states:

The study and practice of transitional justice analyzes policy choices made by regimes emerging from armed conflict and/or authoritarian rule with regard to accountability for past abuses, stability, reform, and democratization.³

Scholars have defined and classified the transitional justice field in three primary ways: (1) through its tools, instruments and institutions;⁴ (2) through a chronological assessment of either institutional development or the scholarship on the field;⁵ and (3) by elucidating versions of regime change that lead to an enactment of transitional justice.⁶

On the operational level, transitional justice has come to be associated with a series of institutional approaches to investigating or addressing the downfall of one regime and the ascendance of the next, namely international or national trials, truth commissions (or other truth-seeking mechanisms), reparations and lustration/administrative purges.⁷ Some scholars include constitution making in a new democracy in the transitional legal effort; others add the relatively recent practice of transnational litigation.⁸ In certain areas, 'local' justice or reconciliation tools have been employed, such as Gacaca in Rwanda and *mato oput* in northern Uganda. In a growing number of cases, different mechanisms are utilized in tandem. Because reparations usually are linked to another of the mechanisms described, whether ordered by a court or recommended by a commission, they will be discussed in detail below as a tool deployed by the institutions to address economic factors in conflict.

Another way the literature describes the scope of transitional justice is through a chronological description of the field's institutional and/or scholarly development. Most of the literature locates the beginning of transitional justice (and often the commencement of the human rights movement) in the post-Second World War Nuremberg and Tokyo military tribunals set up by the victorious Allies.⁹ Ruti Teitel offers a useful three-phase paradigm for understanding the historical evolution of

³ Chandra Lekha Sriram, 'Transitional Justice Comes of Age: Enduring Lessons and Challenges,' *Berkeley Journal of International Law* 23(2) (2005): 506.

⁴ Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2002); Aeyal M. Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel,' *Stanford Journal of International Law* 40(1) (2004): 47–104.

⁵ See, for example, Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice,' *Human Rights Quarterly* 30(1) (2008): 95–118.

⁶ See, for example, Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004).

⁷ See, for example, Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001); Teitel, *supra* n 4; Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Atrocity* (Boston: Beacon Press, 1998); Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vols. I–III (Washington, DC: United States Institute of Peace Press, 1995); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Jersey: Transaction Publishers, 1999).

⁸ Naomi Roht-Arriaza, *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

⁹ In a departure from this structure, both Jon Elster and Gary Bass place transitional justice in a broader historical framework. Elster, *supra* n 6; Bass, *supra* n 7.

transitional justice in practice: a first phase beginning in 1945, a second phase in the last quarter of the 20th century, as the Soviet Union collapsed and Latin America and Eastern Europe underwent extraordinary shifts in political and economic arrangements, and a third contemporary phase in which transitional justice ‘moves from the exception to the norm.’¹⁰

In the vast majority of cases, transition occurs in conjunction with a project of economic and/or political liberalization.¹¹ In one vivid depiction, transitional justice describes ‘a universe of options for the transformation of society from a killing machine to a humane government firmly embracing the rule of law.’¹² Thus, the manner of transition, the shape of the new and old regimes and the relative continuing power of the past government heavily influence the formulation of transitional justice institutions. None of these factors, however, undermines the general conception of transition itself, which retains its centrality in defining the need for such mechanisms. The reliance on ‘transition’ as a moment of discontinuity and rupture generally means that chronological parameters for past, present and future are set by transitional institutions themselves. Physical violence of a particular type or the suppression of expression in a specific manner becomes the mark of the old regime, and its end becomes the definition of the new. The choice of mechanism, therefore, matters less in this context than the commonality among the institutions in defining what has gone before and what will come after the mechanism finishes its work, marking the end of transition.

Teitel argues that the third phase – the contemporary moment – marks the ‘expansion and normalization of transitional justice.’¹³ Similarly, Kieran McEvoy notes that transitional justice has become ‘normal, institutionalized and mainstreamed.’¹⁴ The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1995, as well as the ratification of the Rome Statute, which opened the International Criminal Court (ICC) in The Hague, have entrenched transitional justice mechanisms as expected responses to ongoing global violence.

¹⁰ Ruti Teitel, ‘Transitional Justice Genealogy,’ *Harvard Human Rights Journal* 16 (2003): 71–72.

¹¹ Some authors deliberately have defined transitional justice in a way that might remove the association with liberalization. See, for example, Naomi Roht-Arriaza and Javier Mariezcurrena, ed., *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006). However, the overarching framework of individual rights discourse, the pressure to establish the rule of law and the frequency of transition to a market economy accompanying political transition make the separation between transitional justice and liberalism difficult to prove. As a country study, Rwanda defies in certain ways the linkage to liberalization. It represents one of the most dramatic examples of rupture and transition, including both civil war and genocide and ending with a complete overthrow of one regime by another. Most observers today, however, describe the current government as neither liberal nor democratic. See, Front Line Rwanda, *Disappearances, Arrests, Threats, Intimidation, Co-optation of Human Rights Defenders, 2001–2004* (Dublin: Front Line, 2005). See also, Amnesty International, *World Report: Rwanda* (London: Amnesty International, 2006).

¹² David J. Scheffer, ‘The Tool Box, Past and Present, of Justice and Reconciliation for Atrocities,’ *American Journal of International Law* 95(4) (2001): 970.

¹³ Teitel, *supra* n 10 at 89.

¹⁴ Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,’ *Journal of Law and Society* 34(4) (2007): 412.

As Rosemary Nagy has noted, contemporary transitional justice has become a 'global project,' in which the question has become 'not *whether* something should be done after atrocity but *how* it should be done.'¹⁵ Transitional justice operates through the actions of a series of groups: policy makers who plan and implement the institutions; victim groups defined by commissions or courts; the larger citizenry implicated, but not named, by a final report or court decision; scholars who write the literature about specific country contexts or the phenomenon in general; and practitioners who work for nongovernmental organizations (NGOs) that consult on the possible manner of transition. Although it can be difficult to map the precise influence of one area upon another, commentary in the literature and descriptions of the processes of formation can reveal the degree to which one area models transition for another. The consistency of language and terminology employed in a wide diversity of postconflict contexts reveals a global phenomenon and its seemingly successful export/import from one country or region to another over the course of the past several decades. The quest to reveal a blindness in the field springs from the global nature of the enterprise itself; the movement of ideas about and modes for transition bespeaks not only a series of 'lessons learned' but also potentially the transfer of ideological preoccupations that underpin the seemingly neutral discourse of the project.

Naomi Roht-Arriaza locates the expansion of transitional justice that Teitel describes within the larger move toward institution building in the 20th century. She argues that the 'new institutions of global justice' are balanced and complemented by 'the networking approach, featuring a . . . group of existing national courts and webs of international and national lawyers and organizations.'¹⁶ Literature as well as practice have proliferated in the past 20 years. The establishment of the International Center for Transitional Justice in 2001, the publication of key texts on the enterprise¹⁷ and the growing interest among law students and others in the practice and study of this relatively new field all indicate a new focus on transitional justice. Nagy uses the term 'global project' to describe the field

in order to capture the three-dimensional landscape of transitional justice (local, national, global) and its location within broader processes of globalization. It is a 'project' by virtue of the fairly settled consensus . . . that there can be no lasting peace without some kind of accounting and that truth and justice are complementary approaches to dealing with the past.¹⁸

Although further study is required to fully map and analyze the movement of ideas and models from one country or region to another, one cannot fail to note the growing transnational and global nature of the field.

The cross-fertilization of ideas by elites or by interested parties who have participated in past transitional justice institutions could conceivably reflect inaccurate

¹⁵ Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections,' *Third World Quarterly* 29(2) (2008): 276.

¹⁶ Roht-Arriaza and Mariezcurrena, *supra* n 11 at 202.

¹⁷ For example, see Kritz, *supra* n 7.

¹⁸ Nagy, *supra* n 15 at 276.

impressions, depending upon their interests in promoting a success story about their own work. To some degree, this may be an inevitable consequence of a desire for guidance from individuals who have been through similar experiences of transition. It also means, however, that, in addition to potentially overplaying the success of an institution when discussing it with others, those who come to a conference or a country to describe their experience may themselves be unable to note the issues made invisible by the operation of their particular mechanism. Without this perspective, the same mistakes may easily be perpetuated, in a way that bespeaks not a conspiracy of interests but a coherence of blindness.

The close interrelationship between policy makers who create institutions or write mandates and scholars who describe and critique the field creates a 'snowball effect' not only from one mechanism to another but also between each wave of literature and each new institution. Despite rhetoric about the capacity of transitional justice to foster sustainable peace, implement the rule of law and create national reconciliation, little account may be taken of the possibility that these interests might clash, that the actors involved might have different priorities¹⁹ or that the move to democracy may be accompanied by controversial economic programs that promote liberalization.

The Invisibility of Economics

Transition frequently encompasses at least two major social changes: political upheaval and economic transformation. The political liberalization of society in almost every case brings with it a version of economic liberalization, whether through the structural adjustment plans of the World Bank and the International Monetary Fund, negotiations between the new regime and the old rulers or the opening of markets in transitional economies. While transition frequently bespeaks economic liberalization, it also potentially opens the possibility for recognizing past economic injustice, confronting the role of multinational corporations or resource inequality in conflict and altering present or future inequality through redistribution. All too often, however, this potential is lost in the reality of institutional construction. The literature and institutions of transitional justice intersect in their exclusion of the economic. What might be merely silence on the part of one author in a particular work or of one institution in its specific mandate (prioritizing certain topics over others for a specified reason) can be seen in a broader sense to effectively bar or prohibit substantive discussion of the economic elements that arguably help to constitute both transition and justice.

Sins of Omission: the Literature

Proving silence is a difficult task. Further, the absence of a particular discussion in certain works cannot be taken as evidence of a deliberate effort of omission. In the context of a factor as striking and significant as economic questions or

¹⁹ Leebaw, *supra* n 5.

structural violence in transition, however, the pattern of ignoring these issues becomes particularly meaningful.

Silence occurs not only through the literal absence but also through the tendency either to mention inequality or structural violence as a problem and then to ignore it or to background structural factors in favor of more obvious concerns about physical violence. In this sense, *mention* of the idea that discussion of economic inequality or structural violence is missing might appear to address the absence itself, temporarily making visible what was hidden, without substantively addressing it. The utterance might appear as a remedy when, in fact, it further backgrounds the problem. As the present issue of the *International Journal of Transitional Justice* demonstrates, along with some notable recent academic literature, issues of development and inequality may become the next frontier of scholarly and institutional debates on transitional justice. In order to understand the ways in which the field has developed a language and practice that tends to bar discussion of the economic – and thus of the political-distributional consequences of transitional justice – it is crucial to map the manner in which the exclusion has been established historically.

A survey of the literature indicates that commentators' failure to address these issues often occurs simply through the discussion of a broad canvas of transitional justice concerns that fails to notice this one. Alternately, passing reference is made to structural factors as if to a problem that no one has yet found a way to resolve. Beyond a brief mention of the growing gap between rich and poor in the wake of the Cold War and the concomitant seductiveness of using the 'backward-looking' project of transitional justice rather than perhaps more progressive 'justice projects,' economic issues play almost no role in Teitel's genealogy of transitional justice.²⁰ Economic questions and their relationship to the process of liberalization or ethnic/political conflict come to serve primarily as background to seemingly more 'salient' (and familiar) political questions.

In his extensive discussion of the history of transitional justice, Jon Elster addresses the economic quandary only by focusing on the limited availability of resources for transitional justice mechanisms. He fails to discuss the possibility that the effects of economic transition might themselves be part of a transitional justice mechanism.²¹ His language explicitly divides the 'justice' realm from the 'economic' realm, assuming that the former will look backward, in a sense, toward accountability while economic changes operate in a separate domain and simply affect the resources available to create appropriate justice institutions. In his conclusion for a collection of essays examining the possibilities for peace and justice after civil conflict, Nigel Biggar summarizes seven factors addressed by the authors included in the volume. As with Elster, these factors contain issues of economics only in terms of constraints on the exercise of some versions of justice. Biggar suggests that political leaders have a 'moral responsibility' to 'look after the genuine interests of their people,' which he views as including justice 'as well as material

²⁰ Teitel, *supra* n 10.

²¹ Elster, *supra* n 6.

wealth and physical security.²² Once again, economic growth features primarily as a background fact.

In the literature on the Argentine transition, the implications of the neoliberal economics that underpinned the transition operate essentially as a backdrop to, but wholly separate from, the discussion of transitional justice. Owen Fiss mentions that because President Carlos Menem 'did not have the economy fully under control' in 1990 when a group of military officers attempted mutiny, he 'still needed the support of the sectors of the population loyal to the military.' For this reason, 'Menem took the almost inevitable next step: he pardoned all those who had already been convicted.'²³ The economy functions here as a backdrop to Fiss' central discussion, and the economic transition becomes a limitation on the president's ability to enforce the rule of law and therefore on the strength of Argentine democracy. The focus on rights, even in the broader social sense Fiss advocates rather than the narrowly legalistic one often found in international courtrooms, seems to preclude the possibility of focusing on that which is so adamantly left in the background.

Carlos Acuña more explicitly raises the connection between the economic crisis in Argentina and the liberalization project, which 'meant a radical transformation of the power and nature of the armed forces as a political actor and [is] impossible to dissociate from the process of transitional justice.'²⁴ Although he cites a slightly more causal link between economic factors and transition – in particular, recognizing the relationship between the distribution of power and wealth – Acuña falls one step short of completing the analysis. He retains the common temptation to leave the economic aspects of transition in the background, using them primarily to explain the actions of the military and its influence on the transition.

Although lack of space necessitates a limited number of examples here, the occlusion of economic questions from the literature on transitional justice has been markedly rampant.²⁵ In different ways, Kieran McEvoy and Louise Arbour have both noted the influence of legalism on the field, which tends to narrow the scholarly and institutional conceptions of the manner in which transitional instruments

²² Nigel Biggar, 'Conclusion,' in *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, ed. Nigel Biggar (Washington, DC: Georgetown University Press, 2005), 313.

²³ Owen Fiss, 'Human Rights as Social Ideals,' in *Human Rights in Political Transitions: Gettysburg to Bosnia*, ed. Carla Hesse and Robert Post (New York: Zone Books, 1999), 273.

²⁴ Carlos Acuña, 'Transitional Justice in Argentina and Chile: A Never Ending Story?' in *Reparation and Retribution in the Transition to Democracy*, ed. Jon Elster (New York: Columbia University Press, 2006), 223.

²⁵ In no way do I intend to diminish the excellent work of those scholars who have addressed these questions in a variety of ways. In addition to Mahmood Mamdani's widely cited work on South Africa (Mahmood Mamdani, 'The Truth According to the Truth and Reconciliation Commission,' in *The Politics of Memory: Truth, Healing and Social Justice*, ed. Ifi Amadiume and Abdullahi An-Naim (New York: Zed Books, 2000)), see, Robert Meister, 'Human Rights and the Politics of Victimhood,' *Ethics and International Affairs* 16(2) (2002): 91–108; Joseph Nevins, 'Restitution over Coffee: Truth, Reconciliation, and Environmental Violence in East Timor,' *Political Geography* 22(6) (2003): 677–701; John Torpey, 'Making Whole What Has Been Smashed: Reflections on Reparations,' *Journal of Modern History* 73(2) (2001): 333–358. I would suggest, however, that the exceptional nature of such commentary tends to highlight a general failure in the literature to include economic questions.

may be constructed.²⁶ Beyond this particular preoccupation, however, the ways in which the transitional justice literature focuses on a standard set of debates that employ a familiar list of terms can create a series of assumptions often left unspoken. By focusing on issues surrounding truth, justice and reconciliation – commonly debated objectives of transitional justice institutions – commentators obscure the importance of economic factors in conflict and transition. The repetition of set discussions may create at times a scholarly inertia in which, as with the snowball effect in institutions, it may become difficult to raise questions outside the accepted discourse.

The fetishization of familiar terms, tropes and debates masks other projects which are neglected in the effort to describe and construct the new liberal state. Each trope stands in for an aspect of the liberal project: justice represents the struggle for a ‘depoliticized,’ trustworthy rule of law;²⁷ truth represents the rights of victims to tell their stories and thus to ‘democratize history’²⁸ and reconciliation represents the aspiration to a newly united citizenry in the postconflict state. The terms are played against one another, defining and redefining the ability to achieve the liberal democratic ideal. In the process, deeper challenges to the state-building project potentially disappear. The questions of inequality and structural violence are lost in the process of reconfiguring familiar debates.

If transitional justice partially exists to reconceive society, then the inability to reimagine economic distribution makes full reconstruction impossible. If economic liberalization accompanies political transition, then to ignore its presence as a piece of regime change and a factor in determining the parameters of justice may end up serving a few individuals in the name of the entire citizenry.

Sins of Omission: the Institutions

The mandates of transitional justice mechanisms throughout the world frequently ignore structural economic factors. Subsequently, the final reports of truth commissions or convictions at international tribunals generally fail to mention them as a result of strict adherence to the terms of the commission’s mandate or the law under which the trials take place. Due to its close relationship with international human rights law, transitional justice has the tendency to import both the limitations and the benefits of the larger human rights discourse. The focus on individual accountability may neglect structural factors; an emphasis on prosecutions can obscure systemic responsibility. Because the mandates of both tribunals and truth commissions rely heavily upon the instantiation of human rights in the new state, they tend almost uniformly to emphasize civil and political rights rather

²⁶ McEvoy, *supra* n 14; Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (paper presented at the Second Annual Transitional Justice Lecture, Center for Human Rights and Global Justice at New York University and the International Center for Transitional Justice, New York, 25 October 2006).

²⁷ See, McEvoy, *supra* n 14 at 439.

²⁸ Jacobus A. du Pisani and Kwang-Su Kim, ‘Establishing the Truth about the Apartheid Past: Historians and the South African Truth and Reconciliation Commission,’ *African Studies Quarterly* 8(1) (2004): 83.

than socioeconomic ones. Economic factors become doubly reduced in this translation; they are, first, excluded by a focus on legalistic rights discourse rather than on structural violence and, second, left out according to the common preference of human rights mechanisms for civil and political concerns.²⁹

Even when broader social factors are addressed, they remain contextual. Although a nuanced understanding of context is crucial to understanding the power and politics of rights, poverty and inequality tend to be depicted merely as the landscape against which murder, disappearance, torture and other gross human rights violations are committed. The cost of this contextualization process can be the reinforcement of an idea that reparations, education or 'democratic institutions' will somehow resolve the background factors. The notion that the background must become central³⁰ in order to address the fundamental questions underlying the transition, conflict, crimes of 'individual responsibility' or the 'degradation . . . of large numbers of people' remains unspoken and unnoticed.³¹

Relying on one another for precedent in procedure and practice, the ICTY, ICTR, Special Court for Sierra Leone (SCSL) and ICC statutes cover similar crimes. Each mandate emphasizes the notion that the court will prosecute the most serious crimes and those 'most responsible' for these crimes. The ratification of the Rome Statute and the issuing of first indictments by the ICC represent a new phase of transitional justice. The idea that the court will both define and prosecute the 'most serious crimes to the international community as a whole'³² is founded not only on legal precedent from the *ad hoc* tribunals but also on an assumption that some rights-based baseline exists on which the entire 'international community' can rely. The power to define the discourse of violation, the vocabulary of outrage and the appropriateness of dissatisfaction lies largely within the realm of transitional justice mechanisms, which deploy the human rights norms that originally constituted them. This power has been underestimated in many ways, and the repetition of particular crimes or certain indictable offenses through both courts and commissions may have unexpected effects beyond the standard debates.

Truth commissions have been understood as an instrument for a broader interpretation of the past than that offered by the narrow confines of international law. They generally have failed, however, to investigate fully the socioeconomic background to the conflicts in question, to elucidate the structural violence of the past or to fully grapple with the economic aspects of transition. In Chile, the National Truth and Reconciliation Commission focused on 'serious violations' consisting of physical violence under international human rights norms.³³ The UN-sponsored truth commission in El Salvador determined that the 'serious acts of violence'

²⁹ McEvoy, *supra* n 14.

³⁰ David Kennedy, *The Dark Sides of Virtue* (Princeton: Princeton University Press, 2005).

³¹ Martha Minow, 'Innovating Responses to the Past: Human Rights Institutions,' in *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, ed. Nigel Biggar (Washington, DC: Georgetown University Press, 2005), 97.

³² Defined as genocide, war crimes, crimes against humanity and the crime of aggression in Article 5 of the Rome Statute.

³³ Chilean Ministry of Justice Supreme Decree No. 355 (25 April 1990), art. 1.

it was mandated to investigate would be defined in terms of the nonderogable rights included in the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights, as well as violations of the Geneva Conventions.³⁴ Even within the frame of human rights discourse, the Commission's choice to note the ICCPR rather than the International Covenant on Economic, Social and Cultural Rights (ICESCR) reinforces the hierarchy internal to the movement.³⁵ The argument made at times within the human rights movement for focusing on the former rather than the latter has been that in order to operate productively, human rights organizations need a 'violation, violator, and remedy' and that without the ability to name each, the power of 'shaming' will be significantly reduced.³⁶ In the particular realm of a truth commission, however, these concerns do not apply. The focus on civil and political rights may only demonstrate that transitional justice has imported the biases of its 'parent' movement without noting that even the problematic bases for the hierarchy in the broader realm do not exist in its particular context.

The enacting statute of the South African Truth and Reconciliation Commission (TRC) allowed for a contextual investigation, but subsequently narrowed the inquiry to one solely about gross human rights violations, which were defined as severe physical mistreatment.³⁷ Despite hopes on the part of some central figures in the transition that the TRC would foster social justice, economic redistribution, a 'systematic process of acknowledging the illegitimacy of apartheid' and recognition of the 'collective responsibility of the apartheid privileged,' the work and conclusions of the Commission disappointed these expectations.³⁸ The TRC's final report mentions the role of colonialism as a precursor to apartheid and describes some of the economic underpinnings of the National Party regime. It also discusses the one-day hearing on the role of business in apartheid.³⁹ Because of the narrowed time parameters and individualistic focus of the hearings at the Human Rights Violations Committee, however, the report primarily features individual accounts of victims of gross human rights violations as defined by the TRC, making apartheid the background to particular violations rather than the violation itself.⁴⁰

More self-conscious than much of the literature and many other truth commission final reports, the TRC report in its opening volume briefly touches upon its

³⁴ Thomas Buergenthal, 'The UN Truth Commission for El Salvador,' *Vanderbilt Journal of Transnational Law* 27(3) (1994): 497–544.

³⁵ Arbour, *supra* n 26.

³⁶ Kenneth Roth, 'Defending Economic, Social, and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,' *Human Rights Quarterly* 26(1) (2004): 68.

³⁷ Promotion of National Unity and Reconciliation Act 34 of 1995 (26 July 1995), art. 3(1)(a) and art. 1(1)(ix)(a–b).

³⁸ Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective,' *Modern Law Review* 63(1) (2000): 12.

³⁹ 'The final position and finding of the Commission was that business generally benefited financially and materially from apartheid policies.' *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Juta, 2003) [hereinafter 'TRC report'], vol. VI, ch. 5, p. 140.

⁴⁰ Nagy, *supra* n 15.

own limitations, noting that

The consequences of human rights violations [due to separate development] . . . cannot be measured only in the human lives lost through deaths, detentions, dirty tricks and disappearances, but in the human lives withered away through enforced poverty and other kinds of deprivation.⁴¹

Although the TRC might be viewed as a progressive step toward a fuller recognition of contextual factors in transition (and in the causation of conflict), it nonetheless fits into the broader model described in this article, trading the possibility of making structural violence and economic inequality central for the comparative clarity and simplicity of a narrower category of civil and political rights violations.⁴²

The Focus on Reparations

When they do address economic questions, transitional justice mechanisms focus primarily on reparations or compensation for a victim group defined by the institution. The literature works in conjunction with the institutions to (re)produce discussions about reparations and attempts at compensation for the gross human rights violations investigated by a commission or committed by a convicted war criminal. The narrow focus implies a redefinition of 'economic factors' to the philosophical complexities and practical limitations of reparations. Conceivably, the focus on reparations makes structural factors doubly invisible, as they are not only backgrounded in the project as a whole but also reduced to a singular definition for resolution.

Reparations may be monetary or symbolic, material or moral; in many cases, governments fail to pay them, despite the recommendations of a transitional institution. In a paradigmatic example of state reparations, Germany paid both individual and collective reparations (the former to individual victims of the Holocaust and the latter to the state of Israel).⁴³

In Peru, an initial model for reparations proposed to deal with all aspects of the 'reproduction of the cycle of violence,' including economic inequalities and exclusions, expressions of political violence, bad living conditions and other factors, using reparations as a 'means to sustainable peace, democratic strengthening

⁴¹ TRC report, supra n 39 at vol. I, ch. 4, p. 65. On p. 34, the report describes the 'grim daily reality for every black South African' due to 'collective expulsion, forced migration, bulldozing, gutting or seizure of homes, the mandatory carrying passes, forced removals into rural ghettos, and increased poverty and desperation.'

⁴² Certain institutions – for example, the East Timor Commission for Reception, Truth and Reconciliation and the Guatemalan Commission for Historical Clarification – have included some investigation of socioeconomic rights violations; the implementation of the recommendations has been, however, limited. Arbour, supra n 26; Nagy, supra n 15. *Guatemala: Memory of Silence* (Guatemala City: Commission on Historical Clarification, 1999). As with the literature, I hope to establish the general occlusion of economic issues in past institutions, but it would be specious to claim that these questions are never addressed. Rather, the exception tends to prove the rule.

⁴³ Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W.W. Norton & Company, 2000).

and development.⁴⁴ The final recommendations of the Truth and Reconciliation Commission narrowed the structural objectives to some degree, recommending reparations for anyone who suffered specific human rights or humanitarian violations between 1980 and 2000 as a result of political violence.⁴⁵ The Peruvian case demonstrates the ways in which truth commissions in particular attempt to use reparations, on occasion, to resolve structural factors they have self-consciously avoided fully addressing. It also reveals the difficulty in such an attempt to link issues of resource and power inequality with the narrow purview of reparations.

In South Africa, the TRC recommended individual reparations for victims named in the final report, as well as symbolic reparations, community rehabilitation programs and institutional reform.⁴⁶ The government delayed payment of the recommended sum for several years, amid growing dismay on the part of victims' organizations, and eventually pledged a far smaller amount of reparations that has left victims dissatisfied and angry with the Mbeki government.⁴⁷

In Rwanda, the approach is derived primarily from laws that promise compensation to survivors. The law regarding prosecution for genocide and crimes against humanity states that the judge in a particular case shall rule on damages for victims and their families,⁴⁸ leaving the specifics to a future law. According to a summary provided by Human Rights Watch, the law might include financial compensation in a wide variety of forms but includes no mention of land distribution.⁴⁹ Compensation clearly is viewed as a narrow transaction for genocide victims, it links reparations neither to development nor to redistribution. Gacaca courts are mandated to create a list of victims who suffered material losses or bodily harm and an inventory of losses according to a schedule set out by law. The list is to be sent to the envisioned compensation fund, which should address the claims.⁵⁰ According to the modified 2004 Gacaca law, if a suspect confesses, a portion of his or her sentence may be commuted to community service.⁵¹

⁴⁴ Lisa Magarrell, 'Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice,' *Windsor Yearbook of Access to Justice* 22 (2003): 91.

⁴⁵ Ibid.

⁴⁶ TRC report, *supra* n 39.

⁴⁷ Dumisa Ntsebeza, 'The Legacy of the Truth and Reconciliation Commission,' in *The Provocations of Amnesty: Memory, Justice and Impunity*, ed. Charles Villa-Vicencio and Erik Doxtader (Trenton, NJ: Africa World Press, 2003).

⁴⁸ Republic of Rwanda, Organic Law No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990 (30 August 1996), art. 32.

⁴⁹ Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda* (New York: Human Rights Watch, 2004).

⁵⁰ Organic Law No. 40/2000 of 26 January 2001 Setting Up 'Gacaca Jurisdictions' and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity between 1 October 1990 and 31 December 1994 (26 January 2001), art. 90.

⁵¹ Organic Law No. 16/2004 of 19 June 2004 Establishing the Organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994, art. 73.

According to commentators, compensation to victims

aids the victims to manage the material aspect of their loss. Second, it constitutes an official acknowledgement of their pain by the nation . . . Third, it may deter the state from future abuses, by imposing a financial cost to such misdeeds.⁵²

The notion of restitution or reparation is often linked to the need for social restoration and the institutionalization of the rule of law, with repair viewed as a requirement for the ‘re-remembering’ of society.⁵³ Yet, as Roht-Arriaza and Martha Minow point out, reparations are caught in an inherent paradox: they ideally are meant to restore the *status quo ex ante* of a society in a situation in which no compensation – symbolic or monetary – can actually accomplish the goal of restoration.⁵⁴ The sense in these works is simultaneously that reparation is necessary as a progressive gesture and that its objectives are inherently unreachable if they include the fantasy of actual repair.

Teitel links reparations explicitly to recognition that transition is generally economic as well as political, stating that ‘reparatory measures appear most definitional of the liberalizing move, as these responses instantiate recognition of individual rights,’ in addition to serving both a symbolic role in the transition for society and a literal compensatory one for victims.⁵⁵ As is explored further in the section regarding the costs of this discourse, linking reparations to economic transition may serve to mask the continuing lack of significant redistribution during or after transition.

Effects of Economic Invisibility

Narrowing the Past and Shaping the Discourse

The failure to include economic concerns in transitional justice mechanisms tends to make transition into a political rather than an economic story, limiting knowledge of the economic underpinnings of conflict, narrowing the story of regime change and quelling discussion of development plans by quarantining them within the state and the executive rather than making them part of the transitional justice conversation. Since transitional justice mechanisms, particularly truth commissions, are discursive tools just as much as they are instruments of accountability or reconciliation, they may frame the conflict in one dimension without providing an alternative vocabulary. Thus, apartheid in South Africa after the TRC can become a story about racism or about specific, individual rights violations rather than about long-term, systemic abuses born of a colonial project with economic objectives. It

⁵² Neil Kritz, ‘The Dilemmas of Transitional Justice,’ in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil Kritz (Washington, DC: United States Institute of Peace Press, 1995), vol. I, xxvii.

⁵³ Martha Minow, ‘The Work of Re-Membering: After Genocide and Mass Atrocity,’ *Fordham International Law Journal* 23(2) (1999): 429–439.

⁵⁴ Naomi Roht-Arriaza, ‘Reparations: Decisions and Dilemmas,’ *Hastings International and Comparative Law Review* 27(2) (2004): 157–220; Minow, *supra* n 7.

⁵⁵ Teitel, *supra* n 4 at 8.

also becomes one of physicality rather than structural violence, with the physical conceivably acting as a metaphor for the systemic, allowing the transitional justice institution and the state to address the former while essentially backgrounding the latter.⁵⁶ The genocide in Rwanda can become a story of historic ethnic hatred between Hutu and Tutsi rather than a narrative of decades-long resource inequity, unequal land distribution and colonial constructions. These narratives, partially constructed by the new state, are potentially echoed and reinforced by transitional justice mechanisms, which narrow the narrative of the past in a variety of ways.

These discursive limitations relate directly to the definitional power of transitional justice institutions. The parameters of perpetrator and victim are determined by the mechanism itself, and the effects of those definitions rest not only on an abstract debate about the rule of law but also in the question of what was and will be viewed in society as a crime and a moral outrage. To seek truth through either trial or commission, whether explicitly through amnesty or implicitly through indictment, contains within it the trick of a preordained parameter. The truth sought becomes who killed or tortured rather than who controls immense tracts of land through colonialist enterprises, which countries failed to stop the atrocities from occurring and who merely stood by as it happened. Bystanders and economic beneficiaries might be citizens or countries; in either case, transitional justice fails to take them into account in the interest of the symbolic, the limited and the move toward a liberal rights discourse that offers a new, peaceful, stable state without necessarily disrupting all of the old power relations. Both discourse and definition fall within limited parameters, allowing the story of guilt and innocence to be retold through the lens of the new institution in a way that will, according to the goal of the institution itself, remain the permanent history of a conflict or regime.

In South Africa, the story told by the TRC is one of individual perpetrators committing gross human rights violations against individuals based on the color of their skin or their political affiliation. As Mahmood Mamdani argues, however:

The violence of apartheid was aimed less at individuals than at entire communities and entire population groups . . . The point is that the Latin [American] analogy obscured the colonial nature of the South African context: the link between conquest and dispossession, between racialized power and racialized privilege.⁵⁷

By narrowing its focus to gross human rights violations and limiting discussion of economic violence primarily to one day of institutional hearings on the role of business in apartheid, the TRC retold the story of apartheid from the narrowed perspective of specific rights violations rather than a broad view of colonialism and capitalism.⁵⁸ As a consequence, 'gross violations of human rights were treated more as the product of individuals' decisions and actions than the outcome of the

⁵⁶ Du Pisani and Kim, *supra* n 28.

⁵⁷ Mamdani, *supra* n 25 at 179.

⁵⁸ Richard Wilson, 'Justice and Legitimacy in the South African Transition,' in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez and Paloma Aguilar (New York: Oxford University Press, 2001).

dynamics of the apartheid system.⁵⁹ When the Commission chose specific cases as representative, the hegemonic national unity narrative overtook particular local considerations.⁶⁰ An analysis of the choices of ‘truth’ and narrative at the TRC might easily implicate the questions of which issues were considered paramount, what became background and what was central to the national narrative of truth and reconciliation.

One effect of this process in South Africa is that the legitimacy the government gained through the TRC meant that the Commission’s existence was no longer necessary after the legitimacy of the new democracy had been proven. By declaring an end to transition, closing the TRC at the scheduled time and essentially ignoring the bulk of the Commission’s recommendations for the future, particularly with regard to monetary reparations for the victims, the new government utilized the legitimacy effect of the TRC without implementing the institution’s more inconvenient recommendations.⁶¹ The combination of the Commission’s narrow explanation of the past and the government’s ability to ignore the implications of the final report in its material aspects allowed a new regime to entrench economic inequality while claiming that ‘the new government is different and is committed to protecting and respecting the rights of citizens.’⁶² In another sense, the emphasis on rights discourse in the ‘new’ South Africa and the emphasis on human rights as a mobilizing force for change may have paradoxically ‘frozen the hierarchies of apartheid by preserving the social and economic status quo.’⁶³

Rwanda’s ‘conflict story’ about ethnicity rather than resource inequity or land might be read in conjunction with the current government’s pursuit of a dramatic land and development policy⁶⁴ which is wholly separate from postgenocide justice. Despite the government’s policy of supplanting ethnicity through ‘rwandicity’ discourse⁶⁵ and its determined attempt to separate development from genocide, it can be argued that historic connections between resource inequity and ethnic divisionism remain. The terms Hutu and Tutsi partially derive from unequal labor

⁵⁹ Audrey Chapman and Patrick Ball, ‘The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala,’ *Human Rights Quarterly* 23(1) (2001): 14.

⁶⁰ Hugo van der Merwe, ‘National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission,’ in *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, ed. Nigel Biggar (Washington, DC: Georgetown University Press, 2005).

⁶¹ In addition, ‘[t]he socio-economic transformation [since transition began] has therefore not been a deep-seated one . . . Consequently, the past eight years have largely seen a continuation of unequal power relations, unfree labour patterns, and uneven socio-economic development that characterized the long preceding period of extended colonialism.’ Sampie Terreblanche, *A History of Inequality in South Africa, 1652–2002* (Pietermaritzburg: University of Natal Press, 2002), 20–21.

⁶² Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (New York: Cambridge University Press, 2001), 200.

⁶³ Makau Mutua, ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse,’ *Harvard Human Rights Journal* 10 (1997): 68.

⁶⁴ Vision 2020 Development Plan for Rwanda, Republic of Rwanda Ministry of Lands, Environment, Forests, Water and Mines, National Land Policy, http://www.nur.ac.rw/IMG/pdf/Vision_2020.pdf.

⁶⁵ One of the official current policies in Rwanda is the erasure of ethnic terminology. While the reasoning behind this is not only obvious but also eminently reasonable, it is also heavily contested on the ground and may have the perverse effect of silencing open discourse about the past.

relations, land distribution and differential access to cattle,⁶⁶ and the genocide related closely to tensions based not just on ‘ethnic hatred’ but also on economic disparity and dissatisfaction due to extraordinary poverty.⁶⁷

The pregenocide Habyarimana ‘Hutu Power’ regime used ethnic discourse to manipulate other socioeconomic, political and social divisions and disparities, helping to justify war against the invading Tutsi Rwandan Patriotic Front. The government’s rhetoric fed into popular fears, cultivated over decades, that the Tutsi wished to return to Rwanda to reestablish their monarchy and rule over the Hutu, redistributing land to Tutsi and reinstating the *uburetwa* labor system.⁶⁸ The enemy thus became not the international or donor communities or the corrupt ruling elite but an internal ethnic enemy. As Johan Pottier suggests, ‘[t]he class antagonism and the threat of militancy which they themselves faced were converted into “ethnic hatred” and a readiness to kill the “real” – now ethnicised – enemy.’⁶⁹ Some analyses link specific killings during the genocide directly to land-based grievances.⁷⁰ Many scholars have cited the egregious structural violence of Rwandan society as an enabling environment for genocide, even if it was not as an instigating factor for the atrocities.⁷¹ Decades-long grievances over land and resource distribution combined with other social and political factors to allow the government to manipulate the ethnicity discourse and plan mass atrocity.⁷²

A closer examination of Rwanda’s genocide links it to issues not just of ethnic hatred but also of land- and resource-based grievances, yet postgenocide transitional

⁶⁶ Johan Pottier emphasizes that the differences between Hutu and Tutsi are fundamentally wealth-based rather than race-based and existed prior to Belgian colonization. Johan Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century* (Cambridge: Cambridge University Press, 2002). For a nuanced discussion, see, Alison Desforges, *Leave None to Tell the Story* (New York: Human Rights Watch, 1999).

⁶⁷ Peter Uvin offers a useful survey of major scholarly paradigms for understanding the origins of the genocide. Peter Uvin, ‘Reading the Rwandan Genocide,’ *International Studies Review* 3 (2001): 75–99.

⁶⁸ *Uburetwa*, a precolonial 19th-century system, required labor to be given to Tutsi King Rwabugiri in return for gaining access to land; it was expanded in territory and scope after Belgian colonization. Tutsi were not subject to the system, nor were a small number of privileged Hutu. Pottier, supra n 66. Some have argued that the *uburetwa* system, in combination with racist Belgian policies, increased ‘ethnic’ anger on top of labor- and land-based rage at the authorities for unequal treatment. See, for example, Kathrin Wyss, *A Thousand Hills for 9 Million People – Land Reform in Rwanda: Restoration of Feudal Order or Genuine Transformation?* (Bern: Swisspeace, 2006).

⁶⁹ Pottier, supra n 66 at 22.

⁷⁰ More than one study has documented a commune in Gisenyi where 32 people were killed, of whom only one was Tutsi. Almost all of those killed had been involved in various land disputes before the genocide. Scholars have posited that the genocide may have provided some people with a method for settling past grievances. See, Wyss, supra n 68; Herman Musahara and Chris Huggins, ‘Land Reform, Land Scarcity and Post-Conflict Reconstruction: A Case Study of Rwanda,’ in *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, ed. Chris Huggins and Jenny Clover (Johannesburg: Institute for Security Studies, 2005).

⁷¹ See, Uvin, supra n 2.

⁷² Many different readings have been offered of the causes for the genocide. I would assert merely that economic factors such as inequality and structural violence should be considered significant. Scott Straus argues that radical destabilization due to civil war, a state with well-organized local control and historical ethnic categories, played central causal roles in the perpetration of the genocide. Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca, NY: Cornell University Press, 2006).

justice mechanisms – whether the ICTR, national trials or Gacaca – have failed to address these issues of structural violence and economic inequity. Reconciliation and transitional justice mechanisms may utilize, consciously or unconsciously, the discourse of the past conflict rather than transcending it. If resource scarcity played a significant role in the genocide and yet was articulated through ethnicity, then even using the language of ethnicity to understand the history of the conflict may be too limited for constructing sustainable reconciliation. Just as apartheid's narrative may become one primarily constructed by race, Rwanda's genocide may come to be seen purely through the lens of ethnicity. In the process, structural inequality remains invisible, and the postconflict vocabulary is limited by the mechanisms that deploy it.

Results of Confining 'Economics' to Reparations

The particularistic focus on reparations and compensation for 'victims' itself may have specific distributional effects. The discourse around, and practical considerations of, awarding reparations contributes to the discursive effects indicated above. They help to define guilt and victimhood, contributing to the overall project of defining the citizenry in the new state and society. The project of reparations requires that the mechanism identify (implicitly or explicitly) who the victims are, how their losses can be compensated and in which cases monetary or symbolic reparations should take precedence over other expenditures. On a small scale, reparations move money or resources from the new state to a particular group of citizens. At times, they might attempt to symbolically identify a power shift from autocratic leadership to a democratic, participatory system. By definition, however, reparations do not redistribute either wealth or power on a scale that would dramatically alter the balance of power in the country during or after transition.

To that end, if transition is a political story and its only economic implications are in the particularized realm of compensation, the lack of redistribution during transition will be lost amid discussions of victimhood and payment of reparations. The questions of who 'owes' whom and how much is owed will triumph over issues that might by contrast result in increased solidarity among a broader sector of a country's economically oppressed.⁷³ Instead, fights over who is a victim, whether they deserve payment, whether they will accept money and other particularized conflicts overtake the larger question of economic decisions during and after transition.

Reparations and compensation allow the state to redistribute wealth only in a strikingly narrow manner, frequently compensating only those named by the

⁷³ In certain cases, the struggle for reparations might foster solidarity among the disenfranchised or offer an opportunity for more systemic resistance, for example, demands for compensation from former colonial powers, or the work of the Khulumani Support Group in South Africa. In the context of institutions that establish a particular list of survivors or a standard for determining victimhood, however, the outside borders of such groups may remain radically circumscribed.

transitional justice mechanism. In the process of reparations,

only certain victims became fully part of the narrative of reconciliation. The suffering of many living victims is denied recognition or relegated to a lesser level of significance because their suffering is seen as politically problematic or ambiguous.⁷⁴

Just as the choice to compensate a particular portion of the population may focus attention on the suffering of only a certain group for specific violations, it also may concentrate responsibility on one group of offenders. In the process, wider accountability for the structure that supported the violations cited by a commission or tried at a tribunal may be lost.

Perhaps the most powerful critique of the South African TRC was that its focus on the perpetrators of apartheid ignored the far larger population of its beneficiaries.⁷⁵ In addition, the TRC's final report itself pleaded that the requirement to pay reparations should not deprive other needy members of society of necessary resources and assistance.⁷⁶ Yet the problem may simply be inherent to the institution, leaving redistribution off the proverbial table, as

former victims establish that they were morally undamaged by allowing beneficiaries to keep most, if not all, of their gains from the discredited past, while no longer expecting beneficiaries to defend those gains as legitimate.⁷⁷

Although some have suggested that reparation could be made through development aid, thus theoretically addressing at least some structural factors, others have argued that this strategy 'conflates two separate obligations of government: to make reparations for wrongs it committed and to provide essential services to the population.'⁷⁸ In addition, development projects face problems in targeting only the victims rather than the entire population, perhaps failing in the process to emphasize the moral aspects of reparation. In the worst scenario, granting development aid to a part of the population deemed victims rather than to all those in a disadvantaged economic position may increase the likelihood of violence springing from resentment on the part of those not categorized as victims and thus not eligible for assistance. For example, any such program would present a particular problem in Rwanda, where victims and perpetrators live side by side and where it may be difficult or impossible to maintain development projects for one portion of the population without reviving conflict, if it is perceived that aid flows to Tutsi instead of Hutu.⁷⁹ Development directed through reparations potentially limits the conceptualization of both conflict and redistribution.

⁷⁴ Michael Humphrey, *The Politics of Atrocity and Reconciliation: From Terror to Trauma* (London: Routledge Press, 2002), 121.

⁷⁵ Mamdani, *supra* n 25.

⁷⁶ TRC report, *supra* n 39 at vol. I, ch. 5, p. 129.

⁷⁷ Meister, *supra* n 25 at 95.

⁷⁸ Roht-Arriaza, *supra* n 54 at 188.

⁷⁹ For a comprehensive study, see, Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A Case Study on Rwanda* (Antwerp: Intersentia Press, 2004). See also, Wyss, *supra* n 68. Commentators have noted that community service by offenders in the context of Gacaca might remind the mostly Hutu inditees of the historical *uburetwa* system. Roht-Arriaza, *supra* n 55.

Similarly, restitution in cases of historical injustice could present particular problems in areas such as Eastern Europe or South Africa, which suffer massive inequality because 'historically oriented restitution efforts are both too partial and too inadequate to the survival tasks of rebuilding national economies and civil societies.'⁸⁰ This idea links the cost of narrowing the definition of economics to reparations to the problems of a limited vocabulary about a given conflict. Without expanded narration of a conflict, the economic roots of past clashes remain invisible; without significant redistribution, reparations cannot satisfy the demand to resolve the fundamental origins of conflict.

The reduction of economic questions to the need for reparations and, in turn, a focus on the pressure on reparations as an issue of limited resources in a nascent economy curb the redistributive possibilities of the project of transitional justice. Thus, 'many will ask how much of its limited funds should the new democracy be obliged to allocate for victims' compensation, paying for the sins of the old guard?'⁸¹ In this sense, the separation of development from the transitional mechanisms increases the sense that economic equality has no role to play in the conception of justice. The discussion of redistribution is delinked from the operations of transitional justice, and the primary discourse becomes one of competition over resources used for justice 'as opposed to' for development.

In each way, the project of reparations, which appears backward looking and corrective, relies upon a forward-looking selection among violations, conflicts, groups and injustices. This unspoken choice has implications not only for the reading of the past but also for the events of the future.⁸² Reparations, in fact, may be not only nonredistributive by definition but also determinative of the priorities of the society in which they are awarded. As a consequence, they obscure the underlying causes of conflict.

Both South Africa and Rwanda have to some degree addressed, or at the very least engaged with, questions of land and resource distribution in realms other than their transitional justice mechanisms. The TRC mentions that its work should be comprehended within the context of other mechanisms set up during transition, including the Land Claims Court.⁸³

In Rwanda, the government has implemented a far-reaching development plan, as well as passed a land law and implemented a land policy through its Ministry of Agriculture.⁸⁴ The land law and policy have problems of their own,⁸⁵ but for the purposes of this article, it is critical primarily to note that they have been established

⁸⁰ Minow, *supra* n 7 at 109.

⁸¹ Kritz, *supra* n 7 at xxvii.

⁸² Marc Galanter, 'Righting Old Wrongs,' in *Breaking the Cycles of Hatred: Memory, Law, and Repair*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 2002).

⁸³ TRC report, *supra* n 39 at vol. I, ch. 4, p. 48.

⁸⁴ Organic Law No. 08/2005 Determining the Use and Management of Land in Rwanda, Republic of Rwanda Ministry of Lands, Environment, Forests, Water and Mines, National Land Policy (2004) [hereinafter 'Land policy'].

⁸⁵ I have addressed these issues in greater detail elsewhere. See, Zinaida Miller, *Constructing Sustainable Reconciliation: Land, Power, and Transitional Justice in Post-Genocide Rwanda* (Cape Town: Institute for Justice and Reconciliation, 2007).

in a parallel and unrelated mode to the postgenocide justice system. Although the land law encompasses its own narrative of Rwandan history, including of the genocide,⁸⁶ the process of development has been kept wholly separate from that of transitional justice. The assiduous divorce of development from transitional justice, when linked to the land policy's recitation of the history of Rwanda and of the genocide, indicates the ways in which state narration of the past seeps into many arenas. By separating the two areas, the government can in a certain sense *assume* a supposedly 'reconciled' story of Rwandan history while implementing a complex set of transitional justice mechanisms.

One might argue that as long as the government deals with development or economic distribution in some way, the manner in which it does so hardly matters. In fact, since a common argument about the inability of transitional justice mechanisms to deal with the questions raised in this article is the basic shortage of resources, time and professional capacity, one might argue effectively that it is preferable to deal with these issues through the executive branch rather than through a truth commission or the courts. As discussed above, however, the import of removing economic issues from the purview of these mechanisms is more than simply pragmatic. It implicates a particular story of the conflict, a narrowed discourse for discussing grievance and a limited vocabulary for gaining redress. The power of a transitional justice mechanism to define injustice or violation should provoke careful interrogation of the story told and the way in which it is 'corrected' during transition.

Continued Structural and Renewed Physical Violence

Although determining causality or generating definitive empirical data on the question remains difficult, a growing literature attempts to address the relationship between economics and war, often focusing on inequality and civil conflict. As part of the postconflict 'package,' transitional justice institutions might be conceptualized less as a bridge from past to present or as a measure of memorialization and more as a tool of conflict prevention or as the interruption of a continuing series of violent incidents. Examined in this light, the significance of economic factors increases dramatically. By removing economic questions from transitional justice, the literature and institutions make invisible both the economic causes of conflict and the effects of the postconflict economic situation on the possibility for renewed violence related to past grievances or current experiences of maldistribution. In addition, they may erase from consideration the role in conflict of powerful outside states or multinational corporations, making transnational structural imbalances seem irrelevant with regard to internal violence or repression.

⁸⁶ The land policy narrates a story of precolonial Rwandan harmony radically disrupted by the influence of the racist colonial administration. While the corrosive and violent Belgian influence is unquestioned by any credible source, the way in which the state has chosen to portray land issues tends to erase the possibility of precolonial resource divisions and, in particular, precolonial Hutu/Tutsi divisions. Land policy, *supra* n 84.

As greater attention has been paid to the cyclical nature of violence, it seems likely that postconflict justice and reconciliation equally must be considered conflict prevention mechanisms. In this context, a link between the limited economic improvement offered after transition and the narrow storytelling of transitional justice mechanisms with regard to structural violence and resource inequity provokes reconsideration of the possible consequences of these tendencies for conflict resolution. By ignoring the deeper roots of conflict, the relationship of inequality to reconciliation and the injustice of maldistribution, transitional justice mechanisms may actively contribute to new outbreaks of violence. Even if the transformed postwar economy and society play a more direct role in the possibility for future violence than does the investigation of root causes, the emphasis of transitional justice on uncovering the past suggests the need to include economic bases for war in the analysis of recent history.⁸⁷ The studied neutrality of the discourse, the explicit belief in depoliticized law and biases regarding the hierarchies of human rights norms combine to mask the possibility that transitional justice institutions might contribute to the very conflicts they hope to resolve.

The literature on the economic aspects of civil war and violence is divided. Debates have raged about the relationship of economic growth to peace, the effects of inequality or poverty on the potential outbreak of violence, the existence of a 'conflict trap' and the solidity of empirical findings on any number of related topics.⁸⁸ Whether greed or grievance, vertical or horizontal inequality or growth or recession can be proven to cause and to sustain violence is connected to a set of questions far beyond the scope of this article. Developments in the field with regard to economics and war, however, could influence the literature and institutions of transitional justice in a variety of ways. Robert Meister draws our attention to the fact that

the recent literature on transitional justice . . . is not concerned with measuring and overcoming the persistent effects of unjust advantage from the past on social and economic relations under the successor regime.⁸⁹

Instead, the fields remain divorced from one another, fostering a notion that transitional justice can contribute to stabilizing the future by resolving the past while ignoring deep and abiding inequalities or socioeconomic relations that may well contribute to ongoing violence.

⁸⁷ The importance of understanding root causes is itself debated. Susan Woodward asserts that the transformative nature of war means that 'creating a sustainable peace requires addressing the reality created by that war – the outcomes, not the causes.' Susan L. Woodward, 'Do the Root Causes of Civil War Matter? On Using Knowledge to Improve Peacebuilding Interventions,' *Journal of Intervention and Statebuilding* 1(2) (2007): 143–170.

⁸⁸ Some examples of interventions in this contested area: Astri Suhrke and Julia Buckmaster, 'Aid, Growth and Peace: A Comparative Analysis,' *Conflict, Security and Development* 6(3) (2006): 337–363; Paul Collier, *Breaking the Conflict Trap: Civil War and Development Policy* (New York: World Bank, 2003); Frances Stewart, *WIDER Annual Lecture 5: Horizontal Inequalities: A Neglected Dimension of Development* (Helsinki: United Nations University World Institute for Development Economics Research, 2002).

⁸⁹ Meister, *supra* n 25 at 97.

Development aid may contribute to the structural violence of a society, unintentionally supporting socioeconomic divisions and aiding in the creation of violent conflict.⁹⁰ Inequality of resources or the unequal distribution of development aid may foster conflict in unstable countries. In order to participate fully in the reconstruction process, organizations and individuals involved with transitional mechanisms can benefit from examining the circumstances of development on the ground and the ways in which development, justice, human rights and other issues might contribute to the destabilization of a political situation. Development processes rely to some degree on political stability, which partly is reinforced by reconciliation activities. Reconciliation may develop more effectively if development processes do not undermine the fragile local peace.⁹¹

Recent work in conflict studies and human security has indicated that the apparent ethnic, racial or religious causes of civil conflict may sometimes mask economic origins.⁹² The use of identity to inspire violence or to mobilize parts of the citizenry behind a government or an insurgent/liberation movement requires a deeper accounting of the structural and political causes of conflict. The approach of structuring a reconciliation or truth-seeking mechanism around the terminology of the conflict rather than, potentially, the underlying meaning of those terms risks creating a postconflict mechanism that uses the same discourse as the combatants. As Richard Wilson suggests,

Judging the past on its own terms [in South Africa] contaminated the new democratic conception of justice. The exclusion of crimes that were legal under apartheid created a false distinction between the normative aspects of a racial authoritarian order and illegal forms of violent coercion, when in fact one implied the other.⁹³

In any area where land distribution and colonial conquest continue to play a significant role in contemporary conflicts, these issues are particularly salient. The 'reality' of a past economic system pales in comparison with the way in which it has been memorialized, as 'remembered land systems can be used to forge social difference today.'⁹⁴ In Rwanda, the doubled silence on the ethnic relationship to resource distribution and on the role of those factors in the genocide may make sustainable reconciliation difficult to contemplate, particularly assuming the trope of transitional justice that memorialization and narrative help to stabilize the new society by remembering the past. A 2001 survey stated that land-related problems

⁹⁰ See, generally, Uvin, *supra* n 2.

⁹¹ Karen Brouneus, *Reconciliation: Theory and Practice for Development Cooperation* (Stockholm: Swedish International Development Cooperation Agency, 2003).

⁹² Bernard Wood, *Development Dimensions of Conflict Prevention and Peace Building: An Independent Study Prepared for the Emergency Response Division* (New York: UN Development Programme, 2001).

⁹³ Wilson, *supra* n 63 at 207.

⁹⁴ Chris Huggins and Johan Pottier, 'Land Tenure, Land Reform, and Conflict in Sub-Saharan Africa: Towards a Research Agenda,' in *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, ed. Chris Huggins and Jenny Clover (Johannesburg: Institute for Security Studies, 2005), 385.

in Rwanda 'are considered to be the most serious and greatest negative factors hindering sustainable peace.'⁹⁵

The Rwandan context represents one of many examples of the interaction among conflict, resource distribution, transitional justice and the possibility for renewed violence. When transition 'ends' without addressing these foundational points, the transitional justice institution may permit the renewal of physical violence based on the unspoken continuation of structural violence. The very act of narrowing the parameters within which history is told, reconciliation conceived, the past narrated or justice defined may incite conflict.

Conclusion: Confronting Blindness

The role of international actors in the process of spreading the ideas and ideals of the 'movement' of transitional justice has not yet been fully explored in the literature, perhaps because of (at least in part) the tendency of scholars or ex-commissioners to become consultants to, rather than fully external critics of, the enterprise. Thus, rather than offering a critical exploration of the influence of one area on another or of resulting patterns of invisibility, the literature tends to discuss the possible 'toolbox' or the 'lessons learned' in a particular area.

This analysis of the international transitional justice enterprise relies not on the notion of bad faith or evil intentions; rather, it takes as a starting point the notion that the noble beliefs of its agents may allow them to unwittingly contribute to bad consequences – for example, reinforcing inequality. The effects of a global phenomenon of transition and a set of internationals who purport to assist in its dissemination may be far broader and deeper than is currently understood. Each of the subcommunities interested in transitional justice brings to its series of tasks a particular interest in the formation of the mechanism, a stake in its construction and a discourse about its constitution. All tend to lack a sense that they contribute to *governing* the transition itself, despite helping to shape, and sometimes narrow, the international sense of the elements of postconflict reconstruction and the definitions of the slippery terms 'justice,' 'truth' and 'reconciliation.'

In a connected sense, policy makers among them may avoid the idea that the project of constructing a truth commission, recommending reparations or establishing a court has a politics to it beyond the accepted 'good' of truth telling, memorialization, overcoming impunity and fostering reconciliation. While discussions might address the problems around international law with regard to amnesties, the tradeoffs of justice for truth or the technical mechanisms that best address the inherent lack of due process, they rarely engage questions of power relations, the fetishization of law in the postconflict justice community or the ideological interests that might underpin the sudden preference for one idea of reconstruction over all others.

Once viewed as a global phenomenon rather than an isolated set of institutions or localized occurrences, transitional justice becomes an enterprise, practice and

⁹⁵ Wyss, *supra* n 68 at 17.

project to be analyzed in a broader frame. By examining its patterns of exclusion, we may begin to understand its internal political preoccupations. The invisibility of economics in the discussion of transition is not evidence of a concerted, conscious conspiracy, but it cannot be considered coincidental. The narration of the past as one of political repression rather than economic oppression, or the notion of transition as a dramatic break from a 'bad' to a 'good' regime, inherently narrows the possibilities for imagining redistribution. This article offers a critical perspective on the literature and institutions of the field, but it is merely a starting point for a broader conversation. Rather than offering programmatic suggestions for the resolution of the problems it addresses, this article relies on the intuition that we must reveal and untangle extant biases and their effects as a first step toward their correction.

Transitional justice is based on a series of promises to society and to individuals: of a reformed state, of accountability, of reconciliation, of rights, and fundamentally, of change. The institutions of transitional justice are, at base, definitional. They serve not only to delineate past and future but also to define violation and crime, victims and perpetrators, injustice and morality. They demarcate the boundaries of acceptable demands by a citizenry newly awarded its rights and narrate themselves as instruments of justice, political will, stability and peace. The literature and institutions of transitional justice are, like their 'parent' field of human rights, beginning the process of coming to terms with the past invisibility of economic questions in their midst. In order to address the questions fully, however, transitional justice must be seen as a fundamentally political experiment, as a set of mechanisms that 'take a side' in how a new state operates and as both independent institutions and instruments beholden to and guided by the priorities of a new state and of the international community. If transitional justice as a field wants to engage with the issues outlined in this article, it must do so with open eyes, not only overcoming the blindness of the past but also contemplating the possible biases of the future. As a definitional project, transitional justice cannot stand aside from the distributional consequences of its inclusion or exclusion of particular questions. If economic issues are to remain separate, that must be articulated; if they are to be included within the scope of justice, the actors and scholars engaged with the project must pay careful attention both to past modes of constructing invisibility and to overcoming that blindness.