

ECONOMIC AND SOCIAL JUSTICE FOR SOCIETIES IN TRANSITION



LOUISE ARBOUR*

*Second Annual Transitional Justice Lecture hosted by the
New York University School of Law Center for Human Rights and Global Justice and by
the International Center for Transitional Justice*

25 October 2006, New York University School of Law, New York

Ladies and Gentlemen,

I am very grateful to the Center for Human Rights and Global Justice at New York University School of Law, and to the International Center for Transitional Justice for having invited me to speak to you today. As a long-time aficionado of transitional justice, in fact as one who became an accidental practitioner of the discipline before I even knew it had a name, I was tempted to succumb to an indulgent nostalgia, and to entertain you with a celebration of our many collective accomplishments. And there is indeed cause to celebrate. However, I have chosen rather to seize this marvelous opportunity that has been given to me tonight to invite you to reflect on whether we really are where we can and should be.

Let us recall briefly the intellectual and political roots of transitional justice as a sub-discipline of law. Anchored in the Nuremberg trials, it posits the then revolutionary proposition of individual criminal responsibility for international crimes. These crimes, in turn, originate in the law of war and, increasingly, in international human rights law. Although it has outgrown its early framework, transitional justice was thus at the source

* United Nations High Commissioner for Human Rights.

modeled on criminal justice systems. It became readily apparent that analogies to national criminal law were necessary but not sufficient to deal with the range of grievances and remedial actions that societies emerging from conflict truly called for, and we saw in recent years the emergence of creative efforts to expand the discipline.¹

Without losing its *raison d'être*, I believe that transitional justice is poised to make the gigantic leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition. Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices.

More than in the justice sector at large, it is in the field of transitional justice that it is the most invidious to leave the vindication of ESC rights to the political market place. As we pursue the establishment of democratic institutions in post-conflict societies, it is irresponsible to assume that vulnerable minorities will fare better in the pursuit of their ESC rights than they do in ensuring respect for their civil and political rights, and in protecting themselves from discrimination. Once again, this reflects the hidden assumption that ESC rights are not entitlements but aspirations, expectations, and that they will be fulfilled by market-driven, merit-based initiatives.

¹ According to Alex Boraine, in a lecture he gave in Canada in March 2004 entitled “Transitional Justice as an Emerging Field”, some prominent scholars have rejected the term itself, preferring instead to speak of post-conflict justice. But “post-conflict justice doesn’t address the complexities and processes of political transitions, whether through conflict, negotiation, or state collapse...Others define transitional justice as an extension of regular criminal justice systems that rely exclusively on legal remedies to rectify grievances. This fails to account for the limits of law, particularly in cases of mass crimes such as genocide, ethnic cleansing, and crimes against humanity. In trying to come to terms these types of crimes, not only does our moral discourse appear to reach its limit, but it also emphasizes the inadequacy of ordinary measures that usually apply in the field of criminal justice.” Alex Boraine, *Transitional Justice as an Emerging Field*, Mar. 11, 2004, available at <http://www.idrc.ca/uploads/user-S/10829975041revised-boraine-ottawa-2004.pdf> (last visited Nov. 3, 2006) at 2.

But first, we must examine why ESC rights have not traditionally been a center part of transitional justice initiatives, and whether there are real impediments to the pursuit of such a comprehensive ideal of justice in societies in transition. The reality of the marginalisation of ESC rights is reflected in the articulation of our conception of justice itself. The UN Secretary General's report on "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies"² speaks of justice in the following terms:

For the United Nations, "justice" is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. (at para. 7)

The first sentence, "fairness in the vindication of rights", liberally construed, provides for the need to implement ESC rights, but the second sentence soon circumscribes the concept to a more traditional dispute resolution framework involving adjudication between "the victim" and "the accused". This then, inevitably reflects on a narrow approach to transitional justice, (defined in paragraph 8) which again obscures the need to address gross violations of ESC rights associated with conflict. None of this should come as a surprise. Transitional justice being heavily inspired by mainstream, criminal law-focused justice, the fact that it would pay insufficient attention to economic, social and cultural rights was eminently predictable. It is merely symptomatic of a deep ambivalence within justice systems about social justice. I use that expression here very loosely to refer to a combination of equality and decent standards in the fulfillment of the idea of freedom from want, both reflected in international human rights instruments prohibiting discrimination and protecting ESC rights. We need however to look deeper into the carving out of social justice from mainstream, and eventually from transitional justice, to expose, I suggest, that this is purely a result of choice, which we should reverse.

² S/2004/616, Aug. 23, 2004.

Many of our strategies at international and national levels have been based on what I argue is an unhelpful categorization of rights, with on the one hand civil and political rights, and on the other hand economic, social and cultural rights. This division stemmed from Cold War ideological differences also reflected in legal and conceptual debates on the nature and status of economic, social and cultural rights. The adoption in 1966 of the two Covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, rather than of a single treaty guaranteeing *all* human rights, epitomized the depth of these differences. Yet this categorization is particularly problematic when considering the links between human rights, security and development which are increasingly recognized and which transitional justice must address.

Contrary to this mindset of ‘categorization’, the story of the Universal Declaration of Human Rights, and the place of economic, social and cultural rights within it, reflected a fully integrated vision of human rights as key for ensuring real security in a post-conflict setting. The principle of the indivisibility and inter-dependence of all human rights has been reaffirmed unanimously and repeatedly by the international community since the end of the Cold War, most notably at the Vienna World Conference on Human Rights in 1993 and in the Summits of Heads of State and Government held in 2000 and 2005. Along with civil and political rights, economic, social and cultural rights now have the status of binding law in numerous human rights treaties, regional human rights systems and Constitutions.

But arguments concerning the historical and conceptual origins of international human rights law are not the only ones that should persuade transitional justice practitioners to address economic, social and cultural rights and related crimes, in order to provide justice and redress to victims of all gross human rights abuses – a clear objective of transitional justice efforts. We should do so if only for mere *instrumental* reasons. A critical appraisal of past and present conflicts and crisis situations indeed reaffirms the importance of dealing with all human rights violations in an integrated and

interdependent manner. Given transitional justice's additional objective of bringing about social transformation that will prevent a resurgence of conflict, it is not only important to build dispute resolution institutions, but perhaps even more effective to attack the sources of the legitimate grievances that, if unaddressed, are likely to fuel the next conflagration.

Violations of civil and political rights are intrinsically linked to violations of economic, social and cultural rights, whether they are causes or consequences of the latter. We need only think of Northern Ireland or South Africa to realize that systematic discriminations and inequalities in access to health care, work or housing have led to, or exacerbated, social tension that led to conflict. In crises like the one we now witness in Darfur, the systematic burning of houses and villages, the forced displacement of the population and the starvation caused by the restrictions on the delivery of humanitarian assistance and destruction of food crops are deliberately used along other gross human rights violations - such as murder or rape - as instruments of war. Moreover, no transition to a just peace will be possible in Sudan without putting into place an equitable, non-discriminatory framework of access to land and oil.

In a specific example from a transitional justice mechanism, the Truth Commission in Timor Leste found evidence of direct violations of economic and social rights caused by military operations, security concerns and the political agenda of the government at the time. The Commission noted, among others, the explicit use of education as a propaganda tool, thereby restricting children's educational development (and violating their right to education); the resettlement of entire villages in areas that had been avoided as their poor soils and malaria conditions endangered people's health; and the manipulation of coffee prices to fund military operations, thus limiting farmers' chances of making an adequate living.³ I shall come back later to the achievements of truth commissions and to their potential for expansion.

³ Commission of Timor Leste, *Final Report*, Chapter 7.9: Economic and Social Rights, at 3. Note should be made that the Commission's Final Report is not being implemented at the moment, due to the recent events in Timor Leste. The Commission of Timor Leste noted that: "As its work in the area of truth seeking progressed, the Commission increasingly found evidence of both direct violations of social and economic rights and of the close inter-relationship between the violation of those rights and the abuses of civil and

Such evidence helps to address another argument often raised by those who think greater priority must be given to civil and political rights including in rebuilding justice systems in conflict-torn societies. It claims that the realization of economic, social and cultural rights will automatically flow from the enjoyment of those rights, and it assumes that rights can be realized in isolation from others. Yet those arguments are misguided, and supported neither by law nor by observed experience. The full realization of human rights is never achieved as a mere by-product, or fortuitous consequence, of some other developments, no matter how positive. I believe that this lesson is extremely relevant to transitional justice, which has shown itself vulnerable to the proposition that human rights can be ‘sequenced’ and that some should systematically be accorded greater priority over others.⁴

Are we thus falling into an unjustifiable assumption that violations of economic, social and cultural rights are of a less egregious nature than civil and political rights violations? Or are we reluctant to address economic, social and cultural rights when discussing gross or massive human rights violations because economic, social and cultural rights are only – as some would argue - of a “programmatically” nature and thus cannot truly be ‘violated’?

Among those who will concede that egregious violations of ESC rights may occur, a last hurdle often remains: such rights, it is said, do not lend themselves to judicial or quasi-judicial action. Old misconceptions die hard. So let me turn now to the issue of legal protection and remedies for economic, social and cultural rights violations and how it could and should also be assured by transitional justice mechanisms and efforts.

political rights that had been the chief focus of its work. It decided that this reality should be recognised in its final report.” *Id.* at 10.

⁴ In general terms, transitional justice is predicated on accountability for past abuses of civil and political rights, as a way to achieve peace and the rule of law. The assumption here might be that once the transition is set in motion, and if successful, it will automatically yield to the desired economic and social benefits. This may explain why less attention is paid to economic, social and cultural rights.

The criminal law tradition which provides basic inspiration for transitional justice tends to assume that civil and political rights are freedoms, in relation to which violations can be found, while economic, social and cultural rights are entitlements that States may only be able to provide over the long term, depending on available resources and subject to priorities established in the political arena. Worse, these rights are seen by some not even as entitlements but merely as aspirational goals whose achievement no one can be held accountable for. That argument assumes that protection of economic, social and cultural rights is by definition expensive and burdensome, while the realization of other human rights – or freedoms - is, in that view, essentially resource-free. As a result, the nature of economic, social and cultural rights as legal rights imposing legally-binding obligations on States is frequently misunderstood, if not dismissed, and the resistance to the judicial enforcement of these rights and their consideration by transitional justice mechanisms has been, as a logical result, inevitable.

Yet, many aspects of economic, social and cultural rights are clearly as immediately realizable as many civil and political rights. “Forced” eviction (that is, eviction that is arbitrary or does not respect minimum guarantees) requires the same type of immediate action and redress as does the prohibition of torture. Other aspects of economic, social and cultural rights call for long term investment; but, contrary to widespread misconceptions, the same is true for many aspects of civil and political rights. In developing countries, or in countries emerging from devastating conflict, the construction of a free, universal primary education system, or of a basic universal health care infrastructure makes no more demands on the State than the establishment of an even rudimentary criminal justice system capable of providing legal aid, court interpretation, bail supervision, timely and fair trials and humane conditions of detention. All these require the State to act, rather than refrain from it, and can be costly indeed. We only need to look at the resources needed for the establishment of international, hybrid and national tribunals in the transitional justice context to realize how true that is.

The work of national and regional courts is providing increasing evidence that there is no legal or conceptual impediment to identifying and adjudicating violations of

economic, social and cultural rights. If violations can be established, then judicial protection and enforcement are possible. Courts are today increasingly developing jurisprudence that does not focus solely on discrimination but also that relates to a wider range of economic, social and cultural rights, such as the rights to health, to food, or to adequate housing. Moreover, judicial protection is *effective*, as we have seen in recent court cases. To name only one, the Treatment Action Campaign decision led to the establishment in South Africa of one of the most successful and largest programs in the world to stop mother-to-child transmission of HIV/AIDS.

This is valuable insight for our discussion today, as transitional justice reflects that general mindset which tends to doubt the enforceability of economic, social and cultural rights. Indeed, when Truth Commissions have actually investigated violations of such rights, they generally fell short of proposing reparations to redress these documented violations. The Timor Leste Commission, which investigated in great detail economic, social and cultural rights violations committed by the Indonesian government, decided not to consider victims of economic and social rights violations as beneficiaries for reparation, and this for reasons of, I quote, “feasibility and needs based prioritisation”.⁵

Let me add a footnote to that point. By making the case for the integration of economic, social and cultural rights in the transitional justice framework, I am not, however, suggesting that courts and truth commissions should strive to investigate and provide remedies for economic, social and cultural rights violations under all circumstances and unconditionally. As is the case with the existing judicial mechanisms dealing with gross violations of human rights and humanitarian law, specific criteria, grounded in solid theoretical analysis and empirical research, must be established to determine which violations should be addressed, either as a matter of priority, or at all. Clarification of such criteria has already begun, as we have seen from the practice of the Committee on Economic, Social and Cultural Rights and from case law at national level.⁶

⁵ Commission of Timor Leste, *Final Report*, Part 11: Recommendations, at 40-41.

⁶ Examples of such criteria may include: the specific and deliberate targeting of a group of individuals or a minority; the discriminatory denial or infringement of specific rights, by commission or omission.

Not surprisingly, and most appropriately in the context of transitional justice, they focus first and foremost on discriminatory violations.

Ladies and Gentlemen,

Allow me now to explore briefly with you the potential of existing mechanisms of transitional justice for more systematically including ESC rights, as well as the possible way forward.

Because they usually have the mandate to examine the causes, consequences and nature of gross human rights violations and make recommendations in this regard, truth commissions lend themselves particularly well to the investigation and protection of economic, social and cultural rights. As I said earlier, the Timor Leste Commission, for example, dedicated a whole chapter of its final Report to economic and social rights violations, stressing that “the impact of the conditions in which people of East Timor lived, while often less remarked on, was equally damaging and possibly more long lasting”⁷ than violations of their physical integrity and civil and political rights. In the same way, the UN estimates that seven hundred thousand people were directly affected through loss of shelter and livelihoods during what the government of Zimbabwe called the ‘clean up operation’ of its cities. Were a truth commission to be set up at some point in Zimbabwe, it is hard to imagine that we could argue that it would be capable of investigating summary executions and disappearances, ill treatment or arbitrary detention, but that it would not be capable of investigating such massive violations of the right to housing, or the deliberate targeting of food aid to exclude opponents of the regime. Not only truth commissions could and should be able to look at violations of ESC rights, they should also be willing to provide effective remedies for violations of these rights. Recognition of violations goes a long way, but truth commissions should strive to provide for remedies that are as effective and comprehensive as those they can and do provide for violations of civil or political rights.

⁷ Commission of Timor Leste, *Final Report*, Chapter 7.9: Economic and Social Rights, at 2.

Let me now turn to the judicial adjudication of ESC rights in a transition context. Although the prosecutions by domestic, hybrid and international tribunals mainly address violations of civil and political rights that constitute international crimes, in some cases they have dealt with some violations of economic, social and cultural rights. For example, the ICTY trial chamber in the *Kupreskic* case recognized that the comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with the requisite intent. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies, is also recognised as an international crime, and there are other examples.⁸ The use of statutes of existing international and national courts to adjudicate economic, social and cultural violations as international crimes should thus be further explored. We should also consider the possibility of expanding the current scope of international criminal law to encompass other gross violations of economic, social and cultural rights, such as the discriminatory or deliberate targeting of certain groups in cases of forced evictions or with respect to access to food aid, health care or drinkable water, for instance. In a transitional context, special attention should also be paid to the judicial enforcement of ESC rights in settings other than purely criminal ones. I believe that more use should perhaps be made, for instance, of human rights courts and quasi-judicial bodies⁹ with jurisdiction over a particular country emerging from an episode of serious human rights violations, and there, equal attention should be given to violations of all rights, be they civil or political, or economic, social or cultural. Moreover, the work done to strengthen the domestic

⁸ See, for example, the war crime of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, and hospitals; the war crime of pillaging a town or place or possibly genocide (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part).

⁹ For instance, many cases arising from the internal armed conflicts in Latin America have been brought to the Inter-American human rights system. The Inter American Court for Human Rights issued famous reparation awards to victims of human rights violations committed during a conflict, for instance in the *Plan de Sanchez* case reparations included the obligation for the State of Guatemala to implement development programs for health, education and infrastructure for the affected communities, notably programs to study and diffuse the maya achí culture; to maintain and improve the communications system and the drinkable water infrastructure; bilingual trained educators in primary and secondary schools and the establishment of a health care center in the community: see *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004).

judicial system in the aftermath of conflict should include, for instance, proper training of judges and sensitization of judicial actors to ESC rights.

Beyond investigation and adjudication by truth commissions and judicial bodies, which are only some elements of a comprehensive transitional justice strategy, let us see briefly how the other transitional justice mechanisms have dealt with ESC rights and their potential for expanding in this regard.

First, alongside judicial adjudication of human rights violations, reparations programmes offer much opportunity to redress the economic and social aspects of human rights and humanitarian law violations. Some reparations programmes have already gone beyond a narrow focus on a few civil and political rights violations to include measures related to economic and social rights. Housing and property restitution programs in South Africa, Guatemala and Bosnia and Herzegovina are among these, while both the Guatemalan and Peruvian commissions have made recommendations for educational reforms so as to improve respect for indigenous culture.

Yet most truth commissions have generally focused on victims of war crimes and other gross civil and political rights violations, thereby limiting the scope of their proposed reparation measures. Aware that an approach solely focused on individual victims of such crimes would offer inadequate support for many other people who had been differently affected by the conflict, the Moroccan Equity and Reconciliation Commission stressed its wish to treat “the issue of reparations in a symbolic and material form, involving individuals, *communities* and *regions*” (my emphasis).¹⁰ The Commission thus recommended ‘communal reparations’ to strengthen the economic and

¹⁰ The Moroccan Equity and Reconciliation Commission, *Summary of the Findings of the Final Report*, at 11. Interestingly, the Moroccan Commission solely investigated gross violations of civil and political rights. *Id.* at 1. The Timor Leste Commission recommended that a reparations programme be implemented, including collective measures which should ensure that “rehabilitation takes place in a community context. This means that collective measures be developed to ensure that rehabilitation of victims of human rights violations takes place in context and together with their communities. A special window should be developed through which communities or groups of victims can apply for such assistance”. Commission of Timor Leste, *Final Report*, Chapter 11: Recommendations, at 40.

social development of specific regions that were particularly affected by political violence and were marginalized and excluded.¹¹

The approach taken by the Moroccan Commission is a welcome expansion of the scope of reparations programs. Often in situations of political transformation, both law and policy are caught between different imperatives, such as between the past and the future, between the individual and the collective¹². It is precisely this dilemma of being caught between the individual and the collective that I believe deserves further reflections when thinking about the mechanisms of transformation. We need to be clear that reparations to individual victims will never substitute for more broad based and longer term socio-economic policies that aim to redress and prevent widespread inequalities and discrimination. And we would be mistaken to believe that these policies are better left solely to the responsibility of development actors. To the contrary, it is justice that is at stake, justice in its deepest sense. Transitional justice mechanisms thus have a crucial role to play in recommending the adoption of such measures as part of the necessary reparation for victims and as part of a comprehensive strategy of national reconciliation and peace.

Ladies and Gentlemen,

Transitional justice having as an objective to contribute to the building, in societies in transition, of a solid foundation for the future based on the rule of law, it is imperative to see how best to equip a country to redress often deep-seated social and economic inequalities. A powerful starting point is to aim at anchoring economic, social and cultural rights into the domestic legal system through the constitution. Obviously, prerequisites for the drafting of a constitution need to be fulfilled and depend on the

¹¹ It needs to be noted, however, that communal reparation measures have not yet been implemented. A programme for their implementation is being drafted at the moment. There aren't many examples and lessons learnt to draw from in this respect, as only the Peru Commission recommended measures of a similar nature, with limited implementation as well.

¹²As Ruti Teitel observes, in situations where one is trying to advance justice in the midst of political transformation, "law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective." RUTI G. TEITEL, TRANSITIONAL JUSTICE 6 (2000).

political context, and only a careful appraisal would allow us to decide whether amending or drafting a Constitution is appropriate in a particular case.

The South African Constitution¹³ is probably one of the best known examples of constitutions that incorporate economic, social and cultural rights. The Constitution lists rights related to freedom of trade, labour relations, environment, property, housing, health care, food, water, social security, education, and language and culture.¹⁴ It is not surprising that the Constitution's drafters included these rights, as violations of these - for the majority population - had been a major feature of the previous regime.¹⁵

Let me open a small parenthesis here to make a few comments on what is often the starting point of any transitional justice process, that is, peace agreements. In fact, in some cases, peace agreements are related to Constitution drafting¹⁶, and in all cases set out political, administrative, legal or judicial structures. Since peace agreements have a tremendous impact on other transitional justice mechanisms and the overall ability of the government to redress past abuses and rebuild society, they are intimately linked to the overall transitional justice process, and accordingly, we should pay close attention to them.

Many recent peace agreements already include specific commitments to human rights.¹⁷ They generally focus on civil and political rights, and only rarely cover

¹³ The Constitution of the Republic of South Africa was adopted in May 1996, and drafted according to Chapter 5 of the Interim Constitution of April 1994.

¹⁴ *Id.* Chapter 2: *Bill of Rights*.

¹⁵ Another example is the Constitution of Bosnia and Herzegovina, one of the many annexes of the Dayton Peace Agreement. The Constitution guarantees a list of rights, stresses that the European Convention for the Protection of Human Rights and Fundamental Freedoms has priority over all other law, and lists in an annex 15 additional human rights treaties that are applicable in Bosnia and Herzegovina. The right to property, to private and family life, and to education are mentioned, as is the ICESCR. One could argue that, with all its flaws, the Constitution at least gave Bosnia and Herzegovina a strong ground for the judicial and legal protection of human rights, including economic, social and cultural rights.

¹⁶ See, for example, the Dayton Peace Agreement, which includes as Annex the Constitution of Bosnia and Herzegovina.

¹⁷ A recent study by the International Council on Human Rights Policy, *Human Rights in Peace Agreements*, 2006, examined the following peace agreements: *Cambodia* (Final Act of the Paris Conference, October 1991); *El Salvador* (Peace Agreement in Mexico City, January 1992); *Mozambique*

economic, social and cultural rights. Yet there is no reason why peace agreements could not include economic, social and cultural rights more systematically. The Guatemala Peace Agreement (1996) is a key example in this regard as it sets standards and provides for specific targets for the achievement of various economic, cultural and social rights, including, particularly, the rights of Indigenous Peoples.¹⁸ It also clearly spells out the rationale for securing economic and social rights in post-conflict Guatemala, recognizing that the violations of these rights and the lack of social justice have represented a source of conflict and instability and respect thereof is a precondition for development and peace.¹⁹

In addition to the attention we should pay to constitutions and peace agreements, we should examine key legislation to ensure that it is directed towards strengthening State accountability in relation to economic, social and cultural rights. Ensuring that laws are in place, which guarantee these rights to the whole population, would go a long way to redress discriminatory patterns and inequalities, and would also complement existing

(General Peace Agreement, October 1992); *Bosnia-Herzegovina* (Dayton Peace Agreement, December 1995); *Guatemala* (Agreement on a Firm and Lasting Peace, December 1996); *Northern Ireland* (Good Friday/Belfast Agreement, April 1998); *Sierra Leone* (Lomé Peace Agreement, July 1999); *Burundi* (Arusha Peace and Reconciliation Agreement, August 2000).

¹⁸ The Agreement contains three sections related to human rights, namely the ‘Agreement on Human Rights’ (focused on civil and political rights), the ‘Agreement on the Socio-Economic Aspects and the Agrarian Situation’ (which sets standards and specific targets for the achievements of various economic and social rights) and the ‘Agreement on the Identity and Rights of Indigenous Peoples’ (which, among others, aims at securing the economic, social and cultural rights of Indigenous Peoples).

¹⁹ The Preamble of the *Agreement on Socio-Economic Aspects and the Agrarian Situation*, clearly spells out the rationale for securing economic and social rights in post-conflict Guatemala:

“A firm and lasting peace must be consolidated on the basis of social and economic development directed towards the common good, meeting the needs of the whole population,

This is necessary in order to overcome the poverty, extreme poverty, discrimination and social and political marginalization which have impeded and distorted the country's social, economic, cultural and political development and have represented a source of conflict and instability,

Socio-economic development requires social justice, as one of the building blocks of unity and national solidarity, together with sustainable economic growth as a condition for meeting the people's social needs.”

One should note that the two agreements securing economic, social and cultural rights have had the lowest degree of compliance among all elements that constitute the Guatemala Peace Agreement, while the agreement on civil and political rights has been rather well implemented. The current government has, however, been giving renewed support to the implementation of all peace agreements.

remedies and reparation afforded to victims through existing transitional justice mechanisms. In Bosnia and Herzegovina, my Office - the Office of the High Commissioner for Human Rights - worked on ways to improve the protection afforded to victims of torture and sexual violence in the existing laws on social protection, health care, and internally displaced persons and returnees. An analysis of these laws showed the need for their revision and also identified the need for a new law that would provide reparation to these particular groups and, more broadly, guarantee their economic and social rights in a comprehensive manner.²⁰ Today, the authorities are committed to the drafting of a State law on victims of torture and sexual violence.

Reviewing and strengthening legislation should be seen as an essential part of the mechanism of institutional reforms, which have so far largely focused on law enforcement sectors and vetting of related personnel. Yet, there is no reason not to use these transitional justice mechanisms to promote public sectors reforms that have a direct impact on the protection of economic, social and cultural rights, and review related legislation. There is great potential to expand the scope and reach of transitional justice to address root causes of conflict in a more comprehensive manner.

In spite of many achievements and of occasional exceptions, like in mainstream justice, transitional justice mechanisms have not yet dealt with economic, social and cultural rights adequately or systematically. I suggest that transitional justice should take up the challenge that mainstream justice is also reluctant to rise to: acknowledging that there is no hierarchy of rights and providing protection for all human rights, including economic, social and cultural rights. When viewed as rights, ESC rights call for

²⁰ This is precisely what the Committee against Torture and the Committee on Social, Economic and Cultural Rights recommended to the State Party of Bosnia and Herzegovina at the examination of its report last year. See Concluding Observations by the Committee against Torture, CAT/C/BIH/CO/1, 15 December 2005, and Concluding Observations by the Committee on Economic, Social and Cultural Rights, E/C.12/BIH/CO/1, 24 January 2006. The latter Committee recommended, *inter alia*, “that the State party ensure that victims of sexual violence suffered during the armed conflict of 1992-1995 obtain the status of civilian war victims, to devise and implement a coherent strategy at State level to protect the economic, social and cultural rights of victims of sexual violence and their family members, and to ensure the participation of victims of sexual violence in any decision-making processes affecting them.” (para. 41). While these remedies were provided to victims of civil and political rights, the same should be available to victims of ESC rights.

constitutional protection, legislative promotion and judicial enforcement. A comprehensive transitional justice strategy would therefore want to address the gross violations of all human rights during the conflict and, I suggest, the gross violations that gave rise or contributed to the conflict in the first place. International humanitarian law may not permit reaching back that far, but international human rights law does. And if judicial resistance makes it difficult at first to offer appropriate judicial redress for massive violations of ESC rights, then, at the very least, justice, as part of the transition to a peaceful society, would require that protective constitutional, legislative and institutional measures be put in place to ensure that these violations will not be perpetuated in the future.

Societies in transition present unique opportunities for countries to equip themselves appropriately to be more respectful of human rights and human dignity. Transitional justice, as a dynamic and cutting edge field, could serve as springboard for the systematic anchoring of economic, social and cultural rights in the political, legal and social construct of societies. By reaching beyond its criminal law-rooted mechanisms to achieve social justice, transitional justice could contribute to expand our traditional and reductive understanding of 'justice' by rendering it its full meaning. It is not a matter of possibility; it is a matter of choice, one which we now can, and must, make.