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# Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?

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## Abstract

This article examines the various points at which accountability for economic crimes, including large-scale corruption, intersects with accountability for human rights violations. To date, transitional justice has largely compartmentalized legacies of abuse into those based on a narrow set of human rights violations and those based on economic crimes, which the author argues is an inadequate way to address both sets of abuses. Because corruption and human rights violations are mutually reinforcing forms of abuse, the field of transitional justice should approach economic crimes in the same way it approaches civil and political rights violations. The author suggests that traditional transitional justice mechanisms would be strengthened by an engagement with corruption and economic crimes, which would allow for both sources of impunity to be confronted.

## Introduction

To some of its practitioners, transitional justice and its mechanisms of truth seeking, prosecution, reparations and institutional reform were meant solely to apply to holding the perpetrators of massive violations of human rights accountable while providing their victims with some measure of truth and justice. The prevailing assumption seems to be that truth commissions, human rights trials and reparations programs are meant to engage mainly, if not exclusively, with civil and political rights violations that involve either physical integrity or personal freedom, and not with violations of economic and social rights, including such crimes as large-scale corruption and despoliation. To a growing number of transitional justice advocates, particularly those who work in or come from impoverished postconflict or postdictatorship countries, this traditional view is inadequate. It ignores the experience of developing countries abused by dictators or warlords who have been *both* brutal and corrupt. It perpetuates an impunity gap by focusing on a narrow range of human rights violations while leaving accountability for economic crimes to ineffective domestic institutions or to a still evolving international legal system that deals with corruption.<sup>1</sup>

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<sup>1</sup> For the purposes of this article, economic crimes are defined as offenses committed by both state and nonstate actors that may constitute violations of the human rights enumerated in the International Covenant on Economic, Social and Cultural Rights.

The first part of this article looks at how accountability for human rights violations and accountability for economic crimes have intersected, and the impact of this on impunity. The second part examines the reasons behind the compartmentalization of human rights and economic crimes and its consequences for anticorruption and transitional justice initiatives. The third part explores the limits of existing anticorruption mechanisms, as well as the potential of transitional justice mechanisms as an alternative. The fourth part shows that engaging with economic crimes can have a significant effect on truth seeking and reparations and can contribute to more effective means of combating impunity. The last part of the article addresses the strategic policy questions that transitional justice advocates ought to answer when confronted with legacies of economic crimes and large-scale corruption.

## The Intersection of Human Rights Violations and Economic Crimes

The legacies of large-scale corruption and other economic crimes committed by politically exposed persons<sup>2</sup> or by leaders and members of nonstate armed groups have been, with a few exceptions, ignored in transitional justice initiatives. The few exceptions – such as the initiatives carried out in Chad, the Philippines, Sierra Leone, East Timor, Peru and, most recently, Liberia – and some concepts underlying the International Criminal Court's Trust Fund for Victims (ICC-TFV) demonstrate that transitional justice can be strengthened and can confront impunity more effectively if it engages with accountability for corruption and economic crimes.

The relationship between a state's human rights record and the extent of corruption in its government can be as simple as one of mutual reinforcement. As Transparency International asserts:

A corrupt government which rejects both transparency and accountability is not likely to be a respecter of human rights. Therefore, the campaign to contain corruption and the movement for the promotion and protection of human rights are not disparate processes. They are inextricably linked and interdependent.<sup>3</sup>

In many cases, the relationship is more complex. Not all transitions are from corrupt dictatorships to relatively democratic societies, and whether emerging from authoritarian rule or armed conflict, many developing countries that have undergone human rights-focused transitional justice processes still face the consequences of unresolved legacies of economic crimes, legacies that have for the

<sup>2</sup> A frequently used definition of a politically exposed person is that of the Financial Action Task Force (FATF): 'Individuals who are or have been in the past entrusted with prominent public functions in a particular country. This category includes, for example, heads of State or government; senior politicians and government, judicial or military officials; senior executives of State owned corporations and important political party officials.' FATF, 'Report on Money Laundering Typologies 2003–2004,' <http://www.fatf-gafi.org/dataoecd/19/11/33624379.pdf> (accessed 13 August 2008).

<sup>3</sup> Lawrence Cockcroft, 'Corruption and Human Rights: A Crucial Link,' Transparency International working paper (1998).

most part been ignored by past transitional justice processes and were not seen as having significant implications for defeating impunity.

As the examples below demonstrate, while the main motivation behind large-scale corruption might be greed, the availability of resources to maintain impunity is clearly just as important a motive. These examples show that economic crime pays at least insofar as it helps perpetrators defeat or delay attempts at prosecution and even ultimately escape accountability for human rights violations.

### **Pinochet's Legacy of Corruption**

A significant part of Chilean society long regarded the late Augusto Pinochet as 'honest in money matters',<sup>4</sup> as if to mitigate his regime's human rights record. The discovery of substantial Pinochet-owned offshore bank accounts has decisively broken the myth of his incorruptibility. The funds in these accounts, discovered in the course of a US congressional investigation, were moved while Pinochet was the subject of extradition efforts in Europe.<sup>5</sup> Pinochet died without being convicted of any crime. The corruption charges against him were brought too late,<sup>6</sup> certainly long after he had already used his ill-gotten assets to avoid accountability. Nonetheless, Pinochet's death does not prevent the recovery of those assets – a possibility that, as discussed below, has an impact for other transitional justice mechanisms such as reparations and truth seeking.

### **Post-Abacha Nigeria and Post-Mobuto DRC**

In Africa, massive human rights violations and large-scale corruption not only intersect but also overlap across various political transitions. The death of Nigeria's Sani Abacha made it impossible to hold him accountable for human rights violations, so the recovery of some \$4 billion in assets he and his family amassed became the focus of the post-Abacha government.<sup>7</sup> Although some of these assets were turned over by Swiss and American banks, a Swiss-brokered, global compromise fell through in 2001. To this day, the Abacha family continues to use these assets to maintain influence in Nigerian politics and to preserve the impunity of those who could still be held accountable.<sup>8</sup>

In the Democratic Republic of Congo (DRC), the legacy of Mobuto Sese Seko remains unaddressed, including the estimated \$12 billion in funds he embezzled.<sup>9</sup> Despite their magnitude, Mobuto's economic crimes have been ignored in

<sup>4</sup> 'Pinochet's Secret Millions Tarnish His Image,' *New Zealand Herald*, 19 October 2004.

<sup>5</sup> See, United States Senate Permanent Subcommittee on Investigations, 'Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act, Case Study Involving Riggs Bank' (July 2004).

<sup>6</sup> See, 'Pinochet Family Cleared of Embezzlement Charges,' *Reuters*, 27 October 2007.

<sup>7</sup> Elizabeth Olson, 'Nigeria to Recover \$1 Billion from Late Dictator,' *New York Times*, 18 April 2002.

<sup>8</sup> In 2002, the author conferred with the Nigerian government's Swiss lawyer in Geneva, who admitted to difficulties in obtaining evidence of Abacha's stolen wealth given the family's considerable political power in Nigeria.

<sup>9</sup> Tim Daniel, 'Repatriation of Looted State Assets: Selected Case Studies and the UN Convention Against Corruption,' in *Global Corruption Report 2004* (Berlin: Transparency International, 2004).

transitional justice initiatives. Instead, the focus has been on the cycles of violence that have taken place since Mobuto's fall. By leaving unexamined the relationship between Mobuto's economic crimes and the enduring violence in the DRC, transitional justice has been boxed into a small corner, dwelling on the violent consequences of an unresolved past while mostly ignoring its structural causes.

### **Post-Suharto Indonesia and Post-Marcos Philippines**

Transitional justice remains elusive in Asia, and the examples of Indonesia and the Philippines show how economic crimes and human rights violations have mutually reinforced impunity in the region. Indonesia's Suharto died without being convicted of any crime involving human rights, or for the corruption that allowed his family to amass an estimated \$9 billion.<sup>10</sup> While Ferdinand Marcos was held civilly liable in the US to pay damages to approximately 10,000 victims of human rights violations in the Philippines,<sup>11</sup> no one among his associates, including his widow, Imelda Marcos, has been imprisoned for those violations or for the corruption they perpetrated.

In both cases, the postdictatorship governments not only failed to hold the former dictators criminally accountable for corruption but also employed flawed measures to hold them and their military subordinates liable for human rights violations.<sup>12</sup> Marcos and Suharto enjoyed impunity until they died. Their military conspirators remain unaccountable and their families continue to enjoy the fruits of their economic crimes.

### **South Africa and the Post-TRC Impunity Gap**

This pattern of mutually reinforcing impunity has emerged across different countries. It should prompt honest reflection on the adequacy of an approach in which accountability for civil and political rights violations is privileged over an approach that engages with both this narrow set of human rights and economic crimes.

Post-apartheid South Africa illustrates this inadequacy well. The country's Truth and Reconciliation Commission (TRC) did not address corruption simply because it claimed that corruption fell outside its mandate. Whether or not the exclusion of economic crimes may have had more substantive reasons, its consequences, as articulated in a South African civil society report from 2006, should be a lesson for other countries, especially those seeking to emulate the TRC process. The report demonstrates the link between human rights violations and corruption, pointing out that 'when the apartheid state was at its most repressive, it was also at its

<sup>10</sup> Agung Putri, 'Evading the Truth: Will a Truth and Reconciliation Commission Ever be Formed?' *Inside Indonesia* 23 (2003); John Colmey and David Liebhold, 'The Family Firm,' *Time*, 24 May 1999.

<sup>11</sup> See, Maria Glenda Ramirez, 'The Philippines: Assessing the Need for a Truth Commission Fifteen Years After' (paper presented at 'Human Rights and Law in Asia,' Asia Society, New York, 27 March 2001).

<sup>12</sup> See, for example, David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (New York: International Center for Transitional Justice, 2008).

most corrupt.<sup>13</sup> The author contends that by not addressing corruption under apartheid, the TRC lost a historic opportunity, as

[E]vidence of these [economic] crimes will be further erased over time and money stolen will continue to enrich the beneficiaries of corruption. In taking this path, we choose to close the book on the past. Such a decision will not threaten the South African elite and will no doubt be welcomed by many. It will, however, probably always haunt us as a society.<sup>14</sup>

### **Mutually Reinforcing Impunity**

The ongoing trials of Peru's Alberto Fujimori and Liberia's Charles Taylor also show that prosecution in itself may not decisively break the mutually reinforcing walls of impunity built in the pretransition period. Most of these dictators' ill-gotten assets were hidden while they were in power, so that Fujimori can even claim that since his exile 'no foreign bank accounts have been found.'<sup>15</sup> If the kind of zeal shown in prosecuting human rights cases is not applied to denying ex-dictators access to their ill-gotten assets, these assets will be used to derail trials and asset recovery efforts. Taylor's hand is apparent in the effort to intimidate prosecution witnesses appearing in the Special Court for Sierra Leone (SCSL),<sup>16</sup> as it is in the defeat of proposed Liberian legislation that would have frozen some of his assets.<sup>17</sup>

Using their ill-gotten assets, the likes of Pinochet, Marcos and Suharto have financed destabilization and intimidation, stifled investigations, delayed trials, fought extradition and sponsored political proxies to counter attempts at holding them accountable for human rights violations. With more than enough in such assets, they can do this until the political tide changes in their favor or until their deaths, whichever comes first. These examples show how impunity for economic crimes reinforces impunity for human rights violations.

### **The Compartmentalization of Transitional Justice**

In theory, there seems to be no fundamental obstacle to applying the key elements of transitional justice to large-scale corruption and economic crimes. In practice, however, the predominant approach in the transitional justice field tends to view human rights as narrower than the range of human rights violations that actually occur. The field compartmentalizes the unresolved legacies faced by transitioning societies, particularly in developing countries. It constructs one compartment for human rights violations and another for economic crimes and corruption. Economic crimes thus are treated as if they do not constitute rights violations in themselves. Not only does this compartmentalization oversimplify the relationship

<sup>13</sup> Hennie van Vuuren, *Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994* (Cape Town: Institute for Security Studies, 2006), 3.

<sup>14</sup> *Ibid.*, 87.

<sup>15</sup> 'Peru's Former President Plots His Return to Power,' *New York Times*, 22 December 2002.

<sup>16</sup> Sheriff Z. Adams, 'Moses Blah Returns from the Hague,' *News*, 29 May 2008.

<sup>17</sup> 'Liberian Lawmakers Reject Bill to Freeze Taylor's Assets,' *Associated Press*, 23 September 2007.

between those unredressed legacies but it also does not reflect the reality of the societies that seek to address them.

Some transitional justice practitioners from Africa have pointed out that ‘the traditional definition of transitional justice [is] too narrow.’ In their view, a more meaningful definition must recognize contexts where ‘mass poverty and socio-economic concerns inform the needs of victims and the object of justice.’ Specifically, these practitioners see corruption as a *principal* subject of the field:

[Transitional justice advocates in] countries such as Nigeria, Kenya and Liberia . . . have included issues of corruption as a key crime to be addressed, making the argument that this ‘structural violence’ has had far wider implications than direct violence, and that it has been and continues to be a fault-line for violent conflict.<sup>18</sup>

This dissonant view of transitional justice evokes a previous challenge to the universalist assumptions of the human rights movement,<sup>19</sup> which was based on the argument that certain Asian values affect the way some Asian states apply human rights standards. In the present case, the challenge comes by way of African activists asserting ownership over local transitional justice initiatives.

Transitional justice advocates often speak of nurturing a sense of ownership among the people of societies in which transitional justice mechanisms are pursued. Yet, the predominance of civil and political rights-focused transitional justice initiatives in many developing countries struggling with what the African practitioners describe as ‘mass poverty and socio-economic concerns’ creates doubt that a complete sense of ownership can be inculcated as long as economic crimes and large-scale corruption are excluded from mainstream transitional justice advocacy.

This focus on civil and political rights violations and corresponding hesitation to address violations of socioeconomic rights may be an extension of the larger dichotomy in human rights discourse. Civil and political rights violations are seen not only as justiciable but also as susceptible to being redressed through transitional justice. Socioeconomic rights violations, meanwhile, usually are considered non-justiciable and therefore better addressed by a catch-all reference to development programs.

Thus, most truth commissions, which are often seen as the most iconic mechanisms of transitional justice, have ignored corruption and economic crimes. By one count, 34 truth commissions were established worldwide between 1974 and 2004.<sup>20</sup> Of these commissions, only three appear to have expressly engaged with economic crimes,<sup>21</sup> socioeconomic rights violations or a set of crimes that necessarily incorporates past acts of corruption. The rest have *tacitly* assumed corruption and

<sup>18</sup> See, African Transitional Justice Research Network, ‘Mapping Exercises, Key Findings and Challenges: Definition of Transitional Justice in Africa,’ [http://www.transitionaljustice.org.za/index.php?option=com\\_content&task=view&id=314&Itemid=36](http://www.transitionaljustice.org.za/index.php?option=com_content&task=view&id=314&Itemid=36) (accessed 24 August 2008).

<sup>19</sup> See, Randall Perenboom, ‘Human Rights and Rule of Law: What’s the Relationship?’ *Georgetown Journal of International Law* 36(1) (2005): 809–945.

<sup>20</sup> Kathryn Sikkink and Carrie Booth Walling, ‘Errors about Trials: The Emergence and Impact of the Justice Cascade’ (paper presented at the Princeton International Relations Faculty Colloquium, 27 March 2006).

<sup>21</sup> These are Chad, Liberia and Sierra Leone.

economic crimes to be outside the ambit of truth seeking, as truth commissions are described as ‘bodies set up to investigate a past history of violations of human rights in a particular country.’<sup>22</sup>

International, hybrid and regional human rights tribunals, including the ICC, have been set up to try heads of state and other political or military leaders, with many prosecutions founded on the concept of system crimes.<sup>23</sup> The range of crimes that form part of this prosecutorial strategy assumes the exclusion of economic crimes, despite the otherwise strategic role of these crimes in maintaining systems of abuse. The assumption seems to be that someone else will address those ‘other’ systemic violations and that something else can provide redress.

The transitional justice tools prescribed by the UN for its field missions partly reflect this narrow view. The UN Office of the High Commissioner for Human Rights (OHCHR) acknowledges that truth commissions ‘traditionally’ have focused ‘on serious human rights abuses . . . as well as violations of international humanitarian law and war crimes.’<sup>24</sup> It acknowledges, however, that ‘in some countries, economic crimes have been as prominent – and in the public’s mind as egregious – as the civil and political rights violations by a prior regime.’ OHCHR declares that, in such cases, one ‘option’ is to engage in ‘discussion of including corruption and other economic crimes within a truth commission’s mandate.’<sup>25</sup> The fact that OHCHR notes that economic crimes can be as prominent and, ‘in the public’s mind,’ as egregious as violations of civil and political rights may be indicative of a perspective that takes the public’s mind standard of egregiousness less seriously than the standard officially adopted by an international human rights institution. This perspective implies a hierarchy of egregiousness that places economic crimes below civil and political rights violations. The gravity of these two forms of abuse seems to be equal only in the public’s mind, and not in the minds of international institutions or nongovernmental organizations (NGOs), which, by their practice, significantly define the conventions of human rights and prescribe to the rest of the world how human rights violations are to be redressed.

The former UN High Commissioner of Human Rights Louise Arbour began to move away from this view. She made an explicit statement that transitional justice should engage with socioeconomic rights violations, noting 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 . . . A comprehensive transitional justice strategy would therefore want to address the gross violations of all

<sup>22</sup> Priscilla Hayner, ‘Fifteen Truth Commissions – 1974 to 1994: A Comparative Study,’ *Human Rights Quarterly* 16(4) (1994): 598.

<sup>23</sup> System crimes have been described as ‘crimes such as genocide, crimes against humanity and war crimes [that] differ from ordinary crimes in that they are generally of such a scale that they require a degree of organization or system to perpetrate.’ International Center for Transitional Justice, *Pursuing Justice In Ongoing Conflict: A Discussion of Current Practice* (May 2007), 21.

<sup>24</sup> See, UN Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Truth Commissions* (2006), 9.

<sup>25</sup> *Ibid.*

human rights during the conflict and, I suggest, the gross violations that gave rise or contributed to the conflict in the first place.<sup>26</sup>

How (or even whether) UN agencies and NGOs engaged in transitional justice work will incorporate this view remains to be seen.

## The Limits of Anticorruption Initiatives and the Potential of TJ Mechanisms

Because it must respond to different types of transitions, victims and perpetrators, transitional justice has become increasingly nuanced and has evolved into the multidisciplinary field it is now. It embraces not only law and human rights but also the reform of police and military bureaucracies,<sup>27</sup> healthcare and psychology, education, children's rights, gender, media and communications, and even art and filmmaking. As a result, a wide range of international actors with a varied set of skills now work within the field. Yet, despite the expansion in the disciplines it employs, transitional justice has remained narrow in the range of injustices with which it deals, avoiding engagement with legacies of corruption and economic crimes and leaving them for fragile posttransition governments to address.

The paths along which human rights advocacy and anticorruption initiatives evolved might partly account for this situation. While transitional justice was still a nascent field in the 1990s, nongovernmental anticorruption initiatives, such as Transparency International, emerged at the international level.<sup>28</sup> This was after the 'justice cascade' had already been set in motion by human rights activists,<sup>29</sup> with the cascade's direction fixed on civil and political rights violations. The human rights movement gave rise to the subfield of transitional justice. The international anticorruption movement, meanwhile, did not develop its own analog to that subfield. The anticorruption movement was more forward looking, seeking to prevent corruption rather than push for accountability for past actions. It promoted the nebulous notion of 'good governance' instead of confronting legacies of large-scale corruption and economic crimes.

International financial institutions (IFIs) eventually caught up with the anticorruption movement and have since been influential in shaping its direction. The IFIs' anticorruption agenda is driven in part by criticism of the role they played in lending to corrupt, repressive regimes. Their current anticorruption rhetoric notwithstanding, it is unlikely that IFIs will look at the past to examine their roles in sustaining authoritarian regimes, given the empirically proven correlation

<sup>26</sup> Louise Arbour, 'Economic and Social Justice for Societies in Transition' (lecture given as the Second Annual Transitional Justice Lecture, New York University School of Law Center for Human Rights and Global Justice and the International Center for Transitional Justice, New York, 25 October 2006), 14.

<sup>27</sup> See, for example, Eirin Mobekk, *Transitional Justice and Security Sector Reform: Enabling Sustainable Peace* (Geneva: Geneva Center for the Democratic Control of Armed Forces, 2006).

<sup>28</sup> Transparency International was formally established in 1993.

<sup>29</sup> See, Sikkink and Walling, *supra* n 20.

between foreign debt and abusive dictatorships.<sup>30</sup> As one critic asked about the World Bank's stance, 'How far can the Bank really go with this agenda, in particular where the Bank itself has been the cause of corruption, and odious and illegitimate debts, in the past?'<sup>31</sup>

Since the social and economic impact of large-scale corruption is of such magnitude that posttransition governments can hardly ignore them, a common initiative among victim countries has been to seek the recovery of assets amassed by corrupt former leaders. Victim countries often find themselves in the predicament of lacking both the kind of proof and the political leverage necessary to deal with the states in whose banking and financial institutions their embezzled funds are kept. Although countries like Switzerland and the UK have been trying seriously to rid themselves of the reputation of being laundering centers for ill-gotten wealth, the challenges to recovering assets have not decreased significantly for victim countries.<sup>32</sup>

Most victim countries simply cannot afford the costs of foreign litigation; in many cases, they cannot even match the resources available to perpetrators. This increases the importance of finding an alternative means of ferreting out the truth regarding corruption (including the whereabouts of proceeds), obtaining the cooperation of 'low-level' perpetrators (for instance, through selective conditional amnesties, as discussed below) and procuring a trail that can stand as evidence in prosecutions of higher level perpetrators. Victim countries would benefit from having a transitional justice mechanism as an alternative means for dealing with legacies of corruption and economic crimes. As stand-alone asset recovery efforts are not often part of a comprehensive agenda to extract accountability from former rulers, situating these initiatives in a transitional justice context could only be beneficial.

Two recent developments could take transitional justice in this direction. First, the UN Convention Against Corruption (UNCAC)<sup>33</sup> took effect in 2005 and explicitly made asset recovery a 'fundamental principle.'<sup>34</sup> Second, the US has begun enforcing anti-money laundering regulations, including criminal law enforcement against non-American perpetrators of large-scale corruption. The US president

<sup>30</sup> See, David Gray, 'Devilry, Complicity, and Greed: Transitional Justice and Odious Debt,' *Law and Contemporary Problems* 70 (2007): 137–164.

<sup>31</sup> Gail Hurley, 'Wolfowitz Needs to Look at Corruption of Yesterday, Not Just Today and Follow the Positive Example of Norway,' European Network on Debt and Development (1 June 2006), <http://www.eurodad.org/whatsnew/articles.aspx?id=338> (accessed 27 August 2008).

<sup>32</sup> It has been said that 'asset recovery is a costly and time consuming enterprise. It requires lawyers, forensic accountants, expert opinions, translators, travel expenses, etc. Private law firms often prove helpful in tracing and recovering assets abroad, as in the efforts of the Philippines against Ferdinand Marcos and Nigeria against the estate of Sani Abacha. Such firms are expensive, generally charging from \$200 to \$600 per hour. Corruption offenders can be relied upon to spare no expense to keep their ill gotten gains.' Excerpted from Jack Smith, Mark Pieth and Guillermo Jorge, *The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention Against Corruption*, (International Center for Asset Recovery brief for the U4 Anti-Corruption Resource Center, February 2007), 2.

<sup>33</sup> United Nations Convention Against Corruption, UN General Assembly Resolution A/RES/58/4, *entered into force* 14 December 2005.

<sup>34</sup> Ch. V, art. 51, of the UNCAC states: 'The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.'

has, for example, issued a proclamation prohibiting entry into America for foreigners linked to corruption abroad.<sup>35</sup> One US official describes this as a policy of ‘prosecuting kleptocrats’ and of ‘denying safe haven to corrupt officials and their illicitly-acquired assets.’<sup>36</sup>

In addition, the World Bank’s Stolen Asset Recovery Initiative (StAR)<sup>37</sup> and the UN Office of Drugs and Crime (UNODC) explicitly connect asset recovery efforts with accountability for large-scale corruption and the level of a victim country’s development. They do not, however, connect them to extracting accountability for massive human rights violations. StAR proposes to support ‘coordinated, international requests to freeze assets in relation to a specific Politically Exposed Person.’ It cites as exemplary the asset recovery experiences of Nigeria, Peru and the Philippines. Neither the World Bank nor UNODC has (yet) linked its anticorruption initiatives with its own or outside transitional justice mechanisms. Nonetheless, the fact that StAR has singled out the experiences of Nigeria, Peru and the Philippines specifically because of these countries’ histories of repressive *and* corrupt rule shows the potential for combining these mechanisms.

## Value Added by Addressing Economic Crimes

### A Fuller Account of the Legacy of Abuse

The human rights focus of transitional justice determines the way in which a repressive regime or a brutal conflict is remembered. Most transitional justice mechanisms focus on civil and political rights violations, which means that accounts of abuse and injustice invariably focus on violations committed by police, military and paramilitary personnel. In the process, nonphysically violent abuses committed by civilians (or military officials) connected to the regime, including spouses, children, other relatives or even finance and budget ministers and advisers, are glossed over. An engagement with corruption would allow transitional justice mechanisms, particularly truth commissions, to frame their work within a larger factual context. By exposing the extent of corruption or the scale of economic crimes, these mechanisms would reveal that the depth of the damage caused by perpetrators goes beyond violence directed against their opponents or against citizens targeted by repressive measures.

In proposing that truth commissions look into economic crimes, this author’s assumption is not that past truth commissions that dealt with civil and political rights violations were completely effective in resolving those injustices. That point

<sup>35</sup> United States of America Presidential Proclamation No. 7750, ‘Proclamation by the President: To Suspend Entry as Immigrants or Non-Immigrants of Persons Engaged in or Benefiting From Corruption’ (12 January 2004).

<sup>36</sup> David Luna, ‘Prosecuting Kleptocrats: Denying Safe Haven to Corrupt Officials and Their Illicitly-Acquired Assets’ (remarks at the ‘International Recovery of the Proceeds of Corruption’ seminar, American Bar Association Section of International Law Anticorruption Initiatives and Compliance Issues Committee, Washington, DC, 9 December 2005).

<sup>37</sup> World Bank, *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan* (June 2007).

is still open to debate, and the debate will always be framed by different contexts, such as whether prosecutions, reparations and other measures accompanied or followed a truth commission's findings and whether amnesties or steps to overcome the impunity of perpetrators identified by truth commissions were taken. There are those who argue that truth commissions should not be a substitute for prosecutions,<sup>38</sup> but this stance assumes that once truth is revealed, individual criminal accountability follows. In that respect, it would make little difference to the process if truth commissions were *also* to address economic crimes, establishing, for example, individual criminal accountability for large-scale corruption. But there are those who fear that the political bargaining that surrounds a truth commission can end up blocking prosecution. In cases of civil and political rights violations, the South African experience shows this to be a valid apprehension. In cases of economic crimes and corruption, the prospect of recovering assets following a TRC process could offset the risk of prosecution being bargained away, a choice that seems acceptable in the case of Kenya<sup>39</sup> and Bangladesh.<sup>40</sup>

Two additional features would distinguish a truth commission with a mandate to look into both human rights violations and economic crimes from past commissions. The first would be its capacity to establish a more complete truth. The second, which is discussed below, would be its potential to harness resources for reparations and to counter the ability of perpetrators to maintain their impunity.

Even though it did not have an explicit mandate to look into economic rights violations, the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor addressed famine and forced displacement. By holding hearings on these economic rights violations,<sup>41</sup> CAVR was able to establish that, of the estimated 102,800 victims who died during the Indonesian occupation, approximately 84,200 died of hunger and illness rather than being killed outright or forcibly disappeared.<sup>42</sup> More important, it established a far more truthful account of the Indonesian occupation than it would have had it limited itself to physical integrity violations tied to civil and political rights.

The incorporation of economic crimes into accounts of past abuses allows the myth of clean dictatorships to be shattered,<sup>43</sup> giving society an opportunity to reflect on the relationship between the economic crimes and the human rights violations committed by former rulers and other perpetrators. By reflecting on the relationship between plunder and pain, the various manifestations of transitional justice – prosecutions, conditional amnesties, reparations programs as well as

<sup>38</sup> Michael P. Scharf, 'The Case for a Permanent International Truth Commission,' *Duke Journal of Comparative and International Law* 7(2) (1997): 375–410.

<sup>39</sup> Gakuu Mathenge, 'Githongo's Cure for Impunity,' *The Standard*, 24 August 2008.

<sup>40</sup> 'Bangladesh Sets Up Corruption Truth Commission,' *Agence France Presse*, 30 July 2008.

<sup>41</sup> See, 'CAVR Public Hearing on Famine and Forced Displacement 28–29 July 2003 Dili, Timor-Leste,' CAVR press release (23 July 2003).

<sup>42</sup> See, Human Rights Data Analysis Group, 'Timor-Leste FAQs,' [http://www.hrdag.org/resources/timor-leste\\_faqs.shtml#1](http://www.hrdag.org/resources/timor-leste_faqs.shtml#1) (accessed 20 August 2008).

<sup>43</sup> 'Chile Sets Precedent for Holding Dictators Accountable for Corruption: Pinochet Facing Charges on Corruption,' Transparency International press release (25 November 2005).

vetting and other institutional reforms – are informed by a more comprehensive account of the crimes that were committed by perpetrators, including data on the wealth they amassed, the resources available for reparations and the kind of punishments or measures of forgiveness that society should impose or can afford.

### **Experience Indicates that a Compartmentalized View of TJ Is Untenable**

OHCHR suggests that a difference in methodology and the possibility of ‘not completing its task’ are obstacles to integrating economic crimes and corruption into a truth commission’s mandate.<sup>44</sup> As only a handful of more than 30 past truth commissions incorporated economic crimes into their truth-seeking work,<sup>45</sup> OHCHR does not seem to have sufficient empirical basis to conclude that if other commissions had done the same, they would have been unable to overcome the anticipated obstacles.

In any event, those commissions mandated to look into economic crimes, as well as those that construed their role as requiring an examination of socioeconomic rights violations alongside other types of abuses, did in fact establish findings regarding corruption or other socioeconomic rights violations. Doing so did not appear to have hindered them from simultaneously looking at their countries’ legacy of massive human rights violations.

The Chad Commission’s mandate included identifying ‘the financial operations and bank accounts,’ as well as other assets, of former President Hissène Habré and his associates.<sup>46</sup> The Commission’s report includes a list of plunderers and their assets and recommends the vetting of these persons and the sequestration of their assets. Its recommendations regarding both human rights and economic crimes were not implemented, although some of those named in the report as Habré accomplices were removed from office, albeit more than a decade later.<sup>47</sup> The Sierra Leone TRC report, meanwhile, declares ‘years of bad governance, endemic corruption and the denial of basic human rights’ as among the causes of armed conflict. It even identifies specific diamond mining companies that had links to armed groups in the country.<sup>48</sup> As mentioned earlier, CAVR conducted thematic hearings on forced displacement and famine. Its report links the violation of

the [economic] right of people to food with . . . the denial of freedom of movement, the violation of the right of individuals to live where they want, the denial of access to relief, the destruction of food sources, and ultimately the violation of the right to life.<sup>49</sup>

<sup>44</sup> OHCHR, *supra* n 24 at 16.

<sup>45</sup> Sikkink and Booth Walling, *supra* n 20.

<sup>46</sup> Chad Council of State Decree No. 014/P.CE/CJ/90 (29 December 1990).

<sup>47</sup> Human Rights Watch, ‘Habré Henchmen Ousted from Government,’ press release (12 August 2005).

<sup>48</sup> *The Final Report of the Truth and Reconciliation Commission of Sierra Leone* (Freetown: Truth and Reconciliation Commission of Sierra Leone, 2004) [hereinafter ‘Sierra Leone TRC report’].

<sup>49</sup> *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (Dili: Commission for Reception, Truth and Reconciliation in East Timor, 2005), ch. 7(3), p. 3.

These examples show that truth commissions *can* examine and report on legacies of corruption, economic crimes and other socioeconomic rights violations. They also show, however, that, as with truth commission recommendations on civil and political rights violations, the implementation of recommendations regarding accountability for economic crimes depends on the political will of the succeeding government.

The broader mandates of the abovementioned truth commissions did not lead to unreasonable delays in the completion of their work or the submission of their reports. It could be argued that the few commissions that addressed economic crimes and corruption acted more expeditiously than their strictly human rights-oriented counterparts, considering the 'dual' coverage of their mandates. Given the different contexts in which transitional justice measures are applied, it may not even be reasonable to compare the effectiveness of truth commissions on the basis of their mandates; it may be more useful to strongly encourage local ownership of the truth-seeking process and to let local actors resolve issues involving the inclusion of economic crimes within a commission's mandate. By that standard, whatever may be said about the ongoing truth-seeking process in Liberia, the inclusion of economic crimes in the law that created the truth commission<sup>50</sup> was characterized by the relatively active engagement of Liberian civil society, as well as of the international community.

The ongoing process of establishing the Truth, Justice and Reconciliation Commission (TJRC) in Kenya should be informed by the debates that took place in 2003 surrounding the recommendations of the Task Force on the Establishment of a TJRC.<sup>51</sup> One side of the debate recommended that the proposed truth commission exclude corruption and economic crimes from its mandate because their inclusion would enlarge the breadth of investigation and distract from human rights violations.<sup>52</sup> In response, the Task Force took the position that 'the investigation of past economic crimes should be included [because, otherwise, it would] represent such a yawning gap in the record of truth of Kenya.'<sup>53</sup> The Task Force then proposed a method of truth seeking that was significantly similar to the Philippines' means of addressing its conjoined legacies of corruption and human rights abuse.<sup>54</sup> The task force proposed that the truth commission be 'organized into two chambers, one to look into past gross violations of human rights abuses and another to deal with past grave economic crimes.'<sup>55</sup> OHCHR's position in the Kenya debate represents a compromise of sorts. In particular, the High Commissioner has noted that:

<sup>50</sup> Liberia Truth and Reconciliation Commission Act (May 2005), art. 4, sec. 4.

<sup>51</sup> The Task Force was referred to as the 'Mutua Commission,' after its chairperson, Prof. Makau Mutua.

<sup>52</sup> These debates are chronicled in detail in, Priscilla Hayner and Lydiah Bosire, *Should Truth Commissions Address Economic Crimes? Considering the Case of Kenya* (New York: International Center for Transitional Justice, 2003).

<sup>53</sup> *Ibid.*, 207.

<sup>54</sup> In 1986, two commissions were established in the Philippines: one to investigate and prosecute human rights violations and another, the Presidential Commission on Good Government (PCGG), to do the same for economic crimes under the Marcos dictatorship. The first commission was dissolved in 1989 and the other still exists.

<sup>55</sup> Hayner and Bosire, *supra* n 52 at 207.

Economic matters certainly should not be excluded per se. If there is a clear link between economic issues and violence – such as land conflicts that erupt in violence or the State confiscates property when persons are arrested or disappear – then a truth commission should clearly recognize, inquire into and report on these matters.<sup>56</sup>

While engaging with corruption would require an entirely different pool of investigators with a different set of skills and experiences, this does not differ significantly from what investigations in other transitional justice contexts would require. For example, OHCHR's 'tools' on prosecutions and transitional justice suggest:

Effective investigation requires appropriate analysis of the ways in which such organizations are legally required to work, as well as how they actually operated during the time in question. Lawyers may lack all the skills necessary to carry out such analyses, and *significant input from other experiences and disciplines can be very beneficial*.<sup>57</sup>

Transitional justice institutions invariably need experts in areas other than law or human rights. In fact, transitional justice should already have moved beyond its legalistic origins given that the varied contexts in which the field operates requires it to transcend a reliance on law as an instrument of justice. A transitional justice-based truth-seeking process that addresses economic crimes might be a sounder approach than the predominantly litigation-based process utilized, to their frustration, by the Philippines, Nigeria and Pakistan.

A study on lustration programs implemented in post-Soviet Eastern Europe compared the effectiveness of two distinct approaches to truth revelation.<sup>58</sup> It concluded that an 'incentive-based truth revelation' (ITR) process, which provides those who collaborated or worked in the former regimes with 'incentives for revealing themselves,' works better than an 'evidence-based truth revelation' (ETR) procedure, which 'operates in a fashion similar to an ordinary court system' and does not provide incentives. Processes that include ITR, the study points out,

create incentives for perpetrators to step forward and testify against themselves. The reward offered to the perpetrator or ex-collaborator is usually immunity from criminal charges or serious sentence reduction. Using such procedures allows for the extraction of statements from those wrongdoers for whom evidence does not even exist. Such effectiveness is impossible in the case of ETRs, which resemble traditional prosecution methods by relying on extricating evidence of collaboration from archival resources or from victims' testimonies.<sup>59</sup>

As discussed below, an ITR approach would be useful if a judicious amnesty policy for economic crimes were combined with efforts to recover assets from perpetrators.

<sup>56</sup> OHCHR, *supra* n 24 at 16.

<sup>57</sup> Emphasis added. OHCHR, *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives* (2006), 21.

<sup>58</sup> Marek Kaminski and Monika A. Nalepa, *Judging Transitional Justice: An Evaluation of Truth Revelation Procedures* (Irvine: Center for the Study of Democracy, 2004).

<sup>59</sup> *Ibid.*, 15.

## Asset Recovery as a Resource for Reparations

Most postconflict or postdictatorship developing countries cannot, on their own, finance transitional justice measures. This predicament has plagued the SCSL,<sup>60</sup> the Extraordinary Chambers of the Courts of Cambodia (ECCC)<sup>61</sup> and Liberia's Truth and Reconciliation Commission.<sup>62</sup>

While this is not a comprehensive solution to the problem of financing transitional justice initiatives, it seems both just and practical for the recovery of assets amassed by perpetrators of economic crimes to be used in part to fund those initiatives, particularly reparations programs. In the Philippines, reparations for victims of the Marcos dictatorship are anchored in proposed domestic legislation, as well as a competing initiative that relies on the enforcement of the US Alien Tort Claims Act judgment against the Marcos family.<sup>63</sup> Both approaches depend on about \$680 million in assets recovered by the Philippine government in 2003 from Marcos bank accounts in Switzerland.<sup>64</sup> The Philippine experience also shows that paths that were closed to transitional justice can be opened when reparations and asset recovery intersect. As though opening a backdoor to truth seeking, the proposed reparations law calls for the establishment of a commission that would 'ensure that the truth behind all human rights violations is thoroughly documented.'<sup>65</sup>

In Peru, a special fund, *El Fondo Especial de Administración del Dinero Obtenido Ilicitamente en Perjuicio del Estado* (FEDADOI), was created to govern the use of assets confiscated from Fujimori and his close associates.<sup>66</sup> Under the FEDADOI law, recovered assets have been used for both anticorruption and transitional justice measures, including truth seeking and reparations.<sup>67</sup> The truth commission hearings in Peru, coming off revelations of widespread corruption by the Fujimori regime, created the political conditions that prompted Switzerland<sup>68</sup> and the US<sup>69</sup> to return to Peru \$77 million and \$20.2 million in ill-gotten assets, respectively.

<sup>60</sup> Integrated Regional Information Network (IRIN), 'Donors Pledge Less than Half Funds Needed for War Crimes Court,' 3 October 2005.

<sup>61</sup> Pepe Escobar, 'Rouge Justice,' *Asia Times Online*, 14 April 2005.

<sup>62</sup> Rob DeVries, 'Liberia Truth Commission on Hold Due to Lack of Funds,' *Jurist*, 28 November 2006.

<sup>63</sup> Decision of the US Ninth Circuit Court of Appeals in *Hilao v. Estate of Ferdinand Marcos et al.*, No. 03-16934, DC No. MDL-00840-MLR (28 December 2004) contains a summary of the relevant US court decisions.

<sup>64</sup> See, *Republic of the Philippines v. Estate of Ferdinand Marcos*, G.R. No. 152154, Supreme Court of the Philippines (15 July 2003).

<sup>65</sup> Thirteenth Philippine Congress, House of Representatives House Bill No. 3315, sec. 8(B)(4).

<sup>66</sup> Funds confiscated from Fujimori and Vladimiro Montesinos may be used already under the FEDADOI law, 'even before it is judicially determined [that the assets] have been illicitly acquired.' Nelly Calderón Navarro, 'Fighting Corruption: The Peruvian Experience,' *Journal of International Criminal Justice* 4(3) (2006): 507–508.

<sup>67</sup> Decree of Urgency No. 122-2001, art. 10 (iii) and (iv).

<sup>68</sup> Swiss Federal Office of Justice, 'Montesinos Case: Switzerland Transfers 77 million US dollars to Peru,' press release (20 August 2002).

<sup>69</sup> US Department of State, 'Transfer to Peru of Assets Derived From Corruption,' press release (12 January 2004).

The possibility of using recovered assets to finance reparations programs is not limited to situations involving fallen dictators. The Sierra Leone Truth and Reconciliation Commission, for example, distinguishes between ‘the revenue generated from mineral resources’ and ‘seized assets from convicted persons.’<sup>70</sup> The former contemplates a mining tax to finance reparations, while the latter refers to the possibility that assets of perpetrators who ‘profited from the conflict’ will be used to fund reparations programs.

With the indictment of Taylor for the war crime of pillage,<sup>71</sup> this might be possible, but it is not necessarily assured. A conviction for pillage can lay the basis for the forfeiture of Taylor’s ill-gotten profits,<sup>72</sup> but because the SCSL is aimed only at accountability for war crimes and gross human rights violations, it does not bridge the gap between Taylor’s economic crimes and the legal obligation to provide reparations for victims. The statute states that forfeited assets will be turned over to ‘their rightful owner’ or to the government of Sierra Leone, but not necessarily used for reparations. The prosecutor argues that while they may be ‘morally connected,’ Taylor’s ill-gotten assets and the victims’ right to reparations are not ‘expressly legally connected.’<sup>73</sup>

### **The Judicious Use of Conditional Amnesties Can Contribute to Asset Recovery**

While amnesty-for-truth mechanisms have often immediately (and justifiably) triggered concerns that they encourage impunity with respect to human rights violations, a similar approach with respect to large-scale corruption and economic crimes may not be as controversial, especially if it results in the recovery of assets amassed through those crimes.

An ITR-based approach clearly motivated some of the approaches to corruption investigation and asset recovery that are now in the UNCAC.<sup>74</sup> The treaty contemplates the possibility of granting amnesty for providing truth in connection with corruption investigations.<sup>75</sup> This was not a hard choice to make, as granting amnesties and other incentives in exchange for information arguably is not as difficult a dilemma in corruption cases as in cases involving gross human rights violations. In many states, anticorruption legislation in general already offers

<sup>70</sup> Sierra Leone TRC report, *supra* n 48 at vol. II, ch. 4, p. 269.

<sup>71</sup> SCSL statute, art. 3(f).

<sup>72</sup> SCSL Rules of Procedure, Rule 104(c).

<sup>73</sup> From remarks made by SCSL prosecutor Stephen Rapp at a briefing for NGOs on 14 July 2008.

<sup>74</sup> See, for example, art. 37(1) of the Convention: ‘Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.’

<sup>75</sup> See, art. 37(3): ‘Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.’

whistleblower protection. Some states even allow *qui tam* actions in corruption cases.<sup>76</sup>

Even if the truth-seeking process can be used to establish a perpetrator's complicity in large-scale corruption, truth commissions clearly are not in themselves a means for recovering assets. When combined with amnesties and anticorruption instruments, such as the UNCAC and mutual legal assistance treaties, however, an incentive-based truth commission policy can create conditions conducive to asset recovery. For instance, immunity offered in the Philippines by a commission of inquiry-type agency led to disclosures of hidden Marcos assets and hastened asset recovery litigation in Switzerland.<sup>77</sup>

### Expanding the Role of Human Rights Courts

The Taylor case shows that factual and legal issues that involve evidence of an economic crime can be addressed in a trial for war crimes and human rights violations. As discussed earlier, human rights courts reflect a compartmentalized view of human rights and transitional justice and do not see themselves as mandated to address corruption and other economic crimes.

That being said, most existing tribunals can take measures that address economic crimes even if this is not seen as their principal mandate. By doing so, they can go beyond their specific but limited role of holding individual perpetrators liable for a narrowly defined set of human rights violations and fulfill two other possible roles: enhancing victims' right to reparations and expanding the range of tools against impunity.

Under the ICC statute, victims of crimes tried before the ICC can obtain reparations from the ICC's Trust Fund for Victims.<sup>78</sup> Among the penalties in the ICC statute is the 'forfeiture of proceeds, property and assets derived directly or indirectly from that crime.'<sup>79</sup> Thus, perpetrators who amassed assets through the crimes and human rights violations for which they are convicted can be held accountable not just for those crimes expressly within the Court's jurisdiction but also for economic crimes.

The regulations applicable to the TFV provide for a number of ways in which the assets of a convicted perpetrator can be used for reparations.<sup>80</sup> The ICC prosecutor, or even victims, may request a freeze on assets that might be susceptible to being

<sup>76</sup> A good example is the US False Claims Act, 31 U.S.C., sec. 3729, which allows citizens to file cases against persons involved in fraudulent government contracts and to obtain a portion of the damages recovered.

<sup>77</sup> The Presidential Commission on Good Government has both investigatory and immunity-granting powers.

<sup>78</sup> See, Article 79: 'A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.'

<sup>79</sup> ICC statute, art. 77(2)(b).

<sup>80</sup> See, Marieke Wierda and Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims* (New York: International Center for Transitional Justice, 2005).

used for reparations.<sup>81</sup> In the issuance of an arrest warrant for Thomas Lubanga, for example, the ICC's Pre-Trial Chamber requested that states trace, freeze or seize Lubanga's assets. In issuing its request, the Chamber noted that 'the reparation scheme provided for in the Statute is not only one of the Statute's unique features . . . it is also a key feature,' and that 'the success of the Court is, to some extent, linked to the success of its reparation system.'<sup>82</sup>

The ECCC, meanwhile, has two unique features. First, it can award 'collective and moral reparations'<sup>83</sup> to victims of the Khmer Rouge, unlike the *ad hoc* tribunals for the former Yugoslavia and Rwanda, which had no reparations mandates. Second, it can receive civil party claims, marking the first time that victims have been granted a clear *locus standi* before a hybrid human rights court.<sup>84</sup> While any judgment to provide reparations is to be 'borne by convicted persons,'<sup>85</sup> this should not limit the court's discretion in defining what kind of 'collective' and 'moral' reparations would be meaningful for victims. Of the handful of accused, only one has relatively significant assets that can be applied toward reparations for almost two million Khmer Rouge victims.<sup>86</sup> This circumstance should prompt the ECCC to look at how the Khmer Rouge's profitable history of massive illegal logging and mining<sup>87</sup> can be tied to the court's reparations mandate.

A less obvious but more strategic way in which human rights courts can develop their role in the field of transitional justice is by exploring approaches through which they can assume jurisdiction over economic crimes and large-scale corruption. As argued earlier, the concept of system crimes should be an opportunity for human rights courts to prosecute and try human rights violations and economic crimes together.<sup>88</sup> Certain crimes, such as the appropriation of property,<sup>89</sup> pillage<sup>90</sup> and starvation,<sup>91</sup> are already both violations of socioeconomic rights and war crimes that fall within the mandate of human rights courts. The concept of system crimes arguably could go further, lending itself to the inclusion of large-scale corruption and despoliation when carried out in conjunction with gross human rights violations. The ICC prosecutor has indicated the possibility of undertaking

<sup>81</sup> ICC statute, art. 57(3)(e).

<sup>82</sup> Situation in the Democratic Republic of the Congo: In the Case of *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Pre-Trial Chamber 1, No. ICC0-01/04-01/06 (31 March 2006).

<sup>83</sup> Rule 23, para. 11, of the ECCC's Internal Rules states: 'The Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons.'

<sup>84</sup> Internal Rules of the ECCC, Rule 23, para. 1(a) and (b).

<sup>85</sup> *Ibid.*

<sup>86</sup> As of writing, five accused are before the ECCC. Only Ieng Sary appears to have some assets that may be described as substantial.

<sup>87</sup> Philip Shenon, 'Now It's the Jungle that the Khmer Rouge Decimates,' *New York Times*, 7 February 1993. See also, Global Witness, 'Forests: The Khmer Rouge and the Funding of the Civil War,' [http://www.globalwitness.org/pages/en/khmer\\_rouge\\_and\\_civil\\_war.html](http://www.globalwitness.org/pages/en/khmer_rouge_and_civil_war.html).

<sup>88</sup> See, OHCHR, *supra* n 57.

<sup>89</sup> ICC statute, art. 8(iv).

<sup>90</sup> *Ibid.*, art. 8(xvi).

<sup>91</sup> *Ibid.*, art. 8(xxv).

an investigation of 'money-laundering and other crimes' connected to resource extraction associated with armed conflict.<sup>92</sup>

A bolder step is to characterize large-scale corruption as a crime against humanity in itself, which some anticorruption advocates have proposed.<sup>93</sup> Some argue that, even now, 'in certain cases, corruption may take the form of a crime against humanity,' so that this 'possibility extends significantly the jurisdictional ambit of national courts and empowers the International Criminal Court to consider a case.'<sup>94</sup> This approach would not be unprecedented, as transitional justice has contributed to the recognition of certain sexual offenses as war crimes.<sup>95</sup> There is room to argue that certain economic crimes committed by a repressive regime or in the context of an armed conflict should fall within the ICC's jurisdiction.

The abovementioned possibilities would not only contribute to the progressive development of international human rights law but also advance international anticorruption mechanisms. No international tribunal has explicit jurisdiction over large-scale corruption. The UNCAC does not create any organ that might perform this function.<sup>96</sup> Some domestic courts might possess jurisdiction over specific corrupt acts committed outside their territorial jurisdiction, but this is defined by domestic law,<sup>97</sup> or, in some cases, by a regional treaty.<sup>98</sup> Moreover, longstanding principles of immunity and extradition that no longer pose as insurmountable an obstacle to foreign prosecution in cases of gross human rights violations are still obstacles in cases of corruption committed abroad.<sup>99</sup>

Unlike the international legal regime for protecting human rights, the international legal regime that governs corruption is relatively new. In the drafting of the UNCAC, no consensus emerged on the definition of corruption.<sup>100</sup> The growing

<sup>92</sup> See, ICC Prosecutor press release, No. pids.009.2003-EN (16 July 2003).

<sup>93</sup> At the 11th International Anti-Corruption Conference in South Korea, organized in May 2003 by various states' anticorruption agencies, the former Kenyan minister of justice, Kiraitu Murungi, proposed that large-scale corruption be declared a crime against humanity. See, 'Seoul Findings,' a summary of conference findings, [http://www.11iacc.org/download/finish/11IACC\\_Seoul\\_Findings.doc](http://www.11iacc.org/download/finish/11IACC_Seoul_Findings.doc)

<sup>94</sup> See, Ilias Bantekas, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies,' *Journal of International Criminal Justice* 4(3) (2006): 1.

<sup>95</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, Zoran Vuković (Foča)*, Appeals Chamber Judgment, No. IT-96-23 (12 June 2002).

<sup>96</sup> In a chapter entitled 'Mechanisms for Implementation,' the UNCAC creates a 'Conference of State Parties.' However, this body has no adjudicative power or any capacity to create a tribunal to act on actual corruption cases.

<sup>97</sup> An example would be the US Foreign Corrupt Practices Act, 15 U.S.C., sec. 78dd-1, *et seq.*

<sup>98</sup> Such as the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1 (18 December 1997).

<sup>99</sup> Veronica Pujas, 'Immunity and Extradition: Obstacles to Justice,' in *Global Corruption Report 2004* (Berlin: Transparency International, 2004).

<sup>100</sup> The author participated in the discussions of the UN Ad Hoc Committee on how corruption should be defined. Once the impossibility of getting members to agree on a definition was established, none was used in the Convention.

number of regional conventions against corruption<sup>101</sup> and the taking into effect of the UNCAC obviously will contribute to combating impunity for corruption. Still, this pales in comparison to the relative robustness of the international mechanisms that can already extract accountability for human rights violations.

## Conclusion: The Scope of 'Justice' in Transitional Justice

The theories at the center of transitional justice are broadly drawn and susceptible to varying interpretations, including that mechanisms that address corruption and economic crimes should be incorporated into its mainstream. The practice of transitional justice to date, however, has been associated with a very narrow paradigm of what constitutes human rights violations. Any engagement with socioeconomic rights issues would require transitional justice advocates to disabuse themselves of the overemphasis on civil and political rights that Balakrishnan Rajagopal attributes to 'the dominance of Western scholars and NGOs,' arguing that it has in turn allowed a 'bias ... [to be] built into the normative corpus of human rights.'<sup>102</sup>

Both civil and political rights and socioeconomic rights abuses are committed against overlapping sets of victims by an invariably overlapping set of perpetrators. An impunity gap is created when transitional justice mechanisms deal with only one kind of abuse while ignoring accountability for large-scale corruption and economic crimes. It is true that resolving the nearly intractable social and economic inequities that bring about or exacerbate human rights violations and conflict are not explicit aims of transitional justice. Nonetheless, addressing poverty and social inequality must be regarded as among the strategic goals of any transitional justice undertaking.<sup>103</sup> At the very least, it should be an overarching aim of any attempt at truth seeking, criminal prosecution, reparations and institutional reform. It may be stating the obvious to say that whatever gains may be made from transitional justice initiatives could be unmade if the conditions that led to or aggravated repression and conflict are left to fester, allowing repression to reemerge and conflict to recur.

Whether the engagement with corruption is founded on the premise that corruption is a human rights violation,<sup>104</sup> or on the theory that economic crimes are part of an indivisible system of crimes committed by the same set of

<sup>101</sup> Examples are the Inter-American Convention Against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and, most recently, the African Union Convention on Combating Bribery and Corruption.

<sup>102</sup> Balakrishnan Rajagopal, 'Human Rights and Development: Legal and Policy Issues with Special Reference to Dams,' in *Regulation, Compliance and Implementation*, ed. Angela Cropper, Daniel Bradlow and Mark Halle (Cape Town: World Commission on Dams, 2000), pp. 4–5.

<sup>103</sup> Which is not to say that transitional justice has been effective thus far in arriving at this goal. A study for the UK's Department for International Development (DFID) concludes that 'the impact of [transitional justice mechanisms (TJMs)] on poverty reduction will be particularly limited as long as reparative measures that address the economic and social consequences of human rights violations continue to be neglected, and while violations of economic and social rights remain largely excluded from the focus of TJMs.' Jane Alexander, 'A Scoping Study of Transitional Justice and Poverty Reduction,' final report for DFID (January 2003), 3.

<sup>104</sup> See, for example, Nihal Jayawickrama, 'Corruption: A Violation of Human Rights?' Transparency International working paper (June 1998).

perpetrators or regime,<sup>105</sup> the mechanisms used in transitional justice can in fact be applied. The question, then, is under what conditions they should be applied. So far, transitional justice has largely avoided this question. It wants to look at abuses committed under dictatorships and during armed conflict, but it looks away when it sees the economic crimes and social injustices that breed or worsen poverty, conflict and repression.<sup>106</sup> Posttransition developing countries that are chronically poor *and* conflict-ridden are likely to remain so notwithstanding the introduction of transitional justice measures. By allowing these structural inequities to persist through evasion, the field of transitional justice can rightly be accused of creating and then frustrating expectations of meaningful change.

To be fair, the exclusion of corruption and economic crimes from transitional justice mechanisms does not necessarily mean that the role of these violations in abuse and conflict is being diminished. A popular view is that transitional justice is meant to address one part of the problem with the hope that it can contribute to the solution of the whole. This view accounts for the policy argument that bringing in a nonhuman rights component could become a distraction in the work, for instance, of a truth commission. It also explains the apprehension that looking into large-scale corruption and economic crimes could divert the public's attention from the gravity of human rights violations and spread the limited resources for pursuing transitional justice mechanisms too thin. Furthermore, some validity can be found in the concern that the field of transitional justice, as it is, lacks the capacity to investigate and extract accountability for corruption. This precisely begs the question: Is capacity lacking because transitional justice is inherently incapable of engaging with economic crimes and corruption, or is it lacking because the field has not paid attention to such abuses?

These policy arguments, founded as they are on what transitional justice is perceived to be and has achieved so far, do not answer the questions of what transitional justice should aim to become and what it can still do. While transitional justice promotes accountability by what it chooses to confront, it may reinforce impunity by what it chooses to ignore.

<sup>105</sup> For a useful and practice-oriented view of the indivisibility of rights and Peru's experience with truth seeking in the context of both socioeconomic rights as well as civil and political rights violations, see, Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development,' *Yale Human Rights and Development Law Journal* 10 (2007): 88–140.

<sup>106</sup> According to Jane Alexander, 'An approach to transitional justice that incorporates the goal of poverty reduction calls for particular attention to be paid to the perspectives of victims. It requires an examination of the linkages between poverty and human rights violations, and of structural inequalities as a root cause of conflict.' Alexander, *supra* n 103 at 48.