

# Women's Freedom from Want after Armed Conflicts: Does the Inclusion of Economic, Social and Cultural Rights in Transitional Justice Help Women?

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## Abstract

*The author tries to discuss women's freedom from want after armed conflicts, she analyzes in particular reference to the inclusion of economic, social and cultural rights in transitional justice. This article aims to contribute to the analysis of civil society actors in their relationship with conflict and gender in order to foster understanding of the complex interactions between civil society, the invocation of human rights, and conflict dynamics. It starts with the assertion that transitional justice is an essentially discursive and definitional project. The article discusses on different sections. In the third section, it suggests four avenues for civil society and donors to positively influence the prospects of transitional justice to foster gender equality, and the concluding section briefly refers to the existing framework of the EU relating to transitional justice and gender.*

## 1. Introduction

Countries emerging from conflict and other situations of violence increasingly choose to establish a variety of mechanisms to respond to systematic or widespread human rights abuses. Women and girls have often been disproportionately affected by the effects and consequences of violent conflict. This paper deals with gender in transitional justice from the lens of women's "freedom from want", that is, women's enjoyment of basic economic, social and cultural human rights (ESCR), such as the right to freedom from hunger, and the right to non-discriminatory access to health-care, housing or work.

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In recent years, progress has been made in including gender considerations in approaches dealing with a violent past. Two of the most well-known transitional justice mechanisms – criminal prosecutions and truth commissions – have paid increased attention to gender and there is a growing recognition of gender-crimes within international criminal law.

However, the current approaches to dealing with gender issues in transitional justice suffer from important limitations. This paper focuses on one of them. It outlines the consequences of limiting transitional justice strategies to civil and political rights in so far as gender dimensions of the conflict are concerned. The article argues that by narrowly focusing on violations of civil and political rights, transitional justice mechanisms gloss over important gender dimensions of the past conflict. Conflicts, their termination, as well as efforts of transitional justice are gendered. As Bell and O'Rourke argue, "matters that address underlying issues of discrimination, domination and improvement of physical, social and legal security particularly with regard to gender, are often addressed as secondary, or not at all."<sup>1</sup> If it is true that women and girls are disproportionately affected by violations of ESCR – both during armed conflict and in peacetime – donor agencies, human rights organisations and governmental authorities must be convinced that narrow conceptions of what constitute human rights violations fail to meaningfully deal with women's experiences in conflict.

The prevailing model of transitional justice has been based on the assumption that transitional justice mechanisms would primarily, or exclusively, address violations of civil and political rights. The neglect of ESCR has important, but so far overlooked implications for the way transitional justice has addressed the manifold experiences of women in armed conflict. For instance, Tafadzwa Pasipanodya has argued how, in her view, the past conflict in Nepal can only be addressed meaningfully if the marginalization of women is addressed and if the protection of their economic, social and cultural rights is enhanced.<sup>2</sup>

Recently, voices have grown louder that transitional justice should no longer marginalize ESCR.<sup>3</sup> The gender implications of such an inclusion have not yet fully

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1 Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," *International Journal of Transitional Justice* 1, no. 1 (2007): 25 and 30.

2 Tafadzwa Pasipanodya, "A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal," *International Journal of Transitional Justice* 2, no. 3 (2008).

3 See for instance C. Chinkin. "The Protection of Economic, Social and Cultural Rights Post Conflict." [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Protection\\_ESCR.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf), [last accessed 14 August 2012]. See also the following book which is freely available on the Internet for download: P. de Greiff and R. Duthie, *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009). Available at: <http://www.ssrc.org/publications/view/1ED88247-585F-DE11-BD80-001CC477EC70/> [accessed 31 August 2012]

been explored. I hope to show that the debate on including ESCR in transitional justice can be linked with efforts to enhance gender equality. I suggest that civil society groups and their supporters could make a valuable contribution to improving both transitional justice as well as the fate of women and girls if they insist that transitional strategies not sideline considerations of ESCR.

This article aims to contribute to the analysis of civil society actors in their relationship with conflict and gender in order to foster understanding of the complex interactions between civil society, the invocation of human rights, and conflict dynamics. It starts with the assertion that transitional justice is an essentially discursive and definitional project. Civil society groups face considerable opportunities, but also responsibilities, when they influence the design of transitional justice strategies. Human rights norms – or rather the way they are invoked and perceived – delineate the acceptable from the unacceptable.<sup>4</sup> The way the vocabulary of international human rights law is used by transitional justice actors carries important consequences for shaping the narrative of the past conflict. By focusing on civil and political rights, the implicit message is that other human rights violations and inequalities were not relevant for addressing the past and for the project of building a new societal contract, but merely factors of contextual background. The article aims to suggest how civil society actors' influence on positively affecting gender equality can be enhanced. I hope to convince the reader that civil society groups aiming at gender equality in post-conflict or conflict-ridden societies may potentially advance their goals by paying increased attention to the inclusion of ESCR in transitional justice processes. If persuaded by this analysis, civil society organisations that lobby for the meaningful inclusion of ESCR in transitional justice processes deserve to be encouraged and supported in their endeavours.

The article proceeds as follows: Section I defines key terms used in this paper and introduces the idea of viewing transitional justice as a definitional project. Section II outlines how the prevailing approaches of transitional justice have so far dealt with a) gender and b) ESCR. It argues that the neglect of ESCR in transitional justice may have negative consequences for women and girls. Section III suggests four avenues for civil society and donors to positively influence the prospects of transitional justice to foster gender equality. The concluding section will also briefly refer to the existing framework of the EU relating to transitional justice and gender.

## **2. Transitional Justice as a Definitional Project**

Before defining key terms, it is important to mention a limitation of this paper. It has been written based exclusively on secondary sources. This essay is mainly

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4 Emily Pia and Thomas Diez, "Conflict and Human Rights: A Theoretical Framework," *SHUR Working Paper 01/07* (2007): 19.

concerned with silence, i.e. the marginalisation of the voices of women and girls affected by manifold inequalities. While the paper aims to support these voices, it does not automatically speak for them. The voices of those most concerned by the topics discussed in this paper are only present as far as they are moderated by those who reported about them in the secondary literature. It is crucial that any proposals made in this paper should be seen as proposals for reflection and not as ready-made action plans. Any sound planning of outside actors' involvement in a (post-) conflict environment should be preceded by contextual analysis, the collection of baseline data and most importantly, by a meaningful consultation of those who will be affected by the measures.

## **2.1 Transitional Justice**

In the last few decades, transitional justice has become a global project. The term transitional justice has gained increased attention, but has not been conclusively defined. There is a general agreement that the central goals of transitional justice can be summarised as "coming to terms with the past in a way that helps to chart a future that moves beyond that past".<sup>5</sup> Transitional justice is rationalised as both an attempt to deal with the past as well as one of building a more just future. The literature often analyses transitional justice according to its institutional mechanisms.<sup>6</sup> The following four mechanisms are often mentioned: criminal prosecutions, truth commissions, reparations programs and institutional reform/vetting (lustration). Criminal prosecutions and truth commissions are undoubtedly the most well-known mechanisms. Reparations can encompass individual, collective, and material as well as symbolic aspects. Reparations are often the most tangible aspect of transitional justice, but past experience has shown that there are often too many promises and too little implementation. Vetting programs, i.e., the exclusion from public service of individuals responsible for abuse, are the mechanism of transitional justice for which the least analysis has been done.<sup>7</sup>

Transitional justice commonly pursues goals such as establishing the truth, providing reparations for harm suffered, restoring the victim's dignity, ensuring that perpetrators are held accountable, facilitating national reconciliation, reforming and legitimising state institutions, and preventing future abuses. It is important

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5 Marta Minow, *Between Vengeance and Forgiveness* (Beacon Press Boston, 1998), 2. See also International Center for Transitional Justice, "What is Transitional Justice?," <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [accessed 31 August 2012].

6 See Minow, *Between Vengeance and Forgiveness*, 2. or Neil J. Kritz and Nelson Mandela, *Transitional justice: How Emerging Democracies Reckon with Former Regimes*. (Washington, DC: USIP, 1995). And Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, (New York: Routledge, 2002).

7 But see: U. N. Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Framework*, (Geneva: UN, 2006). and Alexander Mayer-Rieckh, *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Pablo De Greiff (New York: Social Science Research Council, 2007).

to note that the relationship between different goals may not necessarily always be harmonious, and much depends on how and by whom the (conscious or unconscious, explicit or implicit) decisions to emphasize one or another goal are made. Minow argues that the different mechanisms of transitional justice and the way they are designed have their respective strengths and weaknesses.<sup>8</sup> For instance, criminal prosecutions are better placed to deliver criminal accountability than to establish the truth about the complexities of the past conflict. On the other hand, truth commissions may be well placed to give a voice to previously silenced parts of society or to make recommendations to address a wide range of issues. In addition, each of the mechanisms can be tailored in multiple ways, and, two different truth commissions may be designed with entirely different priorities. The recent literature has stressed that much depends on how the various mechanisms of transitional justice are combined and whether they successfully complement each other.<sup>9</sup>

This essay identifies possibilities of influencing how the emphases of transitional justice are set by focusing on the scope of the subject matter of transitional justice: the violations of human rights and international humanitarian law to be investigated by transitional justice. The contemporary human rights law framework is broad, and just invoking 'human rights' does not tell us a lot about which and whose rights we are speaking. Hence, transitional justice is not only an endeavour to foster the rule of law, to defeat impunity or to build or strengthen legitimate democratic institutions. In Miller's words, transitional justice "also serves to narrate conflict and peace, voice and silence, tolerable structural violence and intolerable physical atrocity."<sup>10</sup> By designing the parameters of what will be investigated by transitional justice, who deserves punishment for which crimes, and who deserves recognition as victims, transitional justice defines or re-defines the narrative on the past abuses. This constructivist reading of transitional justice is the basis for the recommendations of this paper and for the acknowledgement of the power of civil society organisations to shape the discourse on the past and hence the future. In other words, by including ESCR in the analysis of a transitional justice mechanism, the implicit message is that violations of ESCR are as unacceptable as other human rights violations. This has particular relevancy for women and girls who are often disproportionately affected by denials and discriminations with regard to ESCR-related issues, such as in accessing land tenure, property, education or healthcare.

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8 Marta Minow, "The Hope for Healing: What can Truth Commissions do?," in *Truth V. Justice: The Morality of Truth Commissions*, ed. R. Robert and D. Thompson (Princeton: Princeton University Press, 2000).

9 U. N. Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, (Geneva: UN, 2006), 2. The same is stated in all other Rule of Law Tools for Post-Conflict States of the UN High Commissioner for Human Rights.

10 Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* (2008): 267.

## 2.2 Gender

For the purpose of this paper, gender is understood as a set of norms and practices constructed in a specific location and time, shaping individual, symbolic and structural subjectivities.<sup>11</sup> Gender refers to the socially constructed roles, behaviour, activities and attributes that a particular society considers appropriate for men and women.<sup>12</sup> Feminist scholarship has criticized the human rights movement's emphasis on civil and political rights.<sup>13</sup> The most important criticisms can be summarised under two headings: first, feminists have argued that the human rights movement neglected abuses occurring in the private sphere (abuses by non-state actors such as domestic violence) and second, that the human rights movement neglected ESCR to the detriment of women's experiences. This paper takes these feminist critiques to the field of transitional justice. Since gender is not an ontological given, the narrative of conflict can be expected to be influenced by the way a transitional justice strategy deals with gender issues.<sup>14</sup>

## 2.3 ESCR

Contemporary human rights law defines ESCR as those human rights that relate to economic, social, and cultural conditions necessary to living a life with dignity. ESCR are contained within the Universal Declaration of Human Rights, a range of international treaties, and international customary law. The widely ratified International Covenant on Economic Social and Cultural Rights (ICESCR) includes the rights to education, adequate housing, food, work, the highest attainable standard of health, as well as cultural rights.<sup>15</sup> Whether in armed conflict or in peacetime, the enjoyment of ESCR is often unequal within a society. According to the drafters of the Montreal Principles on Women's ESCR, a set of non-binding principles established by experts in 2002, "[t]he systems and assumptions which cause women's inequality in the enjoyment of ESCR are often invisible because they are deeply embedded in social relations, both public and private, within all States. Acknowledging this systemic and entrenched discrimination is an essential step in implementing guarantees of non-discrimination and equality."<sup>16</sup> This statement guides the

11 Cordula Reiman, "All you Need is Love and What About Gender? Engendering Burton's Human Needs Theory," *Centre for Conflict Resolution, Working Paper Series 10*, cited in Diana Copper, "Conflict and Human Rights: A Gender Analysis," *SHUR Working Paper 02/07* (2007): 2.

12 World Health Organization, "Health Topics: Gender," <http://www.who.int/topics/gender/en/> [accessed 31 August 2012].

13 See for instance: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester, UK: Manchester University Press, 2000). Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge, 1997).

14 For a more detailed and sociological analysis, see Diana Copper, "Conflict Society and Human Rights. A Gender Analysis," *SHUR Working Paper 04/07* (2007): 4.

15 "International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976."

16 In December 2002, experts met in Montréal to adopt a set of non-binding principles to guide the implementation of the guarantees of non-discrimination and equal exercise and enjoyment of ESCR. "Montreal Principles on Women's Economic, Social and Cultural Rights," *Human Rights Quarterly* 26, no. 3 (2004).

following sections of this article--arguing that the need to acknowledge systematic and entrenched gender discrimination should be taken into account in designing transitional justice processes.

### **3. Tacking Stock: How Transitional Justice has so far dealt with Gender and with ESCR**

It is important to keep in mind that this section distils a general picture of the "traditional" approach of transitional justice to gender and ESCR, but it is clear that transitional justice experiences have widely varied across space and time. It should also be noted that women's experiences differ depending on geography, ethnicity, social class, and other factors. At the same time, even in 2009, the year of the 30<sup>th</sup> anniversary of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), gender inequalities continue to be a problem concerning most, if not all, parts of the world.<sup>17</sup>

#### **3.1 Transitional Justice and Gender**

Women's agency in armed conflict has been significantly overlooked. Women have most often not been viewed as active shapers, interest holders, brokers and participants of the conflict.<sup>18</sup> If they have not been totally overlooked, they have been conceived as care-takers, victims or passive 'beneficiaries' of outside aid. In the last decade, some important progress has been made, but new challenges and disappointments have emerged.

##### **3.1.1 Progress made**

At the UN, harm inflicted on women has been explicitly recognised in a number of high-level documents. At the Fourth World Conference on Women in 1995, governments adopted the Beijing Declaration expressing their determination "to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity".<sup>19</sup> The 2004 Secretary General's Report on the Rule of Law and Transitional Justice identifies addressing women's experiences of domestic violence as priority for "filling the rule of law vacuum".<sup>20</sup> In 2000, the Security Council adopted landmark resolution 1325, calling all parties to armed conflict to "take special measures to protect women and girls from gender-based violence in armed

17 "Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, entered into force 3 September 1981, A/RES/34/180," United Nations General Assembly.

18 While this paper focuses on the suffering of women situations of conflict and violence, the role of women as perpetrators of human rights violations has been even more strikingly overlooked. See African Rights, *Rwanda, Not so Innocent: When Women Become Killers* (London: African Rights, 1995).

19 UN World Conference on Women, *Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995)*, A/CONF.177/20 (1990), para. 18.

20 "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," *Report of the Secretary-General, S/2004/616, August (2004)*: see for instance para. 15.

conflict.”<sup>21</sup> Less than a year ago, the Council adopted resolution 1820, recognising rape as a weapon in war and urging the Secretary-General and his Envoys to invite women to participate in discussions pertinent to the prevention and resolution of conflict, the maintenance of peace and security, and post-conflict peacebuilding.<sup>22</sup>

Efforts to include gender considerations in transitional justice have been mostly centred at the level of criminal prosecutions. There is no doubt that international humanitarian law pertains to gender-based violence in armed conflict.<sup>23</sup> International tribunals today acknowledge that rape and other forms of sexual violence can constitute genocide,<sup>24</sup> crimes against humanity, or war crimes. They hence belong to the most serious international crimes. In 2001, the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced three men for their abuse of women at a "rape camp" in Bosnia. This landmark decision analysed in detail the international humanitarian law pertaining to sexual violence.<sup>25</sup> In the *Furundzija* decision, the ICTY also held that rape is a form of torture.<sup>26</sup> The tribunal also adapted the rules of evidence specifically to limit the extent to which consent could be presented as a defence to sexual assault.<sup>27</sup> The ICTY created the position of a legal advisor for gender-related crimes and special procedural protections have been introduced to take into account the particular difficulties related to gender-related crimes. The number of female staff in international tribunals has increased. In addition, the prosecutor of the Special Court for Sierra Leone has made sexual violence one of the court's priorities. A few months ago, members of the Revolutionary United Front were convicted for the crime of forced marriage.<sup>28</sup> With the adoption of the International Criminal Court's statute, rape, sexual slavery, enforced prostitution, forced pregnancy, sexual persecution, enslavement, forced sterilisation and sexual violence are today explicitly recognised as war crimes or crimes against humanity.<sup>29</sup>

As far as truth commissions are concerned, most early commissions' mandates have not explicitly included gender considerations. Despite this omission, women's

21 S/Res/1325(2000), para. 10.

22 S/Res/1820(2008).

23 For an early article on the subject, see Theodor Meron, "Rape as a Crime Under International Humanitarian Law," *American Journal of International Law* (1993). See also Christine Chinkin, "Rape and Sexual Abuse of Women in International Law," *European Journal of International Law* (1994), or Eileen Meier, "Prosecuting Sexual Violence Crimes during War and Conflict: New Possibilities for Progress," *International Legal Theory* 10 (2004).

24 *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998.

25 *Prosecutor v. Kunarac, Kovac and Vukovic (IT-96-23) (IT-96-23/1)*.

26 *Prosecutor v. Anto Furundzija (Trial Judgment)*, IT-95-17/1-T.

27 Bell and O'Rourke, "Does Feminism Need a Theory of Transitional Justice?" 27.

28 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Trial judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009.

29 "Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002," Articles 7 and 8.



advocates in South Africa for instance convinced the TRC to conduct special hearings on gender questions. More recently, mandates of truth commissions in Kenya and the Solomon Islands, for instance, contain explicit gender provisions.<sup>30</sup> Recent truth commissions have also used gender hearings or have disaggregated data on the basis of gender. At least at the rhetoric level, there is also greater focus on addressing gender crimes in reparations programs. As the next section shows, the formal inclusion of gender-related provisions in the mandate of a truth commission or a reparations program does not, however, guarantee that gender issues are fully addressed.

### **3.1.2 New Challenges and New Disappointments**

Most of these concerns with current approach to gender in transitional justice have been described in detail elsewhere and this article intends to focus on only one of the problems associated with the current way of thinking of gender problems, namely the marginalisation of ESCR. Nevertheless, two challenges shall be summarised here:

The first and well-documented problem concerns the difficulties involved in prosecuting gender-related crimes in criminal tribunals. As mentioned above, where transitional justice has focused on gender issues, this has been most remarkable in criminal tribunals. Nicola Henry argues that due to the sheer diversity and heterogeneity of wartime rape victims, the experience of giving testimony was likely to be mixed.<sup>31</sup> It is no new story that testifying in court can create an additional form of victimisation for people who have suffered sexual violence.<sup>32</sup> The tribunal's efforts to render the testimony of witnesses relevant and concise may clash with victims' need to narrate pain and suffering.<sup>33</sup> In formal proceedings, a specific vocabulary and form determine what is acceptable and 'useful' to bring a case forward. This can be a frustrating or even dehumanising experience.<sup>34</sup> Many have argued that proceedings in courts should, and could, be modified to accommodate survivors of gender-related crimes.<sup>35</sup> Others have cautioned that the main purpose of any judicial proceeding is

30 For Liberia: *Act Establishing the Truth And Reconciliation Commission of Liberia*, (May 12, 2005), Sections 4 a) and e). Kenya: *The Truth, Justice and Reconciliation Commission Bill*, (signed into law on November 28, 2008), Sections 2 and 5c. Solomon Islands: *Solomon Islands Truth and Reconciliation Commission Act*, Sections 2c, 3a and 6(4).

31 Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence," *International Journal of Transitional Justice* 3, no. 1 (2009).

32 Katherine Franke, "Gendered Subject of Transitional Justice," *Columbia Journal of Gender and Law* 15, no. 3 (2006): 820.

33 *Ibid.*: 819.

34 *Ibid.*: 818.

35 Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (The Hague: Nijhoff Publishers, 1997). Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law," *McGill Law Journal* 46 (2000). B Bedont and K Hall-Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court," *Brown Journal of World Affairs* 6 (1999).

to decide on the binary question of legal guilt or innocence and to establish larger societal principles rather than to provide individual recognition or even healing.<sup>36</sup> In any event, it seems fair to conclude that even in the best of all cases, when a tribunal is most sensitive to gender issues, it will only succeed in recognising women as victims of sexual violence if the women coming before the judges conform their experience to a set of legal vocabulary and pre-determined stages of process. In addition, progressive jurisprudential developments are often insignificant advances for the society and individuals most directly concerned by the crimes. For instance, the *Akayesu* trial at the ICTR was a break-through in accepting sexual violence as an element of genocide, but the vast majority of cases were decided before the *gacaca* tribunals, where little or no effects of the ICTR's holding could be felt.<sup>37</sup>

The second concern with the current approaches to gender in transitional justice is their narrow focus on direct sexual violence. This concern is the starting point for my argument that transitional justice should address violations of ESCR in order to more fully take into account women's experiences in conflict. It is important not to limit gender issues to the incidence of direct sexual violence, although this has unfortunately been a devastating characteristic of many conflicts. It is very rare for criminal tribunals to deal with gender-based violations as anything other than direct sexual violence against women. Recent truth commissions with mandates on gender-related abuses have also tended to focus on direct sexual violence, understood to include *inter alia*, rape, sexual slavery, forced sterilisation. Addressing women's suffering exclusively through the lens of direct sexual violence however ignores the gendered dimensions of conflict and the obvious fact that women can also suffer any other human rights violations else than direct sexual violence. Moreover, it is well-known that men can also suffer gendered violence.<sup>38</sup> Nevertheless, there is a tendency to limit the analysis to direct sexual violence. As an acute illustration, the first volume of the final report of the Liberian TRC has dealt with women's experiences from the implicit assumption that when women suffered, it was necessarily from direct sexual violence.<sup>39</sup> By narrowly conceptualising harm suffered by women as relating to direct sexual violence, the Commission deals exclusively with the civil and political dimensions of women's rights violations. Even

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36 Rosalind Dixon, "Rape as a Crime in International Humanitarian Law: Where to from Here?," *European Journal of International Law* 13, no. 3 (2002). See also Minow, "The hope for healing: what can truth commissions do?," 238.

37 Franke, "Gendered Subject of Transitional Justice," 820.

38 *Ibid.*: 823.. See also: ESCR-Net, "Report from the Women and ESCR Working Sessions," in *Challenging Poverty and Inequality through Human Rights: International Strategy Meeting on Economic, Social and Cultural Rights and ESCR-NET* (Nairobi, 2008), 2.

39 Truth and Reconciliation Commission of Liberia, "Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I: Findings and Determinations," (2008), 63. The commission states that 28% of reported violations were committed against women. The paragraph discussing this number seems to refer exclusively to instances of sexual violence.

if the TRC diagnoses issues such as limited access to education or land tenure as a root cause of conflict, it fails to discuss the ESCR dimensions of violations; and those of women in particular.<sup>40</sup> After having exclusively analysed direct sexual violence, the Commission concludes that, “as a group, men comprise a larger victim category than women.”<sup>41</sup>

While this in no way says that we should ignore the reality of sexual violation of women,<sup>42</sup> concentrating on women’s experiences of sexual violence should not come at the expense of silencing all other important aspects of women’s experiences of conflict, in particular the long-term consequences of violations. Otherwise, by neglecting ESCR in transitional justice, one risks overlooking gendered dimensions of the past conflict. The following section contains a brief overview of how transitional justice has so far dealt with ESCR.

### **3.2 Transitional Justice and ESCR**

ESCR are contained within the Universal Declaration of Human Rights, a range of international treaties, international customary law and national law. The widely ratified International Covenant on Economic Social and Cultural Rights (ICESCR) asks states to “undertake to ensure the equal right of men and women to the enjoyment of all rights set forth in the present Covenant.”<sup>43</sup> It includes the rights to education, adequate housing, food, work, the highest attainable standard of health, as well as cultural rights.<sup>44</sup> During times of armed conflict, international humanitarian law, in addition to human rights law, for instance, prohibit the destruction of objects indispensable to the survival of the civilian population, such as foodstuffs or drinking water installations.<sup>45</sup>

In international legal discourse, particularly in the West, ESCR have, however, long been downplayed as “nothing more than objectives of social policy”.<sup>46</sup> Many misunderstandings and myths persist. Whether in relation to transitional justice

40 For an analysis of the Commission’s preliminary report, see Evelyne Schmid, “Liberia’s Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice,” *PRAXIS - The Fletcher Journal of Human Security* XXIV, 5-28 (May 2009).

41 Truth and Reconciliation Commission of Liberia, “Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I: Findings and Determinations,” 63.

42 Franke, “Gendered Subject of Transitional Justice,” 825.

43 ICESCR, Article 3.

44 Ibid.

45 “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978,” Article 54. According to a study by the International Committee of the Red Cross, this prohibition is part of customary international law and applies in all armed conflicts. See Jean-Marie Henckaerts, Louise Doswald-Beck, and International Committee of the Red Cross, *Customary International Humanitarian Law: Volume I*, (Cambridge: Cambridge University Press, 2007), Rule 54.

46 This is even true in some recent publications. See for instance Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (Oxford: Oxford University Press, 2008), 110.

or the human rights field more broadly, there is a long way to go in translating the international rhetoric of the “indivisibility, interdependency and interrelatedness”<sup>47</sup> of all human rights into reality. Before taking stock on how transitional justice has so far dealt with ESCR, a few remarks shall be made on what I believe is a problematic understanding of ESCR. In some of the literature, commentators discuss the ideological dichotomy between civil and political rights on the one hand, and ESCR on the other, under the heading of “individual vs. group rights”.<sup>48</sup> In other words, it is sometimes believed that civil and political rights are individual rights, whereas socio-economic and cultural rights are group rights. However, this conception is inaccurate. ESCR can be viewed as individual rights just as any other human rights. The right not to be evicted from one’s home without any procedural guarantees (an economic and social right) can clearly be conceived as an individual right. At the same time, abuses of the right to housing can affect particular groups disproportionately and may in certain circumstances be claimed by groups.

Although Pia and Diez correctly explain that ESCR equally belong to the individual as a human being, it seems relevant to note that conceptual classifications of human rights have often proved unhelpful. For instance, Pia and Diez’ explanation that “civil and political rights primarily act as constraints on those who govern” while social, economic and cultural rights “stress the equality that an individual can claim as a citizen” is problematic. It is a misconception to believe that civil and political rights simply act as constraints on the authorities while ESCR necessarily require the state to take resource intensive positive action. As an example, the fair trial provision in the International Covenant on Civil and Political Rights (ICCPR) precisely also derives from the idea of equality (“[a]ll persons shall be equal before the courts and tribunals”<sup>49</sup>). The realisation of civil and political rights equally requires the state to devote resources. To stick with the example of fair trial, the right requires the state to take positive action to train and pay court staff and to establish a complex institutional framework. Practitioners involved in judicial reform activities around the world will agree that guaranteeing due process is no free lunch. At the same time, ESCR can equally act as constraints on the authorities. ESCR demand, for instance, that the state abstain from arbitrarily evicting people from their homes or from limiting state healthcare to certain social groups. Hence, binary compartmentalisations of human rights often derive from unhelpful assumptions and it seems more useful to think about specific challenges to the realisation of human rights. In this paper, the argument is made that the failure to analyze ESCR in transitional justice carries consequences on the realisation of gender equality.

47 United Nations, “World Conference on Human Rights: the Vienna Declaration and Programme of Action A/CONF.157/23, 12 July 1993,” in *New York: UN*, para. 5.

48 Pia and Diez, “Conflict and Human Rights: A Theoretical Framework,” 16.

49 “International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171,” Article 14(1).

Authors such as Louise Arbour, the former High-Commissioner for Human Rights, have observed that transitional justice has so far almost exclusively focused on violations of civil and political rights relating to personal freedoms and physical integrity.<sup>50</sup> As a consequence, transitional justice mechanisms have mostly dealt with torture, killings, arbitrary detention, and “disappearances,” leaving violations of ESCR unaddressed in all but rare instances. Boraine, former deputy chair of the South African TRC, advocates for “a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation”.<sup>51</sup> Arguably, this “deeper vision” is necessary because victims’ needs are related to violations of ESCR as much as they are related to violations of civil and political rights. However, the transitional justice movement has had a narrow view of what constitutes human rights violations, and it is time to recognize that ESCR are not only part of existing international law but are, moreover, a decisive dimension of the past abuses to be addressed.

Looking at the different mechanisms of transitional justice, tribunals have very marginally touched upon violations of ESCR, although some limited progress has been made.<sup>52</sup> To mention just a few truth commissions, in Chile, the National Truth and Reconciliation Commission focused on ‘serious violations’ consisting of physical violence under international human rights norms.<sup>53</sup> The South African TRC had a broad mandate but decided to limit the inquiry to gross human rights violations which were defined as limited to severe physical mistreatment.<sup>54</sup> More recent commissions have sometimes explicitly mentioned economic, social or cultural dimensions.<sup>55</sup> The Liberian TRC for instance had a mandate tasking it to analyze all gross human rights violations, violations of humanitarian law and economic crimes. However, without much discussion, the TRC drew up a list of what it considered as gross human rights violations and did not include dimensions of ESCR violations in that list.<sup>56</sup> While

50 While it is often said that civil and political rights protect personal freedom and physical integrity, the same is true for ESCR. In the absence of food, water or healthcare, one’s physical integrity can easily be harmed. This shows that classifying human rights into different groups is not only unhelpful, but does also not capture the complexity of human rights.

51 Alexander Boraine, “Transitional Justice: A Holistic Interpretation,” *Journal of International Affairs - Columbia University* 60, no. 1 (2006): 17. Cited in Louise Arbour, “Economic and Social Justice for Societies in Transition,” *New York University Journal of International Law and Politics* 40, no. 1 (2007): 2.

52 See in particular: “Prosecutor vs. Kupreskic et al, Trial Judgement,” (IT-95-16-T, ICTY), holding that the widespread and systematic destruction of housing can amount to a crime against humanity.

53 Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” 276.

54 *Ibid.*: 277.

55 Apart from the Liberian TRC, the mandates of truth commissions in Sierra Leone, East Timor, and Chad have also included economic and social aspects. In October 2008, the Kenyan National Assembly adopted a bill which includes economic rights among the issues to be investigated by the planned Truth, Justice and Reconciliation Commission. *The Truth, Justice and Reconciliation Commission Bill*, Article 5. Available at [http://www.kenyalaw.org/Downloads/Bills/2008/The\\_Truth\\_Justice\\_and\\_Reconciliation\\_Commission\\_Bill\\_2008.pdf](http://www.kenyalaw.org/Downloads/Bills/2008/The_Truth_Justice_and_Reconciliation_Commission_Bill_2008.pdf) [accessed 31 August 2012].

56 Truth and Reconciliation Commission of Liberia, “Final Report of the Truth and Reconciliation Commission of Liberia (TRC): Volume I,” 35.

the report of the Liberian TRC diagnoses that the main causes of the conflict were “attributable to poverty, corruption, limited access to education, land tenure, etc.”,<sup>57</sup> the first volume of the TRC’s report fails to analyze whether and/or in what ways these diagnosed root causes of the conflict may have disproportionately affected the female inhabitants of Liberia,<sup>58</sup> although this neglect was finally corrected in a later version of the report issued by the TRC.<sup>59</sup>

As an example, in countries such as Liberia, women face greater difficulties in accessing land tenure. If a transitional justice mechanism investigates violations of civil and political rights, it will deal with the husband’s abduction or death, but it will likely fail to support the female spouse who may have subsequently lost her and her family’s means of subsistence.

As far as reparations programs are concerned, it is fair to say that they have so far rarely addressed ESCR dimensions. But advances are made, and recent efforts testify to increased attention to ESCR, but also to new challenges in implementing such reparations programs.<sup>60</sup>

Voices have grown louder to include ESCR in transitional justice work, in particular to ensure the sustainability of peace.<sup>61</sup> If one accepts that violations of ESCR were at the root of the conflict or played an important part of the experiences of those affected by the conflict, it is only reasonable to think that they should be addressed by the transitional justice strategy. Treating inequality or structural violence simply as the contextual background of a ‘transition’ may do harm. It may undermine a fragile peace and may cement the view that structural violence based on gender is nothing more than natural misfortune. The findings of a transitional justice mechanism such as a truth commission will draw the line between the acceptable and the unacceptable and such a body will present the history of the violent past in one way or another. Those who define the parameters of a transitional justice strategy must be conscious of their power to shape – and potentially limit – the discourse and interpretation of the past; which may have important consequences for the future.

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57 Ibid., 10.

58 Evelyne Schmid, “Liberia’s Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice,” *PRAXIS - The Fletcher Journal of Human Security* XXIV, 5-28 (May 2009).

59 See in particular the Annex to Volume 3 on “Women and Conflict”. Truth and Reconciliation Commission of Liberia, Final Consolidated Report (2009). Available at <http://trcofliberia.org/reports/final-report> (accessed 31 August 2012).

60 See for instance the literature on the experience on the Peruvian reparations program which attempted to include ESCR dimensions in reparations programs. Lisa J. Laplante and Kimberly Theidon, “Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru,” *Human Rights Quarterly* 29 (2007). Or Lisa Magarrell and Leonardo Filippini, *The Legacy of Truth: Criminal Justice in the Peruvian Transition* (International Center for Transitional Justice (ICTJ), 2006).

61 See in particular the second last edition of the International Journal of Transitional Justice: *International Journal of Transitional Justice* 2, no. 3 (2008).

As this article suggests, this opportunity can be creatively used by gender advocates who have long argued that women tend to be disproportionately affected by economic, social, or cultural deprivations, whether before, during or after an armed conflict.<sup>62</sup> During conflict, they not only continue to suffer the pre-existing discriminations and inequalities,<sup>63</sup> but they moreover often suffer violations of multiple and interrelated human rights. For instance, a woman losing her husband or children not only suffers the direct violations of civil and political rights (e.g., the killing or disappearance of her loved ones), but often also endures dire economic, social, and cultural consequences by becoming the sole care-taker of the household. Once a peace agreement is signed, she might further be overlooked by outside actors who in the short-term tend to concentrate on disarmament programs which in turn tend to address the needs of former male combatants.

#### **4. Avenues for Civil Society and Their Supporters**

The observation of this paper is first, that transitional justice has so far not sufficiently dealt with ESCR, and second, that this omission has important gender implications. The proposal of the article is therefore that in order to advance gender issues, civil society can grasp interesting opportunities in linking the issues of gender and ESCR in transitional justice processes. The last section of this article details this proposal by outlining four avenues for action.

##### **4.1 First, civil society groups and donors agencies should pay conscious attention to the ways they help shape the discourse of transitional justice**

Putnam has famously defined civil society organisations as institutionalised associations of people that are both a product of existing power structures and an agent of political change.<sup>64</sup> As Copper has outlined, the relationship between civil society organisations and gender is tense and complex.<sup>65</sup> Moments of transition allow the re-negotiation of relations of power, and transitions open the possibility for recognising past injustice or for giving a voice to previously silent actors. The articulation of what and whose past needs to be uncovered by transitional justice is at the same time an opportunity to give a voice to previously silent parts of society, as well as an opportunity to point out the structural and long-standing issues affecting gender. Truth commissions in particular offer opportunities “for women to have a

62 "Montreal Principles on Women's Economic, Social and Cultural Rights."

63 One of the challenges for transitional justice is the fact that deeply rooted gender inequalities are seldom specific to outbreaks of war, but that the conflict often merely accentuates discrimination and violations that women suffered during peace. Fatima Ayub, Sari Kouvo, and Yasmin Sooka, *Addressing Gender-specific Violations in Afghanistan* (International Center for Transitional Justice, February 2009), 4.

64 Robert Putnam, Robert Leonardi, and Raffaella Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, Princeton University Press, 1993), cited in Copper, "Conflict Society and Human Rights. A Gender Analysis," 2.

65 Copper, "Conflict Society and Human Rights. A Gender Analysis," 3.

platform, to narrate their experiences of human rights abuse, address the nation – and reclaim the public sphere.”<sup>66</sup> They are often tasked to make recommendations to avoid the recurrence of abuses and they are often one of the most legitimate and visible bodies to address long-standing problems. This potential should be used by those who wish to advance gender equality.

The first recommendation is thus simply that civil society actors should be aware of the inherently political purposes of transitional justice. Civil society’s emphases have unavoidable effects on shaping the narrative of the conflict and thus what society needs to address to reach a more just future. ‘Uncovering the past’ can mean various things, depending on which and whose past transitional justice intends to uncover. As Miller explains, the “failure to include economic concerns in transitional justice mechanisms tend to make transition into a political rather than an economic story”.<sup>67</sup> Miller argues that it is no coincidence that the genocide in Rwanda has become a story of historic ethnic hatred between Hutu and Tutsi rather than a narrative of decades-long resource inequity, unequal land distribution and colonial constructions.”<sup>68</sup> In her words:

*The mandate of a commission or the list of crimes to be tried at a court means that, to some degree, the decision about what story to tell is predetermined, as is the manner of addressing the conflict (and sustainably resolving it for the future). Although a government may separately pursue development options, the redistribution of land or other plans for economic change, the argument here is that the divorce of those strategies from transitional justice mechanisms allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based. It suggests that inequality is a question of time or development rather than the entrenched ideology of elites, as well as that the need to memorialize the past does not require the narration of past economic oppression.*<sup>69</sup>

Hence, if analysis shows that denials of ESCR belong to the main root causes of a conflict and are a main part of women’s suffering, the idea of uncovering the past suggests the need to include an analysis of ESCR in the inquiries of transitional justice. If this is neglected, structural violence may be permitted to continue – which may in turn fuel violent conflict. On the other hand, if transitional justice successfully uncovers structural discriminations, marginalisation and the denial of ESCR, it has the potential to be the starting point of a debate on how to tackle these problems, including in terms of gender equality.

66 Vasuki Nesiiah, "Gender and Truth Commission Mandates," in *International Center for Transitional Justice* (2007).

67 Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," 280.

68 *Ibid.*: 281.

69 *Ibid.*: 268.



As an example, the Sierra Leonean TRC was tasked to focus on the experiences of women and in particular, the sexual violence that occurred in the conflict period. Thanks to the strong influence of gender advocates, the TRC also highlighted the structural injustices relating to gender inequalities in family and property law.<sup>70</sup> These findings were used to establish broad recommendations on how to address cultural, legal, social, and political factors which rendered women disproportionately vulnerable.<sup>71</sup> Now, the uphill task is to ensure the implementation of these recommendations. Continuous engagement of civil society will be required to translate the gains made during the commission's work into tangible improvements. But the example shows how civil society actors managed to bring deeply rooted structural gender issues to the surface and how the conscious acknowledgement of the importance of these factors helped the transitional justice mechanism to spur a debate on what would be needed to tackle the issues which have led to the outbreak of conflict.

#### **4.2 Second, civil society can creatively help to make visible the denial of ESCR**

Civil society groups can contribute to make discrimination and ESCR-related human rights problems visible during transitional justice as well as during other times. An interesting and concrete avenue for action was explored in 2007 by Peru's Estudio para la Defensa de los Derechos de la Mujer (DEMUS), an advocacy group for gender justice. To promote a process of political and legal enforceability of women's rights, in particular ESCR, this civil society group established mock tribunals which aimed at creating public awareness and acknowledgement of existing gender related denials of ESCR.<sup>72</sup> The tribunals were based on submissions of symbolic cases showing women's ESCR violations. The cases illustrated patterns of discrimination or the failure of the state to protect women's ESCR. The "juries" were made up of human rights experts. DEMUS managed to convince State representatives to be present at least during one of the hearings. The jury would then issue a "decision", including recommendations for the State and for civil society. While a systematic evaluation of the outcomes of such an innovative approach would be needed before conclusions on its effectiveness can be drawn, it seems safe to at least consider it a creative way to illustrate ESCR denials suffered by women, including long-standing structural discriminations. At the same time, the demonstration effect of tribunals dealing with ESCR may help to illustrate the feasibility of considering ESCR as entitlements which can be addressed in legal terms.

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70 Franke, "Gendered Subject of Transitional Justice," 826..

71 Sierra Leone Truth and Reconciliation Commission, "The final report of the Truth & Reconciliation Commission of Sierra Leone," <http://www.sierra-leone.org/TRCDocuments.html> [accessed 31 August 2012].

72 ESCR-Net, "Report from the Women and ESCR Working Sessions," 4.

### **4.3 Third, civil society actors should be supported to insist on reparations programs which are both gender sensitive and attentive to violations of ESCR**

In international law, the concept of reparations as traditionally understood aims at restoring the situation that prevailed before a violation occurred.<sup>73</sup> This concept fits more easily with violations which are conceivable as discrete events. This explains why reparations for violations of civil and political rights such as rape, arbitrary detention or killings are easier to understand. It is more challenging to deal with deeply encroached structural problems such as women's marginalisation in accessing education or social security. Hence, repairing the situation prevailing before the outbreak of conflict may not be sufficient, and including sexual violence among the violations deserving reparations is addressing only one aspect of gender concerns. More than ten years after the notion of "gender mainstreaming" was tabled at the 1995 Beijing World Conference on Women,<sup>74</sup> the translation of the idea of mainstreaming gender into concrete action is still incomplete. An excellent book edited by Ruth Rubio Marin addresses the question on how to design gender sensitive reparations programs.<sup>75</sup> The publication identifies lessons from past experiences with reparations programs from a gender perspective, and it provides valuable insights into conceptual as well as practical and logistical considerations.

### **4.4 Fourth, civil society organisations and their supporters should strive to increase the participation of women in the design and decision-making of transitional justice mechanisms**

Women have largely been absent in negotiations ending armed conflicts or in designing the parameters of transitional justice. The argument has been made that changing the players will change the nature of the game, and different priorities will arise if women were granted a seat in the negotiations on transitional justice.<sup>76</sup> The Committee on ESCR emphasised in a General Comment that the obligation to fulfil the rights contained in the ICESCR "requires States parties to take steps to ensure that in

<sup>73</sup> For a good introduction, see United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (Geneva: UN, 2008). For the 1928 landmark case: Permanent Court of International Justice, *Case concerning the factory at Chorzów (indemnity-merits): sixteenth (extraordinary) session* [1929], Série C, 1928]. And: Commission United Nations. International Law and James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), Articles 33-37. For the analysis on reparations in transitional justice contexts, see *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford; New York: Oxford University Press, 2006).

<sup>74</sup> UN World Conference on Women, *Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995)*, A/CONF.177/20

<sup>75</sup> Ruth Rubio-Marín, *What Happened to the Women? : Gender and Reparations for Human Rights Violations*, Advancing Transitional Justice Series (New York: Social Science Research Council, 2006).

<sup>76</sup> Christine Chinkin, "Peace Agreements as a Means for Promoting Gender Equality and Ensuring the Participation of Women," *UN Division for the Advancement of Women* (2003): 10, cited by Bell and O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," 30.

practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include (E) to promote equal representation of men and women in public office and decision-making bodies.<sup>77</sup> Similarly, the Committee on the Elimination of Discrimination against Women emphasised the importance of women's participation in political and public life.<sup>78</sup> The Updated Principles on Impunity contain a number of principles which insist on women's participation in the decision making around transitional justice.<sup>79</sup>

A higher number of women participating in decision-making fora should not be assumed to automatically translate into transitional justice processes which are gender-sensitive at all levels. However, the meaningful inclusion of women in the decision-making process does seem to lead to the emergence of different emphases. In line with the argument of this paper, Chinkin observed the prioritisation of socio-economic rights in the agendas emerging from track two peace processes involving women's points of view in Afghanistan, East Timor and Burundi.<sup>80</sup>

Hence, external donors such as the EU should use their influence to insist on women's participation in negotiations around issues of transitional justice. While past experience has shown that to improve gender equality, a complexity of issues needs to be tackled, a compilation of EU documents pertaining to mainstreaming of human rights and gender into European Security and Defence Policy (ESDP) is encouraging.<sup>81</sup> The 2008 Council of the EU compilation contains reference documents on human rights, gender, transitional justice, as well as on civil society. In other words, all the ingredients of what has been suggested in this article are part of EU documents. It is to be hoped that the commitments will be implemented. In May 2009, an analysis of the EU's role in promoting justice in peacemaking in the DRC has concluded that its policy framework lags behind its political statements, and practice on the ground.<sup>82</sup> Nevertheless, the EU draft document on "Transitional

77 Social and Cultural Rights Committee on Economic, "General Comment No. 16 (2005), The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, E/C.12/2005/4," (2005), para. 21.

78 "UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 23: Political and Public Life, 1997,A/52/38."

79 Diane Orentlicher, *Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102/Add.1 (Geneva: UN, 2005), Principles 6,7,32,35.

80 Christine Chinkin, "Peace Processes, Post-Conflict Security and Guarantees of Women's Rights: the International Context Considered" [paper presented at the 9th Torkel Opsahl Memorial Lecture, Queen's University of Belfast, 2004], cited by Bell and O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," 31.

81 Council of the European Union, "Mainstreaming Human Rights and Gender into European Security and Defence Policy: Compilation of Relevant Documents," (2008).

82 Laura Davis, "Small Steps, Large Hurdles: The EU's Role in Promoting Justice in Peacemaking in the DRC," (IFP Mediation Cluster, International Center for Transitional Justice, 2009).

Justice and ESDP” is a useful starting point for further elaboration.<sup>83</sup> It promises that the EU will consider developing further guidelines on how transitional justice could be taken into account in the context of its policies. While the proposals made in the draft document are vague, it is encouraging that there is an explicit statement to support collaboration with civil society.<sup>84</sup> The same complication of documents also “emphasizes the importance of including measures against sexual and gender based violence in transitional justice mechanisms”,<sup>85</sup> as well as the insistence on promoting “the role of women as actors in peace building through their participation in peace negotiations as well as establishing transitional governments and reconciliation structures.”<sup>86</sup>

In sum, there are existing EU frameworks to set into motion what is outlined in this paper. In order to make the best use of this existing framework, it might be useful for the EU to elaborate the draft document on transitional justice and for it to explicitly mandate its mediators to include transitional justice in their facilitation. Further, the EU could enhance the training of mediators by incorporating an introduction into the international legal framework on ESCR. Also, mandating mediators to directly engage with civil society at an early stage would certainly be helpful to support genuine participation of civil society.

## 5. Conclusion

Decoding the gendered nature of conflict and violations committed during a conflict is complicated by the fact that women are often overlooked both as actors and victims. This article has argued that if transitional justice embarks on an analysis of ESCR, it can potentially contribute to the decoding of gender dimensions of a conflict and therefore pave the floor for addressing them. While transitional justice should not be expected to solve all problems at once, its mechanisms can spur a debate on how to confront the deeper social forces that produce and reinforce gender inequality. Since socio-economic conditions and the denial of ESCR have been identified as the

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83 Political and Security Committee of the European Union, “Draft Document on Transitional Justice and ESDP, in view of the PSC Meeting on 20 June 2006 (doc. 10674/06),” [2006], para. F.. Para F states: “Further consideration could be given to ways in which the EU can benefit from the important experience gained by NGOs on transitional justice.”

84 European Union, “Enhancing Cooperation with NGOs and CSOs in the Framework of EU Civilian Crisis Management and Conflict Prevention (doc. 15574/1/06),” [2006].

85 ———, “Check list to Ensure Gender Mainstreaming and Implementation of UNSCR 1325 in the Planning and Conduct of ESDP Operations (doc. 12068/06),” [2006], 10.

86 *Ibid.*, Point 1.

root causes of numerous contemporary conflicts,<sup>87</sup> civil society organisations which aim to address them in transitional justice should be encouraged and supported. As this paper has argued, it is more likely that transitional justice will positively affect gender equality if it acknowledges that structural differences have a negative effect on women and girls.

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87 As mentioned, the Liberian TRC has recently released its first part of the final report, arguing that the root causes of the violent conflicts were attributable to poverty; greed; corruption; limited access to education; economic, social, civil and political inequalities; identity conflict; land tenure and distribution (Truth and Reconciliation Commission of Liberia, "Final Report of the Truth and Reconciliation Commission of Liberia: Volume I: Findings and Determinations," 35). See also the findings of the following recent commissions: Truth and Reconciliation Commission for Sierra Leone, "Witness to Truth: Final Report of the Truth and Reconciliation Commission for Sierra Leone: Volume 2: Findings," (2007),, emphasising marginalisation and economic injustices as the causes of conflict, see for instance para. 141 of Volume 2. And: Truth and Reconciliation in Timor-Leste Commission for Reception, "Chega! Final Report," in particular p. 141ff on ESCR.

