Challenging the "crime of silence": subsistence harms and their recognition within and beyond conventional law.

Diana Sankey

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Abstract

Human existence determines that we are vulnerable not only to attacks on physical integrity, but also to harms which militate against the means of subsistence. Deprivations of subsistence needs in the form of attacks on homes, land, livelihoods and basic resources have been widely perpetrated throughout history and are a particularly significant feature of contemporary conflict and political repression. However, international law is yet to fully recognise these harms as a discrete form of injustice and thus to address them within the mechanisms of international criminal and transitional justice. The thesis defines deprivations of subsistence needs, when perpetrated with knowledge of the possible consequences of such attacks, as "subsistence harms". It argues that subsistence harms constitute a particular and devastating type of violence, which involves interrelated physical, mental and social harms and is inherently gendered. While the existing legal framework acknowledges some aspects of subsistence harms, the failure of law to understand them as discrete, yet also multifaceted, means that its approach remains partial and fragmented; often resulting in continued marginalisation or silencing of these harms.

The thesis examines both the potential and the pitfalls of using international law to begin to fully recognise subsistence harms. It argues that international law could and should play an important role in promoting their recognition. Nevertheless, the thesis also problematises the role of law and draws on critical approaches, in order to analyse alternative understandings of harm and spaces for recognition; especially the praxis of non-governmental tribunals and of social movements. Although law can provide a language for recognition of harms, which can be drawn on by such movements, it also imposes barriers to recognition due to its narrow conceptions of harm and violence. The relationship between subsistence harms and legal recognition is therefore complex and thus requires much greater attention within legal discourse, if such harms are ever to be fully addressed.

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Introduction

Subsistence harms, international law and recognition

"Don't waste bullets, they've got nothing to eat and they will die from hunger".[1]

The conflict in Darfur hit the headlines around the world. But these chilling words were not part of a media story; they were spoken by a perpetrator and cited by the Prosecutor of the International Criminal Court. Why waste bullets, the perpetrator had asked, when victims will die from hunger and lack of subsistence needs? Deaths and suffering from lack of basic human subsistence needs - homes, food, land, livelihoods - and resultant hunger and disease in situations of conflict, political repression and discrimination are frequently not unforeseen or unintended. They often stem from deliberate deprivations of basic physical, mental and social needs associated with human subsistence.[2] Accounts of warfare show that deprivations of the means of subsistence have been an obvious and universal focus of attack throughout human history and have been widely perpetrated within contemporary conflict and repression, as starkly illustrated by the tactics employed in Darfur.[3] Depriving individuals or populations of subsistence needs can form a powerful weapon of political, military, economic and social repression and discrimination.[4] The deprivation of subsistence needs, when perpetrated with knowledge of the possible consequences of such attacks, constitutes what this thesis is calling "subsistence harms".

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[1] Statement of a witness in Darfur regarding a remark made by a perpetrator, quoted in Luis Moreno-Ocampo, 'Keynote Address 2009'
<http://www.icc-cpi.int/NR/rdonlyres/F04CB063-1C1E-463E-B8FB-5ECE076FB1E0/279792/090206_ProsecutorskeynoteaddressinYale.pdf> accessed 9 January 2010.

[2] Action Against Hunger, *The Geopolitics of Hunger 1998-1999: Hunger as a Weapon* (London: Action Against Hunger, 1999); Action Against Hunger, *The Geopolitics of Hunger, 2000-2001: Hunger and Power* (Boulder, Lynne Rienner, 2001); Joanna Macrae and Anthony Zwi (eds), *War and Hunger: Rethinking Responses to Complex Emergencies* (London: Zed Books, 1994); James Orbinski, 'Médecins Sans Frontières – Nobel Lecture' 10 December 1999
<http://nobel prize.org/peace/laureates/1999/msf-lecture.html> accessed 14 June 2008.

[3] Arthur Westing, *Warfare in a Fragile World: Military Impact on the Human Environment* (London: Taylor Francis, 1980); Human Rights Watch, 'Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan' (Report) (May 2004)
<http://www.hrw.org/en/reports/2004/05/06/darfur-destroyed-0>; International Crisis Group, 'Ending Starvation as a Weapon of War in Sudan'(Report No. 54) (14 November 2002)
<http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/054-ending-starvation-as-a-weapon-of-war-in-sudan.aspx> accessed 15 October 2008.

[4] Macrae and Zwi, *ibid.*

Although the words above, regarding the Darfur conflict, were were cited by the Prosecutor of the International Criminal Court (ICC), this does not mean that deprivations of subsistence needs are fully recognised in international law. Indeed, the thesis argues that deprivations of subsistence needs are not recognised as constituting *harms in and of themselves* and, as a result, current forms of legal recognition are profoundly inadequate and problematic. Accordingly, there are four main arguments in the thesis: firstly, that deprivations of subsistence needs constitute a certain type of violent harm centred on human subsistence and that such violence is often inherently gendered; secondly, that law does not fully recognise such deprivations and thus does not or cannot deal with them adequately; thirdly, that deprivations of subsistence needs, should be considered as a significant issue for law; and fourthly, that due to the inherent limitations of law, there is also a need to look beyond conventional legal mechanisms to alternative visions of law, in order to recognise and address these harms. It is hoped that pursuing these arguments may provide an important contribution to existing literature in articulating the significance of deprivations of subsistence needs as being a matter for law, and in critiquing the existing legal framework regarding its ability and willingness to address these forms of harm.

The thesis highlights and analyses the nature of deprivations of subsistence needs, both throughout history and in contemporary contexts, in order to illustrate the fact that such deprivations are not simply misfortunes which occur, but rather that they are perpetrated through direct human agency.[5] Within international law and legal discourse, deprivations of subsistence needs are all too often still treated as unfortunate consequences of physical integrity harms or as natural disasters.[6] The thesis argues that when perpetrated with knowledge of the possible impacts of deprivations of subsistence needs, such deprivations should be seen as constituting a particular type of violence, centred on attacking or totally disregarding human subsistence. Moreover, deprivations of subsistence needs often constitute a gendered form of violence, in predominantly targeting and affecting women and in the sense that the experience of these harms has clear gendered implications. Gender is

[5] Action Against Hunger (1999), n 3 above.

[6] See for example the United Nations Office for the Coordination of Humanitarian Affairs, 'Statement of Under-Secretary-General, Jan Egeland at the open meeting of the Security Council on the Protection of Civilians in Armed Conflict', 28 June 2006 <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1004693> accessed 20 May 2008. This states that 'civilians die in exponentially larger numbers from associated disease and malnutrition than from the violence itself', which shows that such deaths are not treated as directly resulting from "violence".

understood as social constructions of differences between men and women, which the thesis argues impacts significantly on the nature of deprivations of subsistence needs.[7]

The argument is not that international law completely ignores deprivations of subsistence needs. Indeed, provisions within international humanitarian, international criminal and human rights law all indicate some awareness and coverage of violence related to these deprivations.[8] Rather, the thesis argues that this recognition is both partial and fragmented, meaning that such deprivations are simply not being dealt with by existing legal mechanisms in a comprehensive way. The thesis focuses on international criminal law as being most suited to recognising the gravity of these atrocities and instituting some, albeit limited, form of accountability.[9] The growth of international criminal law within recent years, with the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the establishment of the ICC and the emergence of internationalised tribunals such as the Special Court for Sierra Leone, provides a significant opportunity to address such deprivations through a legal justice framework, which needs to be realised.[10] The thesis also looks at human rights law as a way to address certain perpetrations of deprivations of subsistence needs, which may fall below the gravity threshold or resources of international criminal justice. Moreover, human rights law could

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[7] This definition of gender follows feminist understandings of the term. For example, see Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379.

[8] See the Rome Statute which includes offences such as 'deportation or forcible transfer' of a population as a crime against humanity under Article 7(1)(c) and as a war crime under Article 8(2)(a)(vii), 'extensive destruction and appropriation of property as a war crime' under Article 8(2)(a)(iv) as well as 'intentionally using starvation of civilians as a method of warfare' under Articles 8(2)(b)(xxv), extermination as a crime against humanity under Article 7(1)(b) and genocide in terms of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' under Article 6(c). Rome Statute of the International Criminal Court, A/CONF.183/9 (1998). Regarding international humanitarian law, Article 54 Additional Protocol I and Article 14 of Additional Protocol II prohibit 'starvation of civilians as a method of warfare'. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Human rights law also includes the 'right to an adequate standard of living' under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes the right to food and housing, as well as the 'right to the highest attainable standard of health' under Article 12. International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, A/6316.

[9] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton NJ.: Princeton University Press, 2000).

[10] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2.

also play a key role in addressing the long-term impacts of such violence, issues which go beyond the scope of international criminal law.[11]

While deprivations of subsistence needs may be less visible than other forms of violence, there is a causal link between the perpetration and the harm and thus no legal reason why these harms should not be included further within international criminal law. The serious nature of deprivations of subsistence needs, in terms of their impacts and the fact that they are often perpetrated on a massive scale, illustrates that these deprivations often reach the necessary gravity threshold for international criminal law.[12] The reasons for the neglect of deprivations of subsistence needs stem from dominant conceptions of harm and violence within international law, which focus on physical integrity harms and on civil/political rights issues, meaning that issues relating to socio-economic rights or human subsistence are often sidelined.[13] While there are offences within international criminal law and rights within international human rights law which relate to deprivations of subsistence needs, the current frameworks essentially prevent such deprivations themselves from being fully recognised or addressed. The essence of deprivations of subsistence needs in terms of deprivations of homes, land, livelihoods and the human impact of these harms is not fully recognised by current law. The thesis' understanding of deprivations of subsistence needs as subsistence harms seeks to provide an important contribution to legal discourse in defining their nature and consequently in critiquing the law's limited ability to recognise such harms in and of themselves.

1) Terminology: subsistence harms and violence

i) Defining subsistence harms

The thesis uses the term "subsistence harms" in order to name the issue of deprivations of subsistence needs, where existing language either does not exist or is inadequate. This term

[11] On the issue of the importance of addressing long-term consequences of violence, see Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) *International Law and Politics* 1.
[12] Rome Statute, n 8 above. As the Preamble to the Rome Statute and Article 5 states, international criminal law only includes 'the most serious crimes of concern to the international community'.
[13] For literature which acknowledges and critiques this focus, see Arbour, n 11 above; Sigrun Skogly, 'Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?' (2001) 5(1) *International Journal of Human Rights* 58.

originates in the thesis and is employed as a way of gathering up and understanding deprivations of subsistence needs as a certain type of violence, centred on attacking or showing total disregard for human subsistence. The term draws on previous understandings of subsistence rights in terms of minimum economic rights, particularly the work of Henry Shue.[14] However, such existing understandings of subsistence rights tend to perceive them in a predominantly material or biological way.[15] The thesis fundamentally extends and redefines this concept in seeing subsistence as constituting far more than simply economic issues, and instead involving physical, mental and social elements of human survival. Moreover, rather than discussing lack of rights, the term subsistence *harms* emphasises the violence and wrongdoing involved.[16] The possible contribution of this term is therefore twofold: in terms of providing a broader understanding of subsistence and in tying deprivations of subsistence needs to the concept of harm.

Essentially, the term stems from my own understandings and analysis of the nature of deprivations of subsistence needs as they are, and have been, perpetrated and experienced in various historical and contemporary situations. It is therefore based on my analysis of historical uses of such deprivations and the nature of contemporary perpetrations, as discussed in chapter 1. Subsistence harms are defined within the thesis as deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or, more commonly, certain populations, in the course of conflicts, situations of political repression and as a form of discrimination, with perpetrator knowledge of the possible consequences of such violence.[17] This definition contests the traditional distinction between violence perpetrated during peace or during conflict situations.[18] Rather than seeing "peace" as constituting an absence of violence, this definition highlights the continuities of violence

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[14] For previous literature on subsistence rights, see the basic rights literature, in particular, Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton, N.J: Princeton University Press, 2nd edn, 1996); Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (Oxford: OUP, 2009); Wesley T. Milner et al, 'Security Rights, Subsistence Rights and Liberties: A Theoretical Survey of the Empirical Landscape' (1999) 21 *Human Rights* 23.

[15] For literature which perceives subsistence rights as material, see Brian Orend, *Human Rights: Concept and Context* (Peterborough, Ontario: Broadview Press, 2002) 118.

[16] Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) 22(3) *Legal Studies* 319.

[17] The thesis defines discrimination in a traditional legal sense in terms of 'treating one or more members of a specified group unfairly as compared with other people'. Elizabeth A. Martin (ed), *Oxford Dictionary of Law*, (Oxford: OUP, 5th edn, 2003).

[18] For literature which also contests this distinction, see David Keen, 'War and Peace: What's the Difference?' (2000) 7(4) *International Peacekeeping* 1; Christopher Cramer, *Civil War is not a Stupid Thing: Accounting for Violence in Developing Countries* (London: Hurst and Co., 2006) 84.

within both conflict and "peacetime" situations and the similarities of the experience of subsistence harms within these situations.

The emphasis upon deprivations of subsistence needs as harms highlights the human agency involved in the perpetration.[19] The term "harm" encompasses both the perpetration of the act/omission as well as the result of the wrongdoing, which is important in emphasising both the uses and the impact of deprivations of subsistence needs on victims/survivors.[20] Understanding deprivations of subsistence needs as harms would challenge attempts to portray them as resulting from natural phenomenon or as merely constituting unforeseen consequences of other forms of violence.[21] Moreover, naming such deprivations as harms potentially places them in relation to law, as being a matter for law.[22] Using the language of harm could be argued to be problematic in regard to the traditionally narrow conception of harm employed within domestic and international law, which as some scholars, particularly feminist commentators, have argued, focuses on certain types of physical integrity harms to the exclusion of other forms and understandings of harm.[23] However, in defining deprivations of subsistence needs as harms, the thesis deliberately contests these narrow conceptions and argues for a broader legal understanding of harm.

The use of the word "subsistence" places the emphasis upon the nature of the harm perpetrated and experienced. While there are other terms which could have been used in the thesis, these would have been problematic, regarding existing connotations and their narrow scope. For example, the concept of famine has traditionally been portrayed as a natural phenomenon or more recently as a structural issue regarding lack of "entitlements".[24] There is now some literature which has begun to recognise the political nature of famine and its

[19] Conaghan, n 16 above, 322.
[20] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford: OUP, 1984) 33.
[21] For discussion of the way in which famine is often portrayed as a natural disaster see David Marcus, 'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245.
[22] Conaghan, n 16 above, 322.
[23] Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queen's Law Journal* 219; Catherine MacKinnon, 'Sexual Harassment: its First Decade in Court' in Patricia Smith (ed), *Feminist Jurisprudence* (Oxford: OUP, 1993) 145; Catherine MacKinnon, 'Pornography as Defamation and Discrimination' (1991) 71 *Boston University Law Review* 793; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Annandale, NSW: The Federation Press, 1990).
[24] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981). Sen argues that famines are caused not by food shortages but by lack of "entitlements" of certain populations to such food, i.e. by structures of economic and social power.

deliberate use as a weapon of conflict or repression.[25] This literature is therefore highly significant in highlighting the deliberate human agency, which is often involved in the creation or perpetuation of famine, and promoting the need for greater accountability for perpetrators involved.[26] Nevertheless, such literature has yet to fundamentally shift either academic or public perceptions of famine as being either natural or structural. Moreover, this literature, particularly the work of Edkins and Marcus, tends to perceive famine in terms of mass starvation, without reflecting other deprivations of subsistence needs involved.[27] Consequently the term famine, as currently understood, is too narrow to encompass the range of harms involved in deprivations of subsistence needs, such as deprivations of homes, land and livelihoods.

The thesis also looked into using the term "socio-economic harm", but ultimately rejected this as not reflecting the nature of these deprivations. It would be significant and relatively innovative to place socio-economic atrocities within the terminology of harm, since there is a lack of acknowledgement of socio-economic issues within international criminal law.[28] Moreover, socio-economic rights are still predominantly articulated in terms of progressive realisation rather than emphasising deprivations of socio-economic needs.[29] Nevertheless, deprivations of subsistence needs are not simply socio-economic, but rather involve a range of physical, mental and social harms and are often interrelated with other forms of violence. The term socio-economic also refers to a range of rights, such as education, which, while having impacts on subsistence, are not directly linked to deprivations of subsistence needs and do not equate to the severity and gravity of such deprivations. Using a term based around the words "socio-economic" might also serve to present a demarcation between socio-

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[25] See Alex de Waal, *Famine that Kills: Darfur, Sudan* (Oxford: OUP, Revised edn, 2005); Marcus, n 21 above; Jenny Edkins, 'The Criminalisation of Mass Starvation: From Natural Disaster to Crimes against Humanity' in Stephen Devereux and Paul Howe (eds), *The New Famines: Why Famines Persist in the Era of Globalisation* (London: Routledge, 2005); Kurt Jonassohn and Karin Solveig Björnson, *Genocide and Gross Human Rights Violations in Comparative Perspective* (New Brunswick: Transaction Publishers, 1998). Some NGOs have also begun to highlight the political nature of famine, see Action Against Hunger (2001), n 3 above.

[26] *ibid.*

[27] Marcus, *ibid*; Edkins, *ibid.*

[28] See Skogly, n 13 above. She highlights and critiques to some extent the lack of acknowledgement of socio-economic rights violations in international criminal law.

[29] ICESCR, n 8 above. Article 2 talks of 'achieving progressively the full realization of the rights recognized in the present Covenant' rather than emphasising immediate implementation. See David Marcus, 'The Normative Development of Socio-economic Rights through Supranational Adjudication' (2006) 42 *Stanford Journal of International Law* 53.

economic and civil/political rights issues, rather than emphasising the interdependence of rights and harms.[30]

Instead, the use of the term subsistence emphasises the harm not in material terms, but as constituting the deprivation of basic physical human needs for food, water, shelter and livelihoods, and as encompassing deprivations of the mental and social needs associated with human subsistence.[31] The term is used here in the sense of a level or threshold below which human life is severely impoverished or endangered. It constitutes a level below which the *conditions* for living are no longer sustainable. While this approach remains focused on the minimal conditions required for human subsistence, it also incorporates a threshold notion of quality of life, beyond mere biological survival.[32] Subsistence is therefore not only to be understood as the bare *physical* minimum needed for human survival, i.e.: food, water and shelter, but as including mental health and social wellbeing in the conditions necessary for people to survive and live.

Deprivations of homes, livelihoods and basic resources are directly related to physical health and wellbeing. These deprivations involve physical suffering resulting from hunger, malnutrition and lack of shelter, as well as susceptibility to disease and loss of health and

[30] This demarcation largely stems from the ideological differences of the Cold War and from understandings of justiciability, which led to the separate articulation of socio-economic and civil/political rights. However, this has meant that socio-economic rights have often been relegated to second-class status, particularly in terms of perceptions of these rights as positive and progressive rather than requiring immediate effect. More recently there has been much more emphasis within human rights discourse on the independence and indivisibility of all human rights. For literature on this issue see Stephen P. Marks, 'The Past and Future of the Separation of Human Rights into Categories' (2009) 24 *Maryland Journal of International Law* 209; Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 81; Ida Elizabeth Koch, 'The Justiciability of Indivisible Rights' (2003) 72 *Nordic Journal of International Law* 3.

[31] The language and concept of basic needs stems predominantly from economic development discourse, which emphasised the need to ensure access to basic goods and services to enable a basic standard of living, and has been perceived as key to economic development. See Frances Stewart, 'Basic Needs Strategies, Human Rights and the Right to Development' (1989) 11 *Human Rights Quarterly* 347.

[32] This definition shares some similarities with Henry Shue's understanding of subsistence in terms of 'what is needed for a decent chance at a reasonably healthy and active life of more or less normal length'. Shue, n 14 above, 23.

wellbeing.[33] The social and mental aspects of subsistence harms are every bit as real as the physical harms, though they may not be so easily observed. The social aspects of subsistence relate to the often communal nature of human subsistence, in terms of access to basic resources, as well as loss of communal survival networks and social exclusion, which may lead to or exacerbate physical experiences of deprivation.[34] These harms frequently constitute an attack on mental health and wellbeing due to the loss of livelihoods, social exclusion and the effects of the inability to meet the subsistence needs of self and family members.[35]

Denial of a sense of meaning and purpose in life, brought about by deprivations of homes, land and livelihoods, can have devastating impacts on physical survival.[36] If subsistence is thought only to relate to food, warmth and shelter, and does not incorporate mental elements of human survival, then this would constitute a Cartesian dualism, which failed to reflect advances in our understanding of the relationship between mind and body.[37] The health of the mind for most people is also very much contextualised in the social. So again it is necessary to avoid the dualisms of individual and social because the individual requires the social and vice-versa.

The objection may be raised that in some cases of deprivations of subsistence needs, such as forced displacement, sociality is not a central element, due to groups being kept together, for example, in internally displaced person (IDP) camps. However, the social element of subsistence harms is still central in such situations, since normal patterns of subsistence and social survival networks have been disrupted or broken. Such groups are no longer living normal lives, which changes the social dynamic concerning subsistence needs and in turn

[33] For literature which analyses the impact of forced displacement and deprivations of other basic needs on victims/survivors see B. Roberts, K. Felix Ocaka et al., 'Factors Associated with the Health Status of Internally Displaced Persons in Northern Uganda' (2009) 63 *Journal of Epidemiology and Community Health* 227; Richard J. Brennan and Robin Nandy, 'Complex Humanitarian Emergencies: A Major Global Health Challenge' (2001) 13(2) *Emergency Medicine* 147.

[34] For discussion of the importance of communal survival networks and coping strategies to survival see de Waal, n 25 above; Gaim Kibreab, 'Displacement, Host Government's Policies, and Constraints on the Construction of Sustainable Livelihoods' (2003) 55 *International Social Science Journal* 57.

[35] See the research of Roberts et al. which discusses the mental impacts of forced displacement. Bayard Roberts et al., 'Factors Associated with Post-traumatic Stress Disorder and Depression amongst Internally Displaced Persons in Northern Uganda' (2008) 8 *BMC Psychiatry* 38, 45.

[36] See V. Frankl, *Man's Search for Meaning: An Introduction to Logotheraphy* (London: Hodder and Stoughton, 1964).

[37] Francis Crick, *The Astonishing Hypothesis: The Scientific Search for the Soul* (New York: Simon and Schuster, 1995).

impacts on physical and mental aspects of subsistence. Essentially, when looking at subsistence harms one is dealing with a dynamic, holistic situation, where each of these aspects impact on each other and thus any attempt to completely separate out these elements would constitute a misunderstanding of these harms. The thesis argues for a holistic appreciation of the interrelatedness of the physical, mental and social elements of subsistence as all being part and parcel of the dynamics of human existence and survival.

It is also crucial to understand that gender relations have a significant impact on subsistence harms, in terms of who is affected by these harms and how they are experienced in physical, social and mental terms.[38] As noted above, women are often disproportionately affected by subsistence harms, due to underlying gender inequalities.[39] Subsistence harms are therefore defined as constituting gendered harms and the thesis argues for a gender-sensitive approach to them. In the last few decades there has been increasing attention to issues of gender within international law, as seen in the adoption of instruments such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Beijing Declaration and Platform for Action and Security Council Resolution 1325, on women, peace and security.[40] Moreover, international criminal law has developed in recent years to recognise a wider range of sexual offences and to reflect the seriousness of these harms.[41] However, despite such developments, there remain considerable problems and limitations regarding current gender awareness within international law.[42] The treatment of gendered

[38] For literature which discusses underlying gender inequalities in relation to access to basic resources such as food, see Sundari Ravindran, *Health Implications of Sex Discrimination in Childhood* (Geneva: World Health Organisation, 1986); Amartya Sen 'More Than 100 Million Women Are Missing' (1990) 37(20) *New York Review of Books*.

[39] Ravindran, *ibid.*

[40] Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979; United Nations, Resolution 1325 (2000), Adopted by the Security Council at its 4213th meeting, on 31 October 2000, S/RES/1325.

[41] See the key cases on sexual violence within the ICTY and ICTR, *The Prosecutor of the Tribunal* v. *Furundzija*, Trial Chamber Judgement, 22 June 1998, IT-95-17/1-T; *Prosecutor* v. *Akeyesu*, Trial Chamber Judgement, 2 September 1998, ICTR-96-4-T; *The Prosecutor of the Tribunal* v. *Kunarac, Kovac and Vukovic*, Trial Chamber Judgement, 22 February 2001, IT-96-23T; *The Prosecutor of the Tribunal* v. *Delacic*, Trial Chamber Judgement, 16 November 1998, IT-96-21. For relevant literature see Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' (2002) 13 *European Journal of International Law* 697; Kelly D. Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288; Doris Buss, 'Prosecuting Mass Rape: *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*' (2002) 10(1) *Feminist Legal Studies* 91.

[42] For critiques of the continued gendered nature of international law, see for example, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: a Feminist Analysis* (Manchester: Manchester

harms and of female survivors remains problematic in significant ways, in particular due to the lack of consistent attention given to many forms of gendered harms within international criminal and transitional justice, as well as the framing of women's testimony.[43] Essentially, understandings of harm and violence within law are inherently gendered, meaning that harms experienced predominantly by women often remain sidelined or ignored.[44] Where harms against women are recognised in international law this is predominantly in terms of sexual harms or other forms of physical violence, such that subsistence harms continue to be silenced.[45] The thesis therefore argues for a broader understanding of gendered harm within international law in order to reflect the gendered nature of subsistence harms.

ii) Understandings of violence: subsistence harms and other forms of violence

The definition of subsistence harms as deprivations of the physical, mental and social needs of human subsistence, perpetrated with knowledge of the possible consequences of such violence, allows an understanding of the distinct nature of these harms. Subsistence harms are distinct both in terms of the knowledge of the perpetrators that their acts or omissions would endanger access to subsistence needs and in terms of the impact of these deprivations on the victims/survivors. This definition encourages an understanding of the difference between subsistence harms and other forms of violence such as physical integrity harms and structural violence, as well as the interrelationships with these forms of violence.

University Press, 2000); Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005).

[43] Transitional justice has been defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'. N. Roht-Arriaza, 'The New Landscape of Transitional Justice', in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (New York: Cambridge University Press, 2006), 2. There is a growing literature which critiques of the treatment of gendered harms within transitional justice mechanisms. See Katherine M. Franke, 'Gendered Subjects of Transitional Justice' (2006) 15(3) *Columbia Journal of Gender and Law* 813; Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1(3) *International Journal of Transitional Justice* 411; Fionnuala Ní Aoláin and Catherine Turner, 'Gender, Truth and Transition' (2007) 16 *UCLA Women's Law Journal* 229; Barbara Russell, 'A Self-Defining Universe? Case studies from the "Special Hearings: Women" of South Africa's Truth and Reconciliation Commission' (2008) 67(1) *African Studies* 49; Women's Initative for Gender Justice, 'Making a Statement: A Review of Charges and Prosecutions for Gender-Based Crimes before the International Criminal Court' (Report) (June 2008) <http://www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf> accessed 14 July 2010.

[44] Robin West, *Caring for Justice* (New York: New York University Press, 1997); Ní Aoláin, n 23 above.

[45] This issue is beginning to be acknowledged by a few feminist scholars. In particular, see Ní Aoláin, *ibid.*

The concept of violence is notoriously difficult to define, but is most commonly understood in terms of attacks upon some form of personal integrity, through direct human agency.[46] However, the thesis draws on the World Heath Organization's definition of direct violence as the 'intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation'.[47] This definition is important in broadening understandings of violence away from an emphasis purely on direct physical force and injury to one which includes 'neglect or acts of omission' and psychological harm and deprivation.[48] Subsistence harms fit far more easily within this definition, where they may not be recognised within a more conventional definition of direct violence.

Subsistence harms are different and distinct from physical integrity violence. Where it is the physical force and injury which defines such violence, deprivations of subsistence needs form the essence of the violence of subsistence harms. These harms can be portrayed as less immediate and direct, particularly due to the fact that they are interrelated with physical integrity harms in the way they are perpetrated. Subsistence harms may be perpetrated through the use or threat of physical integrity harms, which may serve to obscure the causal link that exists between the attack and the resulting subsistence harm. For example, the deprivation of homes, livelihoods and basic resources has often been perpetrated through the use of deliberate killing or maiming in order to force a population to leave their homes and lands.[49] Similarly, direct physical violence has frequently been perpetrated with the aim of preventing access to agricultural livelihoods or coping strategies, for example attacking IDPs who venture out of camps to attempt to cultivate their lands or to forage for food.[50] While such physical integrity violence is frequently acknowledged, the subsistence harms also perpetrated are all too often overlooked. This is problematic in a normative sense, in terms of

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[46] See Vittorio Bufacchi, *Violence and Social Justice* (Basingstoke: Palgrave Macmillan, 2007).
[47] Etienne G. Krug, Linda L. Dahlberg, James A. Mercy et al., *World Report on Violence and Health* (Geneva: World Health Organisation, 2002) 5.
[48] *ibid.*
[49] See for example, Human Rights Watch, '"They Came and Destroyed Our Village Again": The Plight of Internally Displaced Persons in Karen State' (2005) <http://www.hrw.org/en/reports/2005/06/09/they-came-and-destroyed-our-village-again> accessed 14 October 2009.
[50] Samuel Hauenstein Swan and Bapu Vaitla (eds), *The Justice of Eating: The Struggle for Food and Dignity in Recent Humanitarian Crises* (London: Pluto Press, 2007).

a failure to recognise or condemn subsistence harms. This failure permits a lack of accountability regarding these harms and a lack of acknowledgement of the experiences and needs of victims/survivors.

In defining violence and positioning subsistence harms as a particular form of violence, the thesis also draws on the concept of structural violence. Structural violence has been defined as 'avoidable insults to basic human needs, and more generally to life, lowering the real level of needs satisfaction below what is potentially possible'.[51] Such violence is structural in the sense of being built into political, economic and social structures, rather than necessarily having an identifiable perpetrator.[52] Rather than equating violence with direct physical force, structural violence encompasses issues of livelihoods and basic resources, which therefore renders it relevant to subsistence harms.[53] The concept of structural violence also contests the traditional demarcation between conflict and peace, since it is built on an understanding of the difference between "negative" and "positive" peace.[54] Thus, "negative" peace, which reflects traditional understandings of peace, merely constitutes absence of direct violence and continues to institute structural forms of violence.[55]

This structural definition of violence has been criticised by some scholars for widening the concept of violence to such an extent as to render it meaningless.[56] However, the concept is crucial to understanding the underlying grievances and inequalities which feed into the perpetration and experience of subsistence harms and the interrelationships between different forms of suffering. Although it is important to recognise the particular nature of different

[51] For literature on structural violence, see Johan Galtung, 'Cultural Violence' (1990) 27(3) *Journal of Peace Research* 291; Paul Farmer, *Pathologies of Power: Health, Human Rights and the New War on the Poor* (Berkeley Ca. University of California Press, 2003); Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (Sage: London, 1996).
[52] Johan Galtung, 'Violence, Peace and Peace Research' (1969) 6(3) *Journal of Peace Research* 167, 171.
[53] Daniel J. Christie, 'Reducing Direct and Structural Violence: The Human Needs Theory' (1997) 3(4) *Peace and Conflict: Journal of Peace Psychology* 315; Johan Galtung, 'Meeting Basic Needs: Peace and Development' in Felicia A. Huppert, Nick Baylis and Barry Keverne (eds), *The Science of Well-being* (Oxford: OUP, 2005).
[54] Galtung, n 52 above.
[55] *ibid.*
[56] For such criticisms see J. Keane, *Reflections on Violence* (London: Verso, 1996); Bufacchi, n 46 above, 83.

forms of violence, presenting a clear demarcation between them is often misleading.[57] As Cramer argues, it is important to 'think in terms of "a spectrum of violence" wherein types and degrees of violence and harm flow into one another and are thus interrelated'.[58]

Although subsistence harms are distinct from structural forms of violence, as they are from physical integrity violence, there are similarly clear relationships between them. Subsistence harms are far more direct than structural violence, since the cause-effect relationship between the perpetration of the deprivation and the experience of the harm is much stronger. With regard to structural violence 'there may not be any person who directly harms another person ...The violence is built into the structure and shows up as unequal power and consequently as unequal life chances'.[59] These issues of causation and agency therefore mean that structural violence lies well beyond the purview of international criminal law.

The socio-economic inequalities resulting from structural violence often feed into the perpetration of subsistence harms and constitute underlying causes of such harms.[60] These inequalities provide the context and foundation for the perpetration of subsistence harms and the basis for their inherently gendered nature.[61] Structural violence is a key factor in the gender inequalities which underlie the uses and experiences of subsistence harms and ensure that women are disproportionately affected.[62] In turn, the impact of subsistence harms may lead to further inequalities and perpetuate the impact of both direct and structural violence

[57] David Keen, *Complex Emergencies* (Cambridge: Polity Press, 2008), 171. As Keen argues, 'Studying war and peace over the long view suggests that violence is a bit like energy: it may mutate into new forms without actually disappearing'.
[58] Cramer, n 18 above, 84.
[59] Galtung, n 52 above, 171.
[60] See Frances Stewart, 'Horizontal Inequalities: A Neglected Dimension of Development', Centre for Research on Inequality, Human Security and Ethnicity Working Paper 1 (2003) <http://www.crise.ox.ac.uk/pubs/workingpaper1.pdf> accessed 12 July 2007; Gudrun Østby, 'Polarization, Horizontal Inequalities and Violent Civil Conflict' (2008) 45(2) *Journal of Peace Research* 143; David Keen, *The Benefits of Famine: A Political Economy of Famine and Relief in Southwestern Sudan, 1983-1989* (Princeton, NJ: Princeton University Press, 1994), 114.
[61] On the issue of structural violence and gender see Dyan Mazurana and Susan McKay, 'Women, Girls and Structural Violence: A Global Analysis' in D. J. Christie, R. V. Wagner and D. A. Winter (eds), *Peace, Conflict and Violence: Peace Psychology for the 21st Century* (Englewood Cliffs, NJ.: Prentice-Hall, 2001); Mary K. Anglin, 'Feminist Perspectives on Structural Violence' (1998) 5(2) *Identities* 145.
[62] Mazurana and McKay, *ibid.*

upon survivors.[63] Understanding how structural violence fuels and fosters the perpetration of subsistence harms is also crucial in terms of acknowledging the role of histories of colonialism and development policies in such violence and the responsibility of Western powers as well as the complicity of law itself.[64] While the issue of development is beyond the scope of the thesis, in looking at the historical uses of subsistence harms the following chapter does highlight the relationship between colonialism and the perpetration of these harms.

Essentially, the thesis argues for greater legal recognition of the significant linkages between structural violence, subsistence harms and physical integrity harms.[65] Although structural violence lies beyond the scope of international criminal law, transitional justice mechansisms should focus on recording the underlying contexts and relationships of violence, with a view to promoting ways to redress grievances in the longer-term. Nevertheless, there remain key limitations to the legal recognition of the linkages between structural violence and subsistence harms, particularly due to problems of human rights law, as will be discussed later in the thesis.

iii) The understanding of recognition – a triangular relationship

Understanding the nature and essence of subsistence harms is crucial to highlighting the fundamental problems of recognising these harms within the current legal framework. The issue of recognition is therefore another central aspect of the thesis. The main arguments of the thesis focus on the degree of recognition of subsistence harms provided by the current

[63] See Ellen Messer, Marc J. Cohen and Jashinta D'Costa, *Food from Peace: Breaking the Links Between Conflict and Hunger*, Food, Agriculture and the Environment Discussion Paper 24 (Washington: International Food Policy Research Institute, 1998).

[64] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005). See also Joseph Nevins, '(Mis)Representing East Timor's Past: Structural Symbolic Violence, International Law and the Institutionalization of Injustice' (2002) 1(4) *Journal of Human Rights* 523; Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (London: Cornell University Press, 2005); Peter Uvin, *Aiding Violence: the Development Enterprise in Rwanda* (Connecticut: Kumarian Press, 1998) 109-160.

[65] For literature that highlights the limited recognition of structural violence within transitional justice mechanisms see Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 275; Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); Zinaida Miller, 'Effect of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 (3) *International Journal of Transitional Justice* 266.

legal framework, the significance of legal recognition and the need for forms and spaces of recognition beyond the boundaries of conventional law. It argues that legal recognition of these harms, while profoundly limited, could play a normative role in condemning and sanctioning deprivations of subsistence needs, if law more fully recognised these harms. Conversely, continued lack of recognition would send a powerful signal that subsistence harms can be perpetrated with impunity and leave survivors with a sense of injustice, in that their experiences have been silenced.[66]

Recognition is therefore seen as important in terms of notions of accountability and the normative role of law, but also in terms of the needs of survivors. The role of victims/survivors in international criminal justice is contested, with disagreement surrounding the degree of victim participation and the impact on defendants' rights. Nevertheless, there is an emerging trend in international criminal law towards acknowledging and instituting the rights of victims, as seen in the provisions for victim participation and rights within the Rome Statute of the ICC.[67] Although the degree and form of justice provided by current transitional justice mechanisms is limited and problematic, the value of some form of legal recognition of subsistence harms to survivors should not be underestimated.[68]

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[66] On the issue of the normative role of law see Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7, 11.

[67] See Article 68 of the Rome Statute, on the Protection of the victims and witnesses and their participation in the Proceedings, n 8 above. For literature on the role of victims in international criminal justice, see Sam Garkawe, 'Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis' (2001) 8(3) *International Review of Victimology* 269; A.H. Guhr, 'Victim Participation During the Pre-Trial Stage at the International Criminal Court' (2008) 8(1) *International Criminal Law Review* 109; Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court' (2008) 70 *International Review of the Red Cross* 409; Susana SáCouto and Katherine Cleary, 'Victims' Participation in the Investigations of the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 73; Cherif M. Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203; Mark Findlay, 'Activating a Victim Constituency in International Criminal Justice' (2009) 3 *International Journal of Transitional Justice* 183; Timothy K. Kuhner, 'The Status of Victims in the Enforcement of International Criminal Law' (2004) 6 *Oregon Review of International Law* 95.

[68] For literature which discusses the limitations of current models of transitional justice regarding treatment of survivors, see Nagy, n 65 above; Ní Aoláin, and Turner, n 43 above; Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008); David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 *Human Rights Quarterly* 592. While there are some occasions when the thesis uses the term victims, particularly in terms of those who have not survived subsistence harms, it generally employs the term survivors. The term survivors, avoids the problems of a narrow definition of victim identity and applies not just to direct victims but to a broader range of groups and individuals who have experienced diverse harms. It also avoids the dangers of emphasising passivity and lack of agency, which the term victim tends to imply. For the value of justice to victims/survivors see Kirsten Campbell, 'The Trauma of Justice: Sexual Violence, Crimes Against Humanity and the International Criminal Tribunal for the Former

The use of the term recognition therefore necessitates an outline of how it is being used within the thesis, in relation to subsistence harms. Essentially, the thesis uses recognition in three interrelated ways. Firstly, it is concerned with labelling or categorising a class of acts/omissions as constituting subsistence harms; that is, recognising them as constituting a particular type of harm and violence, as discussed above. The recognition of subsistence harms in this sense is therefore dependent on the definition of these harms provided by the thesis. Secondly, the thesis is concerned with recognition in a legal sense, but in a different way from the more common understanding of recognition in international law as the recognition of states.[69] Once recognised as constituting a discrete type of violence in the first sense, the issue of the recognition of subsistence harms as crimes and rights violations in international law can be analysed. This relates to the argument, already stated, that, while there are some offences and rights within international law which relate to subsistence harms, these harms are not fully recognised within the current legal framework. Instead, they are categorised in other ways and encompassed to some degree within other offences, which means that law fails to recognise the nature of these harms as deprivations of subsistence needs.

The third sense in which recognition is used in the thesis is in terms of the type of recognition provided by legal mechanisms, as well as by spaces of recognition beyond conventional law. Recognition in this sense relates to how recognition is performed within different fora and how this relates to the extent of legal recognition regarding subsistence harms. The thesis therefore analyses the ways in which recognition is performed within legal mechanisms and focuses on the work of international criminal tribunals and truth commissions. Recognition in this sense does not simply mean perceiving that a legally recognised harm occurred. The process by which harms are perceived within legal mechanisms also involves some form of response to the harm, in terms of accountability for perpetrators and redress for victims/survivors.[70] The thesis therefore examines and contrasts the processes of recognition

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Yugoslavia' (2004) 13(3) *Social and Legal Studies* 329; Pablo de Greiff, 'Justice and Reparations' in de Greiff (ed), *The Handbook of Reparations* (Oxford: OUP, 2006) 461.

[69] H. Lauterpacht, 'Recognition of States in International Law' (1944) 53(3) *Yale Law Journal* 385; Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *American Journal of International Law* 605.

[70] Frank Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition' (2008) 41 *Cornell International Law Journal* 675.

within each fora regarding subsistence harms and the degree and type of recognition of subsistence harms consequently provided.

Recognition of subsistence harms within legal mechanisms, such as trials and truth commissions, requires a pre-existing recognition of subsistence harms as constituting a particular category of harm and also recognition of these harms in law. There is some space within such mechanisms to interpret law and thus to possibly promote legal recognition of subsistence harms. Nevertheless, the lack of recognition of subsistence harms in the first two senses means that the ability and willingness of current legal mechanisms to recognise and thus respond to subsistence harms remains limited. The thesis therefore also examines forms of recognition beyond conventional law, in order to perceive different types of recognition, stemming from the work of non-governmental tribunals and social movements. Looking beyond conventional law is important in examining the different ways in which recognition is performed, but also in analysing alternative understandings of harms and violence which may be produced, and which could possibly be used to feed back into legal forms of recognition. The process of recognition within legal mechanisms and in spaces which lie beyond conventional law, consequently allows for some further, ongoing evaluation of the nature of subsistence harms and the extent of current recognition in law. The process can therefore be imagined as a triangular relationship of definition and action, whereby each of the three uses of the term recognition in the thesis are discrete and yet intimately related to each other.

Apart from the traditional use of recognition in relation to state sovereignty in international law, the term is often used in international legal discourse to refer to diverse issues, without generally being theorised. On the other hand, there is a considerable amount of literature on the issue of recognition within political theory, most notably the work of Axel Honneth and Nancy Fraser.[71] Drawing on Hegelian theory of identity, recognition within this literature is centred on issues of self-identity and self-respect and their dependence on recognition by others.[72] Such insights have also been argued to apply on a more macro-level to group identity, in terms of the damage to one's sense of self caused by belonging to a group that is

[71] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, Mass.: MIT Press, 1996); Axel Honneth, 'Recognition and Justice: Outline of a Plural Theory of Justice' (2004) 47(4) *Acta Sociologica* 351; Nancy Fraser, 'Rethinking Recognition' (2000) *New Left Review* 107.
[72] Honneth (1996), *ibid.*

misrecognised and thus devalued in society.[73] While this literature is centred on issues of identity politics, with which the thesis is not directly concerned, there are some aspects which are of relevance to the thesis' understanding of recognition.

The literature on recognition relates in some regard to the third sense of recognition, in terms of acknowledgement of victim/survivor identities through legal mechanisms.[74] Essentially, the legal recognition of harms provided through transitional justice mechanisms can play an important role in validating victims' experiences and thus in acknowledging individuals/groups to be victims.[75] However, while the thesis agrees that recognition of harms experienced is crucial for survivors, it sees the emphasis on recognition in terms of identity as potentially dangerous in transitional justice settings. While it does argue that silencing harm, as the converse of recognition, is particularly damaging, the focus should not be upon victim identities.

Thus, validating survivor experiences through the recognition of harms is seen as important, but the focus of the thesis remains on recognising the subsistence harm involved rather than over-emphasising the individual/group identity of the victims/survivors. The emphasis on identity claims within the theories developed by Honneth and Taylor, for example, could potentially act in divisive ways in transitional societies. Such theories can over-emphasise the importance of group identities and promote cultural essentialism, which could be detrimental to the aims of transitional justice, in terms of societal reconciliation.[76] Moreover, the emphasis on recognition of victims and victim identity could present too clear a demarcation between victims and perpetrators, where in reality this demarcation is often blurred, particularly regarding subsistence harms and underlying socio-economic grievances.[77]

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[73] Charles Taylor, 'The Politics of Recognition' in Amy Gutmann and Charles Taylor (eds), *Multiculturalism* (Princeton NJ: Princeton University Press, 1994) 25.
[74] Haldemann n 70 above; Elizabeth Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 *British Journal of Criminology* 582.
[75] Haldemann, *ibid.*
[76] Seyla Benhabib, *Claims of Culture: Equality and Diversity in the Global Era* (Princeton NJ: Princeton University Press, 2002) 55-68.
[77] Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) 25 *Human Rights Quarterly* 1088.

On the other hand, Fraser's critique of the identity model of recognition and her emphasis on the issue of redistribution fits more closely with some of the arguments within this thesis. Essentially, Fraser argues that the identity model of recognition displaces the importance of redistribution in terms of the marginalisation of certain groups.[78] Her "status model" seeks to avoid the dangers of reification of group identity by emphasising the importance of the recognition of individuals as 'full partners in social interaction'.[79] This requires a concomitant understanding of the importance of maldistribution in terms of socio-economic issues and resource allocation.[80] Fraser also applies such arguments to issues of gender justice, arguing in terms of the importance of addressing socio-economic, gendered inequalities rather than primarily focusing on identity politics and cultural harms, as much feminist research, including feminist legal discourse, continues to do.[81]

As seen above, the thesis argues that for subsistence harms to be fully recognised the relationship of these harms to gender inequalities and socio-economic grievances must also be recognised, which clearly relates to Fraser's arguments on redistribution. The thesis argues that recognition within transitional justice needs to be seen in terms of the promotion of measures of redress and ways of addressing underlying concerns and inequalities.[82] However, while Fraser's arguments regarding distribution and maldistribution are significant, the concepts of recognition prevalent within current political theory, upon which she draws, remain problematic.[83] Essentially, Fraser's approach still perceives recognition and redistribution as interrelated but separate terms.[84] Instead, the thesis uses the term recognition in a much broader way as encompassing issues of underlying socio-economic inequalities and grievances and their relationship to subsistence harms, as well as the need for measures to redress these harms. Therefore, while existing uses and theories of recognition are acknowledged and drawn on to some degree within the thesis, essentially the understanding of recognition applied is quite different; being focused on the recognition of subsistence

[78] Fraser, n 71 above.
[79] *ibid*, 113.
[80] *ibid.*
[81] Nancy Fraser, 'Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice' (2007) 1(1) *Studies in Social Justice* 23.
[82] Ernesto Verdeja, 'A Normative Theory of Reparations in Transitional Democracies' (2006) 37(3-4) *Metaphilosophy* 449.
[83] Fraser, n 71 above.
[84] Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 *New Left Review* 68.

harms in and of themselves. The next section will outline the literatures and methodological approaches used within the thesis which inform its approach towards subsistence harms and its analysis and critique of international law.

2) Sources, methodological approaches and the structure of the thesis

i) Interdisciplinary and critical approaches

The thesis employs a variety of formal legal literatures and sources, such as treaties, human rights covenants and international criminal law case law as well as "soft law" sources such as United Nations (UN) documents and non-binding declarations or commentaries. However, it also uses a wider range of interdisciplinary academic literature and non-governmental sources. This interdisciplinary approach is adopted for two main reasons: the lack of relevant legal literature and the limitations of conventional legal understandings of harm. On a practical level, the paucity of legal discourse relating to the issue of subsistence harms, particularly within international criminal law, necessitates exploring a wider range of literatures. Consequently, the thesis draws on insights from literature outside of law, such as history, international relations, anthropology and medical research, in order to interrogate and define the nature of subsistence harms and to critique understandings of harm and violence within international law and legal discourse.

The paucity of literature relevant to subsistence harms within international law is illustrated with regard to Marcus' work on "famine crimes", which represents a largely unique attempt to discuss the issue of famine and mass starvation in relation to international criminal law.[85] The fact that this work has elicited limited engagement or response, and thus is yet to be seriously acknowledged or developed within legal discourse, illustrates that issues of subsistence are not considered by most legal scholars to be particularly relevant or significant to law.[86] For example, while Smyth's short piece briefly highlights that Marcus' article may

[85] Marcus, n 21 above.
[86] Jeannette Smyth, 'Correspondence' (2003) 97 *American Journal of International Law* 899. See also Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations' (2007) 101(3) *Northwestern University Law Review* 1257; Claire Thomas, 'Civilian Starvation: A Just Tactic of War?' (2005) 4(2) *Journal of Military Ethics* 108.

be useful to genocide scholars, particularly in terms of the concept of 'genocide by attrition', it does not discuss his article at all.[87]

The thesis draws on Marcus' research and argues that it is highly significant in illustrating the way in which famine has been ignored within international criminal law.[88] However, the thesis also develops his research by focusing not on mass starvation, but on developing the concept of subsistence harms, which encompasses a much wider range of harms and reflects the relationship between different forms of violence.[89] Moreover, while Marcus argues that famine crimes could be incorporated into existing offences within international law, it does not critique the limitations of law or explore the inherent problems of law's conceptualisation of harm.[90]

On a more theoretical level, the critical view of law and of current legal framings of harm, employed within the thesis, underlie its engagement with critical legal literatures and its interdisciplinary approach. Critical legal literatures are crucial to informing the methodological approach of the thesis and are particularly relevant in seeking to "demystify" law and highlighting the exclusions, boundaries and silences of law.[91] Such approaches align with the aims of the thesis in terms of examining how and why subsistence harms are silenced by law and in interrogating law's often problematic role in the recognition of harm. The thesis draws to some extent on Third World Approaches to International Law (TWAIL), as this literature provides key insights into historic contexts of violence, in particular the legacy of colonialism and dominant political and economic systems, and law's role in, and thus toleration of, such violence.[92] Drawing on such approaches allows the thesis to examine law's historic acceptance of subsistence harms and the historic roots of such violence, particularly given that contemporary subsistence harms are predominantly experienced in

[87] Smyth, *ibid.*
[88] Marcus, n 21 above.
[89] *ibid.*
[90] *ibid.*
[91] Anghie, n 64 above.
[92] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *International Community Law Review* 371; B. S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3; Pooja Parmar, 'TWAIL: An Epistemological Inquiry' (2008) 10 *International Community Law Review* 363; Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 125.

third world countries. TWAIL approaches also emphasise the importance of understandings of the experiences of third world peoples and of hearing their voices.[93] These approaches therefore promote engagement with alternative understandings of law and of harm, which seek to recognise harms ignored by conventional legal frameworks and discourses.[94]

The thesis also draws on feminist approaches to international law, particularly due to the gendered aspects of subsistence harms.[95] While there has been a tendency within feminist literatures to focus on sexual violence and physical integrity harms, rather than on harms related to subsistence or socio-economic issues, feminist approaches provide important insights which can be used to critique the limitations of legal recognition of subsistence harms. In questioning the objectivity of law, feminist approaches often critique the silences in the law, i.e. the issues which are deemed by mainstream legal discourse to be irrelevant or marginal, in order to look at the silences relating to women.[96] Feminist approaches are significant in highlighting the inherently gendered nature of international law, which is predominantly skewed towards male structures and understandings of harm.[97] The thesis draws on such understandings in order to critique the way that law marginalises subsistence harms and prevents recognition of their gendered nature and of women's experiences of these harms. Feminist approaches also highlight that women may not be completely excluded within law, but rather are included in a marginal way.[98] The thesis uses this understanding to argue that while there may be some recognition of subsistence harms within law, the marginal position of these harms within the legal framework is profoundly problematic and has clear gendered connotations.

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[93] Antony Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) *Chinese Journal of International Law* 77.

[94] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

[95] Given that feminist approaches are focussed on exploring the silences of law, it is particularly surprising that such literature has largely failed to address the gendered aspects of deprivations of subsistence needs. For literature that is slowly beginning to recognise the need to address other forms of gendered harm within international law see Ní Aoláin, n 23 above, 388; Vasuki Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 799. However, even these articles barely mention harms related to women's subsistence needs.

[96] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 615; Charlesworth and Chinkin, n 42 above; Charlesworth, n 7 above, 381.

[97] Charlesworth, Chinkin and Wright, *ibid* 644; Buss and Manji n 42 above; Charlotte Bunch, 'Women's Rights as Human Rights: Towards a Re-vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486.

[98] Charlesworth, Chinkin and Wright, *ibid*, 625.

In adopting a critical approach, the thesis examines the work of social movements and non-governmental tribunals in order to assess how they use law to recognise silenced forms of harm and violence. The thesis engages with the exclusions and boundaries of law and looks both outside of as well as inside of law in order to examine the issue of the recognition of subsistence harms.[99] This approach has two purposes: firstly to examine how subsistence harms may be recognised in alternative spaces beyond and outside of traditional legal mechanisms and secondly to analyse alternative ways of conceptualising harm and violence, which potentially may be used to influence international law "from below".[100]

Defining social movements has proved difficult and one must be aware when discussing social movements of the range of movements and the differences between them.[101] Indeed, social movements represent a range of claims and demands, not all of which may promote the recognition of silenced harms and some movements may even perpetuate or promote the marginalisation of certain groups.[102] The thesis understands social movements as being centred on mass mobilisation around a particular issue or interest and as having more informal and inclusive forms of organisation than other types of activism, such as NGOs.[103]

It therefore draws on definitions of social movements as being 'collective actors constituted by individuals who understand themselves to share some common interest and who also identify with one another, at least to some degree'.[104] Non-governmental tribunals, on the other hand, have different forms of organisation, membership and aims. Such tribunals are often established by NGOs or other civil society organisations in order to "judge" a particular situation involving the perpetration of violence and the experience of silenced harms.[105]

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[99] Olivia Harris, *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity* (Oxford: Routledge, 1996).

[100] For literature on law "from below" see Boaventura de Sousa Santos and César A. Rodríguez-Garavito, *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005), 18; Rajagopal, n 94 above; McEvoy and McGregor, n 68 above.

[101] Michael McCann, *Law and Social Movements* (Aldershot: Ashgate, 2006).

[102] On the need for caution regarding social movements, and awareness that not all social movements may promote emancipatory visions of rights see Rajagopal, n 94 above; Baxi, n 92 above.

[103] Neil Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 *Human Rights Quarterly* 980.

[104] *ibid*, 984.

[105] Arthur W. Blaser, 'How to Advance Human Rights Without Really Trying: An Analysis of Nongovernmental Tribunals' (1992) 14(2) *Human Rights Quarterly* 339; Niamh Reilly and Linda Posluszny,

They essentially draw on and contest law through claiming the right to judge harms, which is traditionally the preserve of states and international legal institutions.[106]

The thesis understands both non-governmental tribunals and social movements as constituting certain forms of civil society activism, but ones often ignored by international law and legal discourse. Indeed, international legal discourse, where it does engage with civil society, tends to focus on the work of western NGOs, which is very different from the forms of contestation constituted by non-governmental tribunals and social movements, or even local NGOs.[107] As Rajagopal argues, 'this "NGOization" of civil society discourse is problematic for several reasons, [it] is too narrow and essentially misses the radical potential of a social-movement perspective to transform international law'.[108] While international NGOs have been viewed by some as 'necessarily incorporated into existing structures of power, losing any emancipatory potential they may have once had', social movements may not suffer, to the same degree, from such restrictions, in being distanced from legal, political and economic institutions.[109]

However, it is also important to recognise the complex nature of civil society and the linkages which may exist between social movements and local and international NGOs.[110] While it is important to move away from the current focus on NGOs in civil society, it is also important to recognise the complexity of civil society and the relationships between different forms of

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'Women Testify: A Planning Guide for Popular Tribunals and Hearings' Center for Women's Global Leadership (2005)
<http://www.cwgl.rutgers.edu/globalcenter/womentestify/completetext.pdf> accessed 20 October 2009.

[106] Jayan Nayar, 'A People's Tribunal Against the Crime of Silence? The Politics of Judgement and an Agenda for People's Law' (2001) 2 *Law, Social Justice and Global Development Journal*
<http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html> accessed 12 October 2008.

[107] For legal discourse which focuses on civil society in terms of the work of western NGOs see for example, Holly Cullen and Helen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1(1) *Non-State Actors and International Law* 7; S. Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan Journal of International Law* 183. For a critique of the way that social movements are often conflated with international NGOs within wider discourse, rather than perceiving the distinct role played by social movements, see Catherine Eschle and Neil Stammers, 'Social Movements and Global Activism' in Wilma de Jong, Martin Shaw and Neil Stammers (eds), *Global Activism, Global Media* (London: Pluto Press, 2005) 50-52.

[108] Rajagopal, n 94 above, 258.

[109] Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009) 197.

[110] Rajagopal , n 94 above, 261

activism.[111] Although social movements often seek to retain their independence from international institutions and Western NGOs, they may generate working relationships with other forms of civil society activism and develop shared strategies, particularly with local NGOs.[112] Transnational social movements may promote the establishment and proliferation of local NGOs, by protesting around a particular issue, and develop networks with other social movements and collective arenas of activism, such as the World Social Forum, as will be seen in the example of the Food Sovereignty Movement.[113] Moreover, non-governmental tribunals have often had links to local or international NGOs and social movements have also been closely involved with the work of some tribunals.[114]

In order to acknowledge these relationships and the importance of looking beyond international NGOs, the thesis draws on a broad understanding which emphasises the complex and contestatory nature of civil society and also positions civil society in relation to international law. It understands civil society as 'an arena of contestation about international law that is located outside the traditional state-derived frameworks of international law and takes place amongst actors who have no formal legitimacy to adjudicate or to develop international law'.[115]

Analysing the work of social movements and non-governmental tribunals in relation to the recognition of subsistence harms is significant not in moving away from law, but rather in

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[111] *ibid.* For literature which seeks to define different froms of transnational activism and relationships between them, see Sanjeev Khagram, James V. Riker and Kathryn Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks and Norms* (Princeton, NJ.: University of Princeton Press, 2001).

[112] *ibid.*

[113] *ibid*; Stammers, n 109 above. For the way in which the Food Sovereignty movement works with other forms of activism see La Via Campesina, 'La Via Campesina Policy Documents' 5th Conference, Mozambique, 16th to 23rd October 2008, 99 <http://viacampesina.org/downloads/pdf/policydocuments/POLICYDOCUMENTS-EN-FINAL.pdf> accessed 9 May 2010.

[114] Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability' (2008) 30(2) *New Political Science* 161, 185. For example, a wide range of social movements were involved in the work of the Permanent People's Tribunal, Session on Neoliberal Policies and European Transnationals in Latin America and the Caribbean. Permanent People's Tribunal, 'Session on Neoliberal Policies and European Transnationals in Latin America and the Caribbean' (2008) <http://www.internazionaleleliobasso.it/dtml/tribunale_permanente/sentenze/34.2_TPP_Lima_ENG.pdf> accessed 2 October 2008.

[115] Emily Haslam, 'Law, Civil Society and Contested Justice at the International Criminal Tribunal for Rwanda' in Marie-Benedicte Dembour and Tobias Kelly (eds), *Paths to International Justice* (Cambridge: Cambridge University Press, 2007) 57, 58.

assessing the way that such movements engage with law, in order to challenge fundamental premises of international law and dominant assertions of rights and harms.[116] Non-governmental tribunals may provide some alternative spaces for the recognition of subsistence harms and their judgments may be able to influence law to some degree in the future.[117] Despite often still being restrained by the current legal framework, they do aim to address harms, which law ignores or sidelines, and to focus on issues of structural violence, and thus can provide some degree of recognition of subsistence harms.[118] The praxis of social movements can also provide alternative forms of recognition of subsistence harms and ways of promoting legal recognition "from below", to some degree. In particular, they often use law as a tool to challenge conventional understandings of harm and legal frameworks, since law provides such movements with a degree of authority and a language to frame their demands and recognise silenced forms of harm.[119]

The thesis focuses, in particular, on the work of the Food Sovereignty Movement, which is a transnational social movement based around the right to food and food production issues.[120] Looking at this social movement provides two important insights for the thesis: highlighting social movement recognition of the limitations of concepts of violence and rights within conventional law and providing a vision of how subsistence harms may be redressed more fully in the long-term through a focus on underlying inequalities and grievances. The Movement uses law as a language to voice its concerns, but at the same time offers a very different vision of human rights, which emphasises communal autonomy and rejects understandings of food as a commodity.[121] The Movement may also provide a way of recognising more long-term issues surrounding the perpetration and experience of subsistence harms, which conventional interpretations of law are perhaps incapable of addressing.

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[116] Rajagopal, n 94 above.
[117] Mary Kaldor, *Global Civil Society: An Answer to War* (Oxford: Polity Press 2003). For other literature which looks at influencing international law "from below" see McEvoy and McGregor, n 68 above.
[118] See website of the Permanent People's Tribunal, <http://www.internazionaleleliobasso.it/index.php> accessed 19 April 2010.
[119] Rajagopal, n 94 above, 23.
[120] La Via Campesina, 'Food Sovereignty: A Future Without Hunger' (1996) <http://www.voiceoftheturtle.org/library/1996%20Declaration%20of%20Food%20Sovereignty.pdf> accessed 12 October 2008. La Via Campesina is one of many organisations and local groups which constitute the Food Sovereignty movement. See also Forum for Food Sovereignty, 'Food Sovereignty: A Right for All' (2002) <http://www.nyeleni2007.org/spip.php?article125> accessed 11 November 2008.
[121] La Via Campesina, *ibid.*

However, the use of law by social movements and non-governmental tribunals also presents a tension in regard to the way law can resist influence "from below" and can restrict alternative visions of law, due to the embedded nature of dominant conceptions of rights and harms within the legal framework.[122] Clearly the issue of co-option has been addressed in previous literatures, particularly critical legal literatures and also social movement literature.[123] The thesis draws on these understandings of how alternative visions of rights and harms can become co-opted by law, in order to discuss both the potential and the possible limitations of social movement praxis in regard to the recognition of subsistence harms beyond conventional law. While the thesis does not argue that these issues mean that law cannot be used to promote alternative understandings and recognise silenced harms, these potential tensions and paradoxes do need to be acknowledged.[124]

ii) Outline of the thesis

The first chapter of the thesis focuses on analysing historical and contemporary perpetrations of subsistence harms. It highlights both the continuities in their perpetration and experience, as well as shifts in the nature of contemporary uses of these harms. It discusses particular examples of historical and contemporary perpetrations of subsistence harms, which are drawn on in later chapters in order to analyse the recognition of such harms in different fora. The chapter begins to analyse the issue of subsistence harms in relation to international law: how these harms have historically been tolerated by law and how, despite some acknowledgement of harms related to deprivations of subsistence needs, the existing legal framework remains inherently problematic. The second chapter develops the theme of legal recognition of subsistence harms, explaining the reasons for the lack of attention given by law to these harms and arguing in terms of the importance of further legal recognition. The chapter looks at the role current legal mechanisms can play in providing recognition of subsistence harms but, in highlighting the limitations of law, also turns to other forms of recognition provided by non-governmental tribunals and social movement activism.

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[122] Stammers, n 109 above.

[123] For the dangers of co-option through rights discourses see Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995); McCann, n 101 above.

[124] On the issue of the tensions between law and social movements as well as the way such movements use and interpret law, see Sally Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29 *Law and Society Review* 11.

Having outlined the main issues regarding legal recognition of these harms, the next two chapters look in detail at the way existing legal mechanisms have dealt with harms related to deprivations of subsistence needs. The third chapter is focused on the role of international criminal tribunals in the recognition of harms. It analyses the case law of the various international/internationalised criminal tribunals, including the Nuremberg Tribunal, the ICTY, ICTR and the ICC as well as the hybrid tribunals of Sierra Leone, East Timor and Cambodia. The chapter argues that these tribunals have largely reinforced the problems of international law regarding subsistence harms. The fourth chapter analyses the "truth" of truth commissions regarding subsistence harms and focuses particularly on a comparison between the different approaches of two truth commissions: the South African Truth and Reconciliation Commission and East Timor's truth commission (CAVR).[125] These commissions have been chosen as they both address situations involving the widespread perpetrations of subsistence harms, but reflect different approaches to and treatment of these harms. Although truth commissions arguably provide the space to address a wider range of harms than international criminal tribunals, as well as underlying contexts of violence, such promise remains largely unfulfilled.[126]

The fifth chapter marks a move away from formal legal mechanisms, to look at the work of non-governmental tribunals. The chapter contrasts the recognition of subsistence harms provided by these tribunals with the relative lack of recognition within formal legal mechanisms. However, it also acknowledges that in using existing law these tribunals are often drawn into the problems and restrictions of the legal framework. The last chapter of the thesis looks at ways of addressing subsistence harms beyond legal justice mechanisms, by analysing the role of human rights in addressing harms in the long-term and harms which are not addressed by international criminal law. Essentially, this chapter argues that there is a role for human rights in recognising subsistence harms, but is profoundly critical of current uses and interpretations of rights. The chapter turns to the alternative vision of rights

[125] South African Truth and Reconciliation Commission, 'Final Report', 29 October 1998 <http://www.justice.gov.za/trc/ > accessed 12 May 2009; Commission for Reception, Truth and Reconciliation in East Timor (CAVR), 'Chega!' (2005) <http://www.cavr-timorleste.org/en/chegaReport.htm> accessed 20 May 2008.

[126] For literature which argues that truth commissions provide greater space for discussing harms see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

proclaimed by the Food Sovereignty Movement, which may be far more relevant to addressing the long-term issues surrounding the perpetration and experience of subsistence harms. While not providing a solution to subsistence harms, the Movement's vision of human rights point to ways in which human rights may be re-envisioned to more fully address aspects of these harms.

The concluding chapter returns to the main arguments of the thesis, that subsistence harms are not adequately addressed within law, but that law, if amended to further include these harms, could play some role in fostering a more comprehensive recognition of them. As argued throughout the thesis, there remains a fundamental tension between the need for legal recognition of subsistence harms and the inherent problems of law regarding these harms. The concluding chapter discusses avenues for future research, in particular the issue of whether legal changes may or may not be significant in promoting further recognition of subsistence harms. Essentially, while legal change, such as a new convention on subsistence harms, would be one way of addressing these harms which could be explored in subsequent research, there would remain problems with such a legalist approach. Ultimately, there is not a simple solution to the issue of subsistence harms and the thesis is particularly wary of promoting "top-down" legal changes which may do little to address the fundamental limitations of law as a means of recognising these harms.

Chapter 1

The perpetration and experience of subsistence harms: the nature of the harms and the current legal framework

The deprivation of homes and basic resources as well as the use of scorched-earth policies has been evident from the ancient world through to their perpetration in contemporary contexts such as Darfur and Zimbabwe.[127] These harms have continued to be employed, though with certain contemporary shifts, because they are such a potent weapon of conflict, repression or discrimination. The chapter examines some of the key examples of the perpetration of subsistence harms both throughout history and in contemporary situations, in order to illustrate the significance of these harms and patterns in their usage. The analysis of the historical and contemporary examples is not intended to constitute a comprehensive history of the use of subsistence harms. Rather, the examples selected are illustrative of the key uses and impacts of these harms and are drawn on in subsequent chapters to analyse the treatment of subsistence harms within transitional justice mechanisms and non-governmental tribunals.

The discussion of historical examples serves to contextualise their contemporary uses, allowing an analysis of the continuities in their perpetration, in terms of the continued use of strategies based on deprivations of subsistence needs, such as scorched-earth policies, as well as recent shifts in response to new technologies and political/economic situations. Moreover, the historical and contemporary examples provide key insights into the nature of subsistence harms, as a discrete form of harm centred on interrelated physical, mental and social suffering. Essentially, understanding the nature of subsistence harms is crucial when

[127] Kurt Jonassohn and Karin Solveig Björnson, *Genocide and Gross Human Rights Violations in Comparative Perspective* (New Brunswick: Transaction Publishers, 1998); Arthur Westing, *Warfare in a Fragile World: Military Impact on the Human Environment* (London: Taylor Francis, 1980); International Crisis Group, 'Ending Starvation as a Weapon of War in Sudan'(Report No. 54) (14 November 2002) <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/054-ending-starvation-as-a-weapon-of-war-in-sudan.aspx> accessed 15 October 2008; Human Rights Watch, 'The Politics of Food Assistance in Zimbabwe' (Briefing Paper) (13 August 2004) <http://www.hrw.org/en/reports/2004/08/13/politics-food-assistance-zimbabwe> accessed 5 September 2008.

examining their position within the current legal framework, which forms the last section of this chapter. The understanding of subsistence harms is used to critique the fundamental problem of current international law in regard to these forms of harm and to argue that if law is to ever fully address them, then the current framework and priorities of law will need to be re-examined.

1) Historical and contemporary perpetrations of subsistence harms

i) *The use of subsistence harms as a weapon throughout history*

Although the contexts surrounding the use of subsistence harms differ, there are clear continuities in terms of their use as weapons of attack or control or as forms of acute discrimination. Throughout history these harms have been a key aspect of warfare, employed against marginalised or disposable groups within a particular society and against indigenous peoples by colonial regimes.[128] Subsistence harms, particularly scorched-earth policies, constitute strategies based on an understanding of human dependence on our natural environment, through the long-term destruction of livelihoods and food production. They have therefore been effective ways of inflicting harm upon both current and future generations.[129]

Such tactics cause widespread physical, mental and social harms through resulting hunger, disease, the destruction of communities and loss of survival networks. Since women have traditionally formed the majority of non-combatant populations, they have often been disproportionately affected by subsistence harms.[130] In many cases, the human agency or intent involved in subsistence harms has been hidden by perpetrators. Since deaths through mass starvation have traditionally been associated with natural disasters, perpetrators have easily been able to portray deaths and suffering resulting from subsistence harms as natural

[128] For accounts of the use of harms related to subsistence needs in various situations see Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven: Yale University Press, 1990).
[129] Westing, n 127 above.
[130] For example, women were particularly affected by the implementation of scorched-earth policies and use of concentration camps during the Boer War. See Daniel Low-Beer, Matthew Smallman-Raynor and Andrew Cliff, 'Disease and Death in the South African War: Changing Disease Patterns from Soldiers to Refugees' (2004)17(2) *Social History of Medicine* 223, 241.

disasters or as the unforeseen consequences of other forms of violence.[131] Deaths and suffering resulting from deprivations of subsistence needs have been labelled merely as "complications of violence", rather than as being seen to constitute harms.[132]

Destruction of agriculture and homes, as well as mass displacement of local populations were prevalent and accepted strategies in the ancient world, used to ensure the long-term destruction of the enemy. For example, the destruction of the city of Carthage by Rome in 146 B.C. was preceded by a three year siege, leading to a massive death toll due to starvation and resultant disease.[133] Similarly, during the medieval and early modern periods such tactics continued to be employed to terrible effect, as seen with regard to the systematic destruction of crops and irrigation systems in Mesopotamia by the Mongolian forces, the English use of the scorched-earth tactics during the Hundred Years War and the use of similar strategies in the seventeenth century during the Thirty Years War.[134] Since the warfare of the period was otherwise largely based on pitched battles, the use of these subsistence harms was often a key way in which non-combatants were targeted and affected by conflict.[135]

Subsistence harms continued to be widely employed during the nineteenth and early twentieth century, obvious examples being the US Civil War, where such harms were used as a comprehensive means of attack in order to starve rebellious states into submission.[136] Such

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[131] The fact that mass starvation has traditionally been perceived as a result of natural disasters is due in part to intellectual inheritance, in particular the influence of Malthusian thought. Malthus essentially viewed mass starvation as a natural phenomenon due to food shortages, but also as somewhat necessary in order to check population growth. Thomas Malthus, *An Essay on the Principle of Population* (Oxford: OUP, 1993).

[132] For example, the UN has defined the hundreds of thousands of deaths from starvation and resultant disease in Uganda as simply the 'complications of civil war'. Office for the Coordination of Humanitarian Affairs, 'ECOSOC Special Event: Understanding the Food Crisis in Africa' (2005) <http://www.un.org/Docs/ecosoc/meetings/2005/docs/Mr.%20Bowden%20Speech-%20Food%20Crises-%2027%20October%202005.pdf> accessed 12 June 2008.

[133] Chalk and Jonassohn, n 128 above, 75; V.D. Hanson, *Warfare and Agriculture in Classical Greece*, (Berkeley, Ca: University of California Press, 2nd rev edn, 1998); Robin D. S. Yates, 'War, Food Shortage and Relief Measures in Early China' in Lucile F. Newman (ed), *Hunger in History* (Oxford: Blackwell, 1995).

[134] Westing, n 127 above, 15 and 54. While the scale of destruction and devastation employed by the Mongols was particularly severe, such tactics were accepted and commonplace in Central Asia and many other places at the time. For the use of these tactics during the Hundred Years War see Christopher Allmand, *The Hundred Years War: England and France at War c.1300-c.1450* (Cambridge: Cambridge University Press, 1988).

[135] Maurice Keen (ed), *Medieval Warfare: A History* (Oxford: OUP, 1999).

[136] For analysis of the use of scorched-earth policies during the US Civil War see P. W Gates, *Agriculture and the Civil War* (New York: A.A. Knopf, 1965), 92. It is estimated that millions of hectares of land were laid waste through the use of scorched-earth policies, particularly in Virginia and Georgia, while blockades were also used to deny both the military and the local population access to subsistence needs.

harms also featured widely in colonial times as a way of dispossessing, attacking and controlling indigenous populations.[137] For example, subsistence harms were a crucial form of attack employed by Germany against the Herero peoples in Southwestern Africa in 1904-07 and deprivations of basic resources were a key cause of the widespread deaths within the Belgium Congo.[138] Moreover, anti-colonial struggles were often suppressed through the use of subsistence harms. For example, during the Philippine Insurrection of 1899 to 1903 the US employed a strategy of the systematic destruction of villages, food stores, crops and livestock, which directly caused the deaths of hundreds of thousands of Filipino civilians.[139]

While subsistence harms continued to be widely employed throughout the twentieth century, new technologies, strategies and political or economic policies precipitated some key shifts in the use of these harms, which have in turn influenced contemporary perpetrations. In particular, from the Boer War onwards, concentration or "resettlement" camps have been widely used as a counter-insurgency tool in order to repress local populations or as a tool to dispose of "undesirable" populations.[140] During the Boer War, the British military destroyed as many as 30,000 farmsteads and forcibly interned up to 150,000 people, mostly women and children, in camps, resulting in the deaths of perhaps 26,000 internees from malnutrition and disease, due to the minimal rations and overcrowded conditions in the camps.[141] While displacement had been employed throughout history, the use of internment camps constituted a new form of subsistence harm, illustrated most starkly in the use of concentration camps during the Holocaust.[142] In addition to deprivations of homes, land and livelihoods, concentration camp conditions further ensure such deprivation and destitution, by preventing

[137] On the issue of the use of deprivations of basic resources and dispossession of land and livelihoods during colonial regimes see Eric Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton NJ: Princeton University Press, 2003).

[138] For discussion of the use of starvation tactics such as through destruction or poisoning of water source, see Jon Bridgman and Leslie J. Worley, 'Genocide of the Hereros' in Samuel Totten and William Parsons (eds), *Century of Genocide*, (New York: Routledge, 3rd edn,2008) 14: Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (London: Macmillan, 1998).

[139] Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the 20th Century* (London: Cornell University Press, 2004) 204.

[140] Albert Grundlingh, 'The Bitter Legacy of the Boer War' (1999) *History Today* 21; Peter Warwick, *The South African War: The Anglo-Boer War 1899-1902* (Harlow: Longman, 1980) 61.

[141] See Low-Beer, Smallman-Raynor and Cliff, n 130 above, 241.

[142] Helen Fein, 'Genocide by Attrition 1939-1993: The Warsaw Ghetto, Cambodia, and Sudan: Links between Human Rights, Health, and Mass Death' (1997) 2(2) *Health and Human Rights* 11.

survival strategies and providing minimal basic resources for inmates, leading to physical, mental and social harms associated with deprivations of subsistence needs.[143]

"Resettlement camps" were employed by the Indonesian forces in East Timor following the 1975 invasion and during the occupation.[144] Again, subsistence harms formed a powerful means of controlling and attacking the local population, in order to suppress the armed resistance to the occupation. The Indonesian forces perpetrated widespread attacks on homes, land, livelihoods and basic resources, repeatedly displaced the local population and interned many civilians in the "resettlement camps". These tactics directly caused widespread suffering and mortality through starvation and disease.[145] Conditions in these camps were reported to be appalling, again constituting further deprivations of subsistence needs.[146] The use of these harms in East Timor has had a profound effect on the population and has resulted in long-term impacts on livelihoods and on physical and mental health.[147]

Similarly, internment camps were widely employed alongside other subsistence harms as a counter-insurgency strategy during the internal conflict in Guatemala. Government forces systematically destroyed homes and rural livelihoods in an effort to attack the local population and prevent guerrilla access to food supplies.[148] The destruction of food, homes and livelihoods led families to flee, many of whom were pursued by the army and forced into government controlled camps.[149] 'The army routed these civilians out of their hiding places in the hills and forests; it terrorised them; it laid siege to them to starve them out, after having

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[143] *ibid.*

[144] Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (London: Cornell University Press, 2005) 29-30.

[145] Ben Kiernan, *Genocide and Resistance in Southeast Asia: Documentation, Denial and Justice in Cambodia and East Timor* (New Brunswick, NJ: Transaction Publishers, 2008).

[146] James Dunn, 'Genocide in East Timor' in Samuel Totten, William S. Parsons and Israel W. Charny (eds), *Century of Genocide: Critical Essays and Eyewitness Accounts* (New York: Routledge, 2004) 263.

[147] World Food Programme, 'Food Security and Vulnerability Analysis: Timor Leste' (Report) (April 2005) <http://documents.wfp.org/stellent/groups/public/documents/vam/wfp067434.pdf> accessed 19 July 2010.

[148] Robert M. Carmack (ed), *Harvest of Violence: The Maya Indians and the Guatemalan Crisis* (Norman: University of Oklahoma Press, 1992). While there were some instances of attacks on civilians by guerrilla forces, such destruction was overwhelmingly committed by the government forces. Recovery of Historical Memory Project, *Guatemala: Never Again!* (Maryknoll, NY: Orbis Books, 1999) 40-41. The REMHI Report was coordinated by the Catholic Church as an independent project to gather the truths of the Guatemalan conflict and the experiences of the local population. See Louis Bickford, 'Unofficial Truth Projects' (2007) 29(4) *Human Rights Quarterly* 994, 1010.

[149] Ricardo Falla, 'Struggle for Survival in the Mountains: Hunger and Other Privations Inflicted on Internal Refugees from the Central Highlands' in Carmack, *ibid*, 235-55.

burned their homes and stored crops ... In this way, people were forced to surrender and subsequently clustered into "special camps"'.[150] The widespread displacement and internment directly led to starvation and caused the deaths of countless civilians, particularly women, children and vulnerable groups.[151]

The Guatemalan example also illustrates continuities in the use of subsistence harms throughout history as a tool of discrimination against marginalised or "undesirable" groups and particularly against indigenous populations. While the violence was aimed at controlling the guerrilla forces, it was also indicative of long-term discrimination against the indigenous Mayan population by the ruling elite, which stemmed from the time of the Spanish colonial conquest of the region and thus was linked to previous dispossessions and deprivations.[152] The Mayan population were able to be targeted through subsistence harms, and physical integrity harms, as they were already marginalised within society, which in turn reinforced such marginalisation.[153] Attacks on or discrimination against such groups can be particularly devastating to their long-term survival because of their existing socio-economic marginalisation, meaning that they may be less able to recover from the impact of these harms.[154]

Other strategies and technologies developed in the twentieth century have precipitated shifts in the perpetration and experience of subsistence harms. In particular, twentieth-century technologies mean that traditional scorched-earth policies can be employed through the use of bombs, landmines and herbicides. These technologies have permitted the destruction of homes, land and livelihoods to be perpetrated on a greater scale and with much greater ease. Again, these harms are focused on the interrelationship between human subsistence and the natural environment, as seen in the use of herbicides by the US during the Vietnam

[150] REMHI, n 148 above, 133.
[151] *ibid*, 34-35.
[152] *ibid*, 88.
[153] *ibid*. The REHMI report highlights that 'Many indigenous people interpret the attacks on the civilian population, and particularly the scorched-earth policy waged against peasant communities, as a continuation of the historical contempt with which the dominant sectors have always treated them'. See also Corinne Caumartin, 'Racism, Violence, and Inequality: An Overview of the Guatemalan Case' (2005) Centre for Research on Inequality, Human Security and Ethnicity Working Paper 11 <http://www.crise.ox.ac.uk/pubs/workingpaper11.pdf> accessed 14 November 2008.
[154] REHMI, *ibid*.

conflict.[155] In addition to the widespread destruction of homes, crops and food stores through aerial attacks and military hardware, the systematic use of defoliants in Vietnam constituted a new method of destruction.[156]

The use of dioxins such as "Agent Orange" formed a deliberate strategy to deny food to the enemy and gain control of food production and distribution.[157] The use of these tactics has resulted in long-term damage to the environment and thus to livelihoods, leading to physical, mental and social harms.[158] Essentially, this was a strategy which necessitated extensive civilian suffering and starvation in order for the impact of lack of food to be felt by the enemy.[159] There is evidence that the US continued to perpetrate these harms despite knowledge of the devastating effects on the civilian population and the minimum military advantages this would actually bring.[160]

The creation of famine is similarly an age old form of subsistence harm and one which became a particularly devastating tool of political and military repression in the twentieth century, due to new technologies and political/economic policies. While some historical famines could be seen as "natural", resulting from bad harvests and lack of political organisation, famine was also widely precipitated through direct military and political actions, such as scorched-earth policies. However, the twentieth century witnessed increased organisational structures around humanitarian aid, allowing other countries and non-governmental agencies to provide aid to victims in the aftermath of violence and disasters. Essentially, due to the ready availability of humanitarian aid, modern famine must be seen as the result of human action or inaction.[161] Since few areas of the world are truly naturally inaccessible nowadays, there should be no sound reason why basic resources should fail to get where needed, provided there is sufficient government and international will.

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[155] Arthur H. Westing, 'Crop Destruction as a Means of War' (1981) *Bulletin of Atomic Scientists* 38.
[156] Arthur H. Westing, 'The Environmental Aftermath of Warfare in Viet Nam' (1983) 23 *Natural Resources Journal* 365, 371.
[157] Michael G. Palmer, 'Compensation for Vietnam's Agent Orange Victims' (2004) 8(1) *International Journal of Human Rights* 1.
[158] *ibid.*
[159] Westing, n 127 above, 88
[160] *ibid.*
[161] Jenny Edkins, 'The Criminalisation of Mass Starvation: From Natural Disaster to Crimes against Humanity' in Stephen Devereux and Paul Howe (eds), *The New Famines: Why Famines Persist in the Era of Globalisation* (London: Routledge, 2005).

However, the traditional association of famine with natural disasters, such as drought and poor harvests, means that the subsistence harms involved are often hidden and thus responsibility can easily be denied. For example, while the Ethiopian famine of 1984-85 was portrayed by the Government, as well as by humanitarian campaigns as resulting from drought, it was largely precipitated and perpetuated through the use of subsistence harms as a counter-insurgency strategy.[162] Although international humanitarian aid was provided to Ethiopia, this was frequently manipulated and diverted so as not to reach those truly in need.[163] Thus, modern famine constitutes a potent political and military weapon, but one which only recently is beginning to be acknowledged and understood.[164] Famine was similarly created in East Timor during the Indonesian occupation, particularly during 1979, through the systematic destruction of homes, livelihoods and basic resources as well as forced displacement and internment, as discussed above.[165] In addition, the occupying Indonesian forces prevented and then restricted external aid, thus perpetuating situations of famine and mass starvation.[166]

The Ukrainian Famine is a particularly notable example of the use of famine by a government to dispose of "undesirable" groups and control the population in order fulfil aims of the dominant political and economic ideology, in this case Stalinist communism.[167] Again the associations of famine with natural disaster proved convenient for the regime, allowing it to distance itself from this violence, while at the same achieving the desired results. The sheer scale of the deaths resulting from the deprivation of subsistence needs in the years between 1929 and 1933 in Ukraine is illustrative of the potency of subsistence harms as political tools in the twentieth century. Not only did the *dekulakisation* policy involve subsistence harms in the form of dispossession and deportation, which resulted in the deaths of millions of

[162] Action Against Hunger, *The Geopolitics of Hunger 1998-1999: Hunger as a Weapon* (London: Action Against Hunger, 1999); Alex de Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (London: African Rights, 1997) 122-32.
[163] de Waal, *ibid*, 124-27.
[164] See *ibid*; David Marcus, 'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245; Edkins, n 161 above.
[165] Romesh Silva and Patrick Ball, 'The Demography of Conflict-Related Mortality in Timor Leste (1974-1999): Reflections on Empirical Quantitative Measurement of Civilian Killings, Disappearances and Famine-Related Deaths' in Jana Asher, David L. Banks, Fritz Scheuren (eds), *Statistical Methods for Human Rights* (New York: Springer, 2008) 119.
[166] CRS-USCC, 'Final Report, East Timor Emergency Program, June 1979-December 1980', 25 August 1981, cited in Commission for Reception, Truth and Reconciliation in East Timor (CAVR), 'Chega!' (2005) <http://www.cavr-timorleste.org/en/chegaReport.htm> accessed 20 May 2008.
[167] Robert Conquest, *The Harvest of Sorrow: Soviet Collectivisation and the Terror-Famine* (London: Pimlico, 2002).

peasants, but the subsequent excessive requisitioning of grain by the government directly led to the famine of 1932-1933, during which as many as seven million people died.[168]

Despite some natural factors, such as bad harvests, mass starvation was directly caused by the government's policy of excessive requisitioning of grain and its restriction on freedom of movement.[169] The Ukrainian peasants were systematically deprived of their subsistence needs and were prevented from pursuing coping strategies, such as travelling to other regions to find food.[170] The Ukrainian famine is also an early example of the refusal of humanitarian aid. Rather than requesting external aid to help the famine victims, the Soviet Union practiced systematic deception in order to deny the existence of famine and to prevent news of it reaching the West.[171] This essentially meant that, having been deprived of their means of subsistence, the peasants were also denied any possibility of external relief. These deprivations were perpetrated with knowledge of the likely results of such a policy by the regime, as shown by the warnings received by the Moscow leadership from the Ukrainian authorities and the experience of the results of excessive requisitioning during the 1918-21 famine.[172] Indeed, the excessive requisitioning was aimed at controlling the peasants, whom the regime regarded with considerable suspicion, and in order to repress Ukrainian nationalism.[173]

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[168] *ibid.* While estimates of the number of deaths caused by the famine range in the literature from between three to ten million, the figure of seven million is credible from the evidence available. Indeed the 2003 UN General Assembly Joint Statement on the famine signed by 60 countries states that between seven and ten million deaths occurred. United Nations, 'Joint Statement on the Great Famine of 1932-1933 in Ukraine' (2003)
<http://holodomor.org.uk/International_Organisations/UN_Declaration.aspx> accessed 12 November 2009.

[169] Conquest, *ibid*, 262-63. See also Hiroaki Kuromiya, 'The Soviet Famine of 1932-1933 Reconsidered' (2008) 60(4) *Europe-Asia Studies* 663, 665. For an account which emphasises the natural factor of the bad harvests of 1931 and 1932 see R.W Davies and S.G. Wheatcroft, 'Stalin and the Soviet Famine of 1932–33: A Reply to Ellman' (2006) 58(4) *Europe-Asia Studies* 625-33.

[170] Conquest, *ibid*, 327. Indeed, Conquest argues that the effective blockage of the Ukrainian-Russian border in terms of the prevention of entry to grain into the Ukraine and Ukrainian peasants from travelling to access food outside of the Ukraine provides a key indication of the aims and intention of Stalin's regime. Evidence provided by Stalin's secret directive of 22 January 1933 and eyewitness accounts prove that peasants were prevented from leaving the Ukraine in search of food and that those who tried to cross the border were arrested or returned to their villages. For a discussion of Stalin's directive which sought to prevent the influx of starving peasants from the Ukraine and the Northern Caucasus see Roman Serbyn, 'The Ukrainian Famine of 1932-1933 as Genocide in the Light of the UN Convention of 1948: The State of the Question' (2006) 62(2) *The Ukrainian Quarterly* 181.

[171] Conquest, *ibid*, 308.

[172] *ibid*, 326. Even though Stalin was aware of the excessive nature of the requisition targets to be imposed on the Ukraine, the policy went ahead regardless and was ruthlessly enforced. See also Kuromiya, n 169 above, 673.

[173] Conquest, *ibid.*

ii) Contemporary uses of subsistence harms

These historical examples illustrate both the continuities in the use of subsistence harms as well as the shifts in their uses from the twentieth century onwards, in response to new technologies, political and economic systems and patterns of warfare. While subsistence harms have continued to be employed as an effective method of political and military violence and repression, their use has also been adapted in order to reflect contemporary contexts and technologies, in particular political and economic conditions, stemming from the end of the Cold War and the rise of globalisation. Patterns of development and international economic policies have also impacted on the perpetration of subsistence harms. In particular, the pattern already becoming apparent from the mid-twentieth century onwards, that subsistence harms predominantly occur in third world countries, has become even more evident.

This is not because such violence is endemic or unique to such countries, but rather that structural violence and underlying socio-economic deprivation, often resulting from histories of colonialism and development policies, play a crucial role in determining where such violence will occur.[174] There must be a certain degree of existing poverty or lack of social safety nets and democratic accountability within the state system for such harms to be conceived as a viable form of violence. This is not to say that subsistence harms are a third world issue, rather, whilst largely experienced in third world countries, the West often plays a key role in their perpetration. Western states and non-state actors play a role in providing political, military or economic support for states which perpetrate these harms.[175] For example, the US, and indeed other countries, supported the Guatemalan government in its counter-insurgency campaign, which enabled the mass perpetration of subsistence harms as well as other forms of violence.[176]

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[174] Paul Farmer, *Pathologies of Power: Health, Human Rights and the New War on the Poor* (Berkeley Ca. University of California Press, 2003). Antony Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) *Chinese Journal of International Law* 77, 89.

[175] Peter Stoett, 'Shades of Complicity: Towards a Typology of Transnational Crimes against Humanity' in Adam Jones (ed), *Genocide, War Crimes and the West: History and Complicity* (London: Zed Books, 2004) 39-41.

[176] REMHI, n 148 above. See also the findings of the Permanent People's Tribunal regarding US complicity, Susanne Jonas, Ed McCaughan and Elizabeth Sutherland Martínez, *Guatemala Tyranny on Trial: Testimony of the Permanent People's Tribunal* (San Francisco, Ca: Synthesis Publications, 1984) 261, 266.

Shifts in patterns of contemporary conflict have had a particularly significant effect on the perpetration of subsistence harms. The shift in the nature of contemporary conflict, from predominantly interstate warfare to the dominance of non-international armed conflict, has resulted in a renewed emphasis on the direct and systematic targeting of civilians, often in the form of subsistence harms.[177] This pattern also reflects the contemporary context of the post-Cold War climate, with the rise of globalisation and withdrawal of direct external military funding and the imposition of development policies, which have resulted in a preponderance of internal armed conflict, often centred in third world countries.[178] Such conflicts have been financed, at least in part, by exploiting natural resources and depriving civilians of basic resources and land.[179]

Recent conflict literature has sought to explain these shifts in the patterns of contemporary conflict, in terms of the complex mix of economic benefits and inequalities, which provides important insights into the causes and purpose of violence, and the nature of subsistence harms.[180] These recent understandings of conflict mark a significant move away from previous theories based on ethnic violence and so-called "ancient hatreds"; which reflected the historical environment of the fall of the Soviet Union and drew on a highly essentialist view of ethnicity and identity.[181] In over-emphasising the ethnic bases of conflict, to the exclusion of all other factors, such theories fail to question the political, economic and

[177] United Nations, Report of the Secretary-General on Protection for Humanitarian Assistance to Refugees and others in Conflict Situations, S/1998/883.

[178] Anghie and Chimni, n 174 above, 96. For discussion of the shifts in armed conflict see Mary Kaldor, *New and Old Wars: Organised Violence in a Global* Era (Polity: Cambridge, 1999).

[179] Christopher Cramer, *Civil War is not a Stupid Thing: Accounting for Violence in Developing Countries* (London: Hurst and Co., 2006) 234; Mats Berdal, 'How "New" are "New Wars"? Global Economic Change and the Study of Civil War' (2003) 9 *Global Governance* 477, 489.

[180] David Keen, *The Economic Functions of Violence in Civil Wars* (London: OUP, 1998); Mats Berdal and David M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (London: Lynne Reinner, 2000); Karen Ballentine and Jake Sherman, *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder, Colo.: Lynne Rienner, 2003).

[181] The ethnicity-based approach was predominant in the 1990s and was heavily indebted to the historical environment of the fall of the Soviet Union and the outbreak of conflicts which showed clear ethnic dimensions. These theories were premised on the view that the collapse of Soviet rule and the end of the Cold War essentially took the lid off ancient rivalries and allowed underlying grievances to surface, leading to armed conflict. See Michael E. Brown, 'Ethnic and Internal Conflicts: Causes and Implications' in Chester A. Crocker, Fen Osler Hampson and Pamela Aall (eds), *Turbulent Peace: The Challenges of Managing International Conflict* (United States Institute of Peace: Washington, 2001) 209.

military manipulation of issues of ethnicity or highlight how political leaders can easily use such issues to divert attention from other grievances.[182]

The more recent conflict studies theories focus on the fact that certain groups can profit from conflict and violence through the manipulation of natural resources and deprivations of homes, land and livelihoods of certain populations.[183] In emphasising the economic factors, and the economic violence perpetrated, these theories inevitably highlight the targeting of homes, livelihoods and other basic resources.[184] Subsistence harms constitute cheap and readily available weapons of conflict which provide combatants and other groups with the economic benefits of homes, land and basic resources.[185] Moreover, the ready availability of humanitarian aid in response to contemporary situations of open violence and natural disasters is also a key feature that impacts on the perpetration of subsistence harms. Humanitarian aid can constitute a signficant economic resource in situations of violence and repression. The influx of external food aid, which almost always now occurs in response to an "emergency" situation, has become another source of conflict funding and a means of perpetrating violence.[186] The presence of hunger and suffering leads to the influx of aid, which can then be manipulated and diverted by governments or rebel groups, and thus constitutes a powerful reason for inducing deprivations of subsistence needs in the first place.[187]

Such economic issues often tie into existing grievances and underlying socio-economic and political inequalities as key factors in the perpetration of contemporary subsistence harms.[188] It is important not to overemphasise the economic factors, since this would obscure the

[182] Walter Kemp, 'The Business of Ethnic Conflict' (2004) 35(1) *Security Dialogue* 43, 53; David Keen, 'War and Peace: What's the Difference?' (2000) 7(4) *International Peacekeeping* 1, 6-7.
[183] See Keen, n 180 above; Berdal, n 179 above, 477.
[184] Keen, *ibid.*
[185] On the issue of the use of food as a weapon of conflict see Jonassohn, n 127 above, 33; Joanna Macrae and Anthony Zwi (eds), *War & Hunger: Rethinking Responses to Complex Emergencies* (Zed Books: London, 1994); Ellen Messer, Marc J. Cohen and Jashinta D' Costa, *Food from Peace: Breaking the Links between Conflict and Hunger* (Washington: International Food Policy Research Institute, 1998).
[186] de Waal, n 162 above.
[187] Mary Anderson, *Do No Harm: How Aid Can Support Peace - or War* (Boulder, Colo.: Lynne Rienner, 1999); Action Against Hunger, n 162 above, 4.
[188] While certain "economic benefits" literature has dismissed the significance of grievances as a factor in the perpetration of violence, there is increasing recognition of the need to combine theories of economic benefits with understandings of grievances in conflict in order to truly understand the causes of conflict. See Berdal and Malone, n 180 above.

importance of grievances to situations of open violence and, crucially, would present subsistence harms in a predominantly material light.[189] Rather, economic motives and socio-economic and political grievances often interact to fuel and foster the perpetration of subsistence harms and other violence.[190] In particular, socio-economic grievances and inequalities may promote the targeting of certain ethnic or political groups through conflict and political repression.[191] While there may be clear economic benefits to perpetrators in employing subsistence harms, in terms of acquisition of land, homes and other resources, underlying socio-economic grievances and/or political discrimination are fundamental to the perpetration of these harms.[192] This relationship between economic benefits and underlying grievances in situations of violence illustrates both the continuities in the use of subsistence harms to discriminate against or attack marginalised populations, as well as the shifts in relation to contemporary military funding.

For example, political and economic inequalities represent a key underlying feature of the recent conflict in Darfur, which has been orchestrated through the ongoing political and economic rivalries between the agriculturalist "African/black" tribal groups and nomadic "Arab" groups.[193] While the polarised use of the terms "African" and "Arab" is clearly an oversimplification of complex identities, the terms have been employed by the government as a device to enflame existing rivalries based on economic and political inequalities. Through the use of subsistence harms, the Sudanese government has sought to render the population as vulnerable as possible so that it cannot support the insurgency, as well as moving the population from resource rich areas, which it is seeking to control for economic and political purposes.[194]

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[189] The thesis is therefore critical of the work of Paul Collier and others who have emphasised 'greed' and dismissed the importance of grievances in creating and maintaining violence. In his evaluation of the empirical research of the project, Collier emphasises that economic greed rather than political and ethnic grievances are key to the causes and trajectories of conflict. Paul Collier and Anke Hoeffler, 'Greed and Grievance in Civil War' (2002) The Centre for the Study of African Economies Working Paper Series <http://www.bepress.com/cgi/viewcontent.cgi?article=1161&context=csae> accessed 20 May 2008.

[190] Ballentine and Sherman n 180 above; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, Ma.: Polity, 2002), 129. See also Cramer, n 179 above, 166.

[191] Frances Stewart, 'Crisis Prevention: Tackling Horizontal Inequalities' (2000) 28(3) *Oxford Development Studies* 245.

[192] Ballentine and Sherman, n 180 above.

[193] Alex de Waal, 'Who are the Darfurians? Arab and African Identities, Violence and External Engagement' (2005) 104(415) *African Affairs* 181.

[194] International Crisis Group, n 127 above. See also Human Rights Watch, 'Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan' (Report) (May 2004)

In addition to being a key economic resource in situations of violence, humanitarian aid can also be used to repress, control or discriminate against certain groups, and thus perpetuate existing inequalities and grievances, as seen in the example of the Ukrainian famine.[195] In Darfur, the government has, at various times, systematically restricted and manipulated humanitarian aid, in order to deprive the local population of basic resources and thus render them solely dependent on the government.[196] Moreover, the use of camp situations by humanitarian agencies to deliver aid can, often unwittingly, feed into and support the political and military use of forced displacement and relocation in order to repress certain populations.[197] For example, in the Sudan the use of "peace villages" by UN agencies served to support the government's attempts to control displaced populations.[198] The use of these "villages" meant that IDPs were confined to certain areas, and thus easier for the government to control. This ensured their continued loss of traditional lands and livelihoods and enabled other ethnic groups to benefit from these resources.[199] IDP or refugee camps can therefore mirror, to some extent, the subsistence harms perpetrated and experienced in concentration camp situations. In Darfur, IDPs have suffered systematic restrictions upon the use of traditional coping strategies, such as foraging for food and fuel, imposed by militia forces through the physical or sexual attacks on those who venture outside the camps, which has particularly affected women and girls.[200]

The issue of humanitarian aid and control of food supplies in contemporary perpetrations of subsistence harms is also evident in the recent situation in Zimbabwe. While the situation differs from that of Darfur, being an example of "peacetime" repression, there are also clear patterns in the use and experience of subsistence harms. This illustrates the continuities of

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<http://www.hrw.org/en/reports/2004/05/06/darfur-destroyed-0>; Human Rights Watch, 'Sudan, Oil and Human Rights' (Report) (24 November 2003)
<http://www.hrw.org/en/reports/2003/11/24/sudan-oil-and-human-rights-0> accessed 5 February 2008.

[195] de Waal, n 162 above.

[196] International Crisis Group, n 127 above.

[197] B.E. Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford: OUP, 1986).

[198] David Keen, *Complex Emergencies* (Cambridge: Polity Press, 2008) 130. As Keen highlights, 'The UNDP [United Nations Development Programme] said it was aiming to "resettle [returnees] in peace villages and then promote agricultural development to strengthen their attachment to land". Since the Nuba had been forcibly deprived of their land by the Sudanese government, the plan suggested an alarming degree of ignorance and witting or unwitting collusion in this dispossession'.

[199] *ibid.* While this is clearly not the intent of such agencies, the use of camps does suit them in terms of enabling the mass distribution of aid, despite the results of such policies.

[200] For the importance of coping strategies to survival in the wake of deprivations of subsistence needs see de Waal, n 162 above; Samuel Hauenstein Swan and Bapu Vaitla (eds), *The Justice of Eating: The Struggle for Food and Dignity in Recent Humanitarian Crises* (London: Pluto Press, 2007).

violence and the need to avoid presenting a clear demarcation between situations of conflict and "peace".[201] The Mugabe regime has employed subsistence harms as weapons of political repression and discrimination to ensure political support from populations loyal to the government, whilst discriminating against politically insignificant populations and punishing opposition supporters.[202] Again, the interaction of existing inequalities and political or economic motivations is evident in the targeting of vulnerable groups or individuals by ruling elites.

As the practice of food distribution in Zimbabwe has shown, those already on the margins of society are easy targets and can be deprived of their subsistence needs, in favour of fulfilling the needs and demands of those who are politically more significant.[203] Mugabe's refusal to accept humanitarian aid in 2004 resulted in government monopoly of the food supply allowing widespread government abuse of food, particularly during the election campaign.[204] The Zimbabwean government has perpetrated other forms of subsistence harms against its own people for political purposes, again largely targeting marginalised populations. Its campaign of demolition and displacement, Operation Murambatsvina, left some 700,000 people homeless or without a livelihood, and thus unable, without assistance, to meet their own subsistence needs.[205] As a result of the destruction of homes and jobs, people were

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[201] Keen, n 198 above, 12.

[202] Human Rights Watch, n 127 above; Cary McClelland, 'Political Capital Deficits in Zimbabwean Famine: National and International Responsibility for Prevention Failure' (2006) 59(2) *Journal of International Affairs* 315.

[203] Human Rights Watch 'Crisis Without Limits: Human Rights and Humanitarian Consequences of Political Repression in Zimbabwe' (Report) (January 2009) <http://www.hrw.org/en/reports/2009/01/21/crisis-without-limits-0> accessed 4 May 2010.

[204] Jeevan Vasagar, 'Vote for us or starve, Mugabe's party tells villagers', *Guardian*, 26 March 2005 <http://www.guardian.co.uk/world/2005/mar/26/zimbabwe.jeevanvasagar> accessed 15 May 2007; Meera Selva, 'Starve the voters: the human cost of Mugabe's election' *The Independent*, 26 March 2005 <http://www.independent.co.uk/news/world/africa/starve-the-voters-the-human-cost-of-mugabes-election-529989.html> accessed 15 May 2007. See also Euan Ferguson, 'Welcome to Mugabeland, where hope wilts in the sun', *The Observer*, 20 March 2005 <http://www.guardian.co.uk/world/2005/mar/20/zimbabwe.euanferguson> accessed 17 June 2006. He argues that during the previous election there was simply fear, '[n]ow there is a more insidious threat: economic death ... The threat of a sore belly, of continued poverty, of recriminations; of angry sponsored boys, fit, armed, in berets. The terrible real imminence of famine'.

[205] Human Rights Watch, 'Zimbabwe: Evicted and Forsaken - Internally Displaced Persons in the Aftermath of Operation Murambatsvina' (Report) (1 December 2005) <http://www.hrw.org/en/reports/2005/11/30/zimbabwe-evicted-and-forsaken-0> accessed 3 March 2010.

forced to flee to the countryside where there are greater levels of poverty, a clear lack of employment and severe food shortages.[206]

The use of subsistence harms against marginalised populations is also evident in Burma (Myanmar). This is an interesting example in again highlighting the relationship between different types of subsistence harms, and continuities of violence within situations of armed conflict and supposed peace. The regime has repeatedly destroyed the homes, food sources and rural livelihoods of certain populations and employed forced displacement as a weapon of counter-insurgency and a means of discrimination against marginalised populations, in particular the Karen people.[207] However, deprivations of subsistence needs have also been widely employed within "peaceful" regions as a way of discriminating against and repressing certain groups.[208]

The reaction of the Myanmar regime in the wake of Cyclone Nargis, has recently illustrated its willingness to ensure that certain populations are deprived of their subsistence needs.[209] In the wake of this natural disaster, the government not only failed to provide relief to the affected population, but systematically obstructed external relief from reaching those in need.[210] There is evidence that the government has further exacerbated the situation through

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[206] Human Rights Watch, 'G8: Call on Zimbabwe to End Mass Evictions: Gleneagles Summit Should Recognize How Human Rights Abuses Fuel Poverty', 6 July 2005 <http://hrw.org/english/docs/2005/09/11/aimbab11718.htm> accessed 14 October 2008.

[207] Burmese Border Consortium, 'Reclaiming the Right to Rice: Food Security and Internal Displacement in Eastern Burma' (Report) (31 October 2003) <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:2561> accessed 2 February 2009; Human Rights Watch, '"They Came and Destroyed Our Village Again": The Plight of Internally Displaced Persons in Karen State' (Report) (9 June 2005) <http://www.hrw.org/en/reports/2005/06/09/they-came-and-destroyed-our-village-again> accessed 14 October 2009.

[208] Amnesty International, 'Myanmar: Leaving Home' (Report) (2005) AI Index: ASA 16/023/2005.

[209] See the Report by the Emergency Assistance Team and the Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health, EAT and JHU CPHHR, 'After the Storm: Voices from the Delta: A Report on Human Rights Violations in the Wake of Cyclone Nargis' (2009) <http://www.reliefweb.int/rw/rwb.nsf/db900SID/ASAZ-7PRKLM?OpenDocument> accessed 2 May 2009. 'The slow distribution of aid, the push to hold the referendum vote, and the early refusal to accept foreign assistance are evidence of the junta's primary concerns for regime survival and political control over the well-being of the Burmese people.'

[210] *ibid*, 33. 'Relief efforts were hampered not only by restrictions and monitoring by the junta, but occurrences of theft and confiscation of relief supplies by authorities, including international aid, were frequently reported among those surveyed. According to relief workers, such reports are particularly problematic in light of the regime's policy that all donated relief supplies be handed over to the Burmese government for distribution and not given directly to survivors.'

implementing polices to force survivors to leave temporary shelters and return to uninhabitable areas, leading to widespread suffering and the experience of physical, mental and social harms.[211] Natural disasters can therefore form the context for permanent dispossession of land and deprivations of subsistence needs.[212] While such harms may not generally be considered as a form of violence, the thesis argues that they need to be taken seriously as constituting a form of subsistence harms.

The examples discussed in this section have illustrated some of the key uses of these harms and how they are experienced. There are clear continuities in the use of these harms throughout history and in contemporary contexts, in terms of their use as a military weapon and tool of political repression and discrimination, as well as shifts in response to contemporary contexts. Scorched-earth policies and forced displacement have continued to be employed within contemporary contexts, but have also been rendered more effective through the use of modern technologies, such as military hardware, herbicides and internment camps. Contemporary contexts, stemming from the end of the Cold War and the rise of globalisation, have led to some important shifts, particularly in the nature of armed conflict, meaning that the use of subsistence harms has become all the more prevalent.

Moreover, the ready availability of humanitarian aid, as a source of funding of conflict and a further means of discrimination or control of certain populations, has also been influential in relation to the use of subsistence harms in both conflict and peacetime situations. Thus, while the perpetration of subsistence harms during armed conflict may be more visible than those perpetrated during situations of "peace", it must be remembered that there are continuities in the nature of violence and that it is often not possible to draw a clear distinction between periods of conflict and of peace.[213] As seen in Zimbabwe, "peacetime" subsistence harms can be as devastating as those perpetrated in conflict and may be

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[211] Amnesty International, 'Open Letter to ASEAN Nations on Myanmar' (16 May 2008) <http://www.amnesty.org/en/node/4922> accessed 1 June 2008.
Amnesty International, 'Myanmar Briefing: Human Rights Concerns a Month after Cyclone Nargis' (2008) AI Index: ASA 16/013/2008.

[212] On the way natural disasters have been used to forcefully implement development policies which have led to dispossession of local communities, see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (London: Penguin Books, 2007).

[213] Keen, n 182 above, 10.

experienced in similar ways.[214] The next section will build on the insights gained from the examples used in order to further analyse the nature of these harms and how they are experienced.

2) *Interrogating the essence of subsistence harms and their impacts*

The examples discussed have begun to illustrate the centrality of physical, mental and social elements of subsistence needs and the way these harms are focused on attacking these needs as a form of violence or discrimination. Subsistence harms have been defined within the thesis as deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or certain populations, in the course of conflicts, situations of political repression or as a form of discrimination, with perpetrator knowledge of the possible consequences of such violence. This understanding is crucial in providing an holistic approach to the issue of deprivations of subsistence needs, which has been lacking in previous literature.

i) The characteristics of subsistence harms: the physical, mental and social aspects

The direct relationship between depriving individuals/groups of their means of subsistence and widespread physical suffering and death amongst such populations is the most visible and apparent impact of these harms, as seen in the examples discussed. Deprivations of subsistence needs can have profound effects on physical health and wellbeing. As the World Health Organization highlights, 'malnutrition in all its forms increases the risk of disease and early death ... Severe forms of malnutrition include marasmus (chronic wasting of fat, muscle and other tissues); cretinism and irreversible brain damage due to iodine deficiency; and blindness and increased risk of infection and death from vitamin A deficiency'.[215]

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[214] For analysis of the gendered nature of continuities of violence, see Cynthia Cockburn, 'The Continuum of Violence: A Gender Perspective on War and Peace' in Wenona Giles and Jennifer Hyndman (eds), *Sites of Violence: Gender and Conflict Zones* (Berkeley, Ca.: University of California Press, 2004).

[215] See World Health Organization's webpage on water-related diseases and malnutrition <http://www.who.int/water_sanitation_health/diseases/malnutrition/en/> accessed 9 June 2009.

Children and the elderly are particularly vulnerable to the physical effects of malnutrition and resultant disease.[216] Such physical impacts can be permanent, particularly in children and adolescents where malnutrition and starvation can inhibit normal physical development.[217] Deprivations of subsistence needs may involve permanent loss of livelihoods for survivors and a continual struggle to meet subsistence needs, resulting in enduring health problems, as seen in Vietnam and East Timor.[218] While the provision of humanitarian aid in the aftermath of subsistence harms may mitigate these effects, its impacts should not be overestimated.[219] The provision of aid is often inadequate to meet people's physical survival needs and prevent the experience of physical harm, and, as seen above, is frequently manipulated such that those most in need may be least likely to benefit.[220]

Physical elements of subsistence harms are often intimately linked with the social aspects of these harms, in terms of loss of survival networks and livelihoods. Violence is profoundly social, and subsistence harms are no exception to this.[221] Access to food and other basic recources is often dependent on family and communal relations, while livelihoods are similarly dependent on labour roles and networks of trade and production, which displacement and loss of basic resources can endanger or destroy. In many societies, community is central to the individual's ability to maintain basic survival needs in terms of access to wider survival networks and community support.[222]

Subsistence harms not only destroy or disrupt access to livelihoods and basic resources, and thus the immediate means of physical survival, but can often impact on social mechanisms that people traditionally draw on when faced with crises, as seen by the examples of camp

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[216] *ibid.*
[217] *ibid.*
[218] United Nations, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (2007) S/2007/643.
[219] See Glen Kim, Rabih Torbay and Lynn Lawry, 'Basic Health, Women's Health, and Mental Health Among Internally Displaced Persons in Nyala Province, South Darfur, Sudan' (2007) 97(2) *American Journal of Public Health* 353.
[220] Jonassohn, n 127 above, 43; Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' (Report) (20 September 2005) 65 <http://www.hrw.org/en/reports/2005/09/19/uprooted-and-forgotten-0> accessed 7 October 2008.
[221] On the social nature of violence, see Vittorio Bufacchi, *Violence and Social Justice* (Basingstoke: Palgrave Macmillan, 2007) 113.
[222] Gaim Kibreab, 'Displacement, Host Government's Policies, and Constraints on the Construction of Sustainable Livelihoods' (2003) 55 *International Social Science Journal* 57.

situations. Outside of camp situations, destruction of homes, livelihoods and basic resources can also impact significantly on the social dynamic of a group, on livelihood roles and opportunities and consequently on the ability of individuals to meet their subsistence needs. These harms are particularly devastating for children, who may be separated from their families as a result of removal from homes and land and thus not have a family structure to meet their subsistence needs.[223]

The social element of subsistence also concerns exclusion and destitution. The long-term impact on communal subsistence needs, therefore, should not be underestimated. As de Waal notes, 'the concept of subsistence, and its converse, destitution, is tied in with participation in a functioning social order. As people become completely destitute they are unable to participate in society; they become outcast, they violate the conventions of society, and they become dependent'.[224] Such harms perpetuate the marginalisation of a community and affect future generations, as seen in Guatemala.[225] As illustrated throughout history, subsistence harms based around destruction of agriculture, in particular, can involve long-term suffering due to damage to land, loss of seeds and other necessary materials, which can take years and substantial investment to recover from, meaning that certain survivors may never regain the means to fulfil their subsistence needs.[226]

The mental aspect of subsistence harms is intimately related to these physical and social elements. Deprivations of homes, livelihoods and basic resources may be aimed at attacking not simply physical and social subsistence, but also at inflicting mental harms. Such mental harm is evident in the deprivations of subsistence needs experienced following the Myanmar regime's policies after Cyclone Nargis. Research into the views of survivors suggests that they 'overwhelmingly describe the despair of having to return to the destruction without the

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[223] Nils Kastberg, 'Strengthening the response to displaced children' *Forced Displacement Review* <http://www.unicef.org/emerg/files/responsetodisplacedchildren.pdf> accessed 26 March 2010.
[224] de Waal, n 162 above, 74.
[225] Edward B. Rackley, 'Displacement, Conflict and Socio-Cultural Survival in Southern Sudan' (2000) *Journal of Humanitarian Assistance*; REMHI, n 148 above 34-35. As the REMHI report on the Guatemala conflict explains, 'When crops were destroyed, part of the seed supply that communities had inherited and preserved for generations was also lost. This interfered with the production cycle and reduced the quality of corn and other crops'.
[226] For the long-term impact of devastation of rural livelihoods see the case studies analysed in Judy El-Bushra and Ibrahim M. G. Sahl, *Cycles of Violence, Gender Relations and Armed Conflict* (London: ACORD, 2005).

basic necessities to survive and to rebuild their lives'.[227] Similarly, during the conflict in Guatemala, the destruction of livelihoods and resultant displacement left families feeling 'completely helpless and anguished by their inability to feed and care for their children'.[228] Research into the nature of this mental harm suggests it was associated with understandings of community survival and fears regarding the long-term impact of the harm.[229] 'The destruction of goods essential for survival ... not only further impoverished the affected families, but also left them with a sense of defeat and despair. Many people feel that their economic sacrifices, the struggles and work of generations have been lost, and that these losses are not only detrimental to them personally but also affect future generations.'[230]

The harm has the potential to inflict mental suffering brought about by the inability to meet subsistence needs, dependence on aid and loss of meaning in life.[231] This dependence is frequently enforced and perpetuated through the provision of humanitarian aid.[232] The refugee or IDP camp situation promoted by humanitarian agencies often creates dependency on aid and denies the political agency of survivors, essentially rendering such survivors as 'bare life'.[233] Such dependency may be further enforced by the perpetration of violence and discrimination both within and outside the camp, as has been evident in Darfur.[234] Studies on the social and mental impacts of displacement of refugees fleeing the Myanmar regime have found that policies preventing freedom of movement, employment and land cultivation

[227] EAT and JHU CPHHR, n 209 above, 42.
[228] REHMI Report, n 148 above, 34-35.
[229] *ibid.*
[230] *ibid*, 41.
[231] United Nations High Commission for Refugees (UNHCR), Fact Sheet No. 20: Human Rights and Refugees. The factsheet states that being a refugee 'means living in exile and depending on others for such basic needs as food, clothing and shelter.' For example see United Nations Office for the Coordination of Humanitarian Affairs 'When the Sun Sets, We Start to Worry: An Account of Life in Northern Uganda' (Report) (November 2004)
<http://www.irinnews.org/IndepthMain.aspx?IndepthId=23&ReportId=65759> accessed 12 June 2008.
This Report highlights that 'More than 1.6 million people have been forced to leave their homes. Deprived of their means of livelihood, once proud farmers and their families now depend entirely on the food they receive in camps for internally displaced persons (IDPs)'.
[232] Harrell-Bond, n 197 above.
[233] For the concept of 'bare life' see Georgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Ca: Stanford University Press, 1998). See also Liisa H. Malkki, 'News from Nowhere: Mass Displacement and Globalized Problems of Organization' (2002) 3(3) *Ethnography* 351, 359.
[234] As the NGO, Action Against Hunger highlighted in their recent report, 'hunger is closely associated with violent death – people who venture out of internally displaced person camps in search of food, risk being shot and killed'. Hauenstein Swan and Vaitla, n 200 above, xvi .

outside the camps appeared to negatively affect refugees' social functioning and mental health.[235]

Conversely, research into the effects of violence on Guatemalan refugees has suggested that the ability to adopt collective coping strategies can actually help to lessen the mental health symptoms associated with such harms.[236] This relates to Frankl's research and experiences during the Holocaust, which strongly associated loss of meaning in life with physical survival.[237] His research is full of stories of concentration camp inmates whose deaths were linked to having felt that meaning in life had been lost.[238] As Frankl argued, 'Those who know how close the connection is between the state of mind of a man - his courage and hope, or lack of them - and the state of immunity of his body will understand that the sudden loss of hope and courage can have a deadly effect'.[239]

Some recent psychiatric research has begun to focus on the issue of psychosocial stressors following displacement, which include the impact of deprivations of basic needs, homes and livelihoods.[240] Research into mental health in the aftermath of conflict in eastern Congo, for example, suggests widespread exposure to trauma with eighty seven per cent of respondents reporting that they lacked basic needs such as water and food and a high percentage reporting deprivations of homes, land and basic resources.[241] Moreover, studies conducted on

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[235] See Barbara Lopes Cardozo, Leisel Talley et al., 'Karenni Refugees Living in Thai–Burmese Border Camps: Traumatic Experiences, Mental Health Outcomes, and Social Functioning' (2004) 58 *Social Science and Medicine* 2637, 2641. See also R. F. Mollica, X. Cui, et al., 'Science-based Policy for Psychosocial Interventions in Refugee Camps' (2002) 190 *Journal of Nervous and Mental Disease* 158.

[236] See, for example, Miriam Sabin, Barbara Lopes Cardozo et al., 'Factors Associated with Poor Mental Health Among Guatemalan Refugees Living in Mexico 20 Years After Civil Conflict' (2003) 290(5) *Journal of the American Medical Association* 635, 641. This study found that social functioning limited the mental harm felt by participants who experienced food scarcity and deprivation whilst fleeing from Guatemala. 'Anecdotal reports collected from qualitative fact gathering indicated that while refugees hid in the highlands of Guatemala en route to Mexico, food was gathered, cooked, and shared collectively. This may have created enough sense of wellbeing to counteract the effects of the shortage.'

[237] V. Frankl, *Man's Search for Meaning: An Introduction to* Logotheraphy (London: Hodder and Stoughton, 1964).

[238] *ibid*, 75.

[239] *ibid.*

[240] See Kenneth E. Miller and Lisa M. Rasco, 'An Ecological Framework for Addressing the Mental Health Needs of Refugee Communities' in Miller and Rasco (eds), *The Mental Health of Refugees: Ecological Approaches to Healing and Adaptation* (London: Routledge, 2004).

[241] Patrick Vinck, Phuong Pham et al., 'Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo' (2008) Berkeley-Tulane Initiative on Vulnerable Populations

displaced persons have shown that absence of basic resources is associated with symptoms of post-traumatic stress disorder (PTSD) and depression.[242] However, while it is significant that such studies are beginning to highlight mental harms associated with deprivations of subsistence needs, there is also a need to be cautious in applying Western psychological labels. Such labels may promote technical solutions which do not take account of the essence of the harm experienced in terms of the interrelationship between the physical, mental and social aspects of deprivations of subsistence needs.

It is important to understand the social element of such impacts on mental health, which Western psychology, premised on individual integrity and identity, may not be capable of incorporating. As Summerfield argues, 'When conflict so routinely involves the terrorisation or destruction of whole communities, even survivors of individual acts of brutality are likely to register their wounds as social rather than psychological'.[243] The emphasis on psychological conditions can also serve to undermine the agency of survivors and present them as passive victims.[244] While the purpose of the harm may be to bring about dependency and social exclusion, those affected may resist such a result and attempt to limit their dependence on hand-outs by engaging in small-scale economic activities and using traditional coping strategies.[245] In Burma, for example, some peasants have sought to resist the military's attempts to deprive them of their subsistence needs by fleeing into neighbouring forests in the wake of attacks on homes and livelihoods, in order to avoid relocation into government controlled camps or villages.[246]

<http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf> accessed 21 June 2009.

[242] Bayard Roberts et al., 'Factors associated with Post-traumatic Stress Disorder and Depression Amongst Internally Displaced Persons in Northern Uganda' (2008) 8 *BMC Psychiatry* 38, 45.

[243] Derek Summerfield, 'The Impact of War and Atrocity on Civilian Populations Basic Principles for NGO Interventions and a Critique of Psychosocial Trauma Projects' Overseas Development Institute Network Paper 14

<http://www.torturecare.org.uk/files/Summerfield-ImpactOfWar%20.pdf> accessed 12 July 2009.

[244] Derek Summerfield, 'The Invention of Posttraumatic Stress Disorder and the Social Usefulness of a Psychiatric Category' (2001) 322 *British Medical Journal* 95, 98.

[245] *ibid.* This highlights the need to avoid the approach of literature centred on 'dependency syndrome', which has further served to deny those affected a sense of independence or initiative. Such representation, which has been pervasive particularly in terms of the strategies of aid agencies and the worldwide media perpetuates the disempowerment of the situation and creates a depoliticised, de-contextualised portrait of the displaced person. For a critique of this literature see Prem Kumar Rajaram, 'Humanitarianism and Representations of the Refugee' (2002) 15 *Journal of Refugee Studies* 247; Gaim Kibreab, 'The Myth of Dependency Amongst Camp Refugees in Somalia 1979-1989' (1993) 6(4) *Journal of Refugee Studies* 321.

[246] Kevin Malseed, 'Networks of Noncompliance: Grassroots Resistance and Sovereignty in Militarised Burma' (2009) 36(2) *Journal of Peasant Studies* 365.

Another way of appreciating the mental harm and the interrelations of all aspects of these harms is to consider how they may actually impact physically. Lack of basic nutritional needs has direct impacts on brain function which can be particularly marked in children and adolescents in terms of mental health and brain development.[247] 'Food intake affects mood, behaviour and brain function, although the effects are difficult to quantify. A hungry person may feel irritable, restless, apathetic or moody over a longer period. Deficiencies of multiple nutrients, rather than one single nutrient, are responsible for changes in brain function that, if prolonged, can cause damage to the nerves in the brain.'[248] There is also growing evidence that trauma and threats to survival can physically manifest themselves in actual scarring of brain tissue.[249] Although research in this area is still in its infancy, and there is a need to be cautious in regard to its application, it may present important insights in the future in terms of understandings of the relationship between mental and physical harm.[250]

iii) The gendered nature of subsistence harms

The examples of subsistence harms also provide insights into the often gendered nature of these harms. While there has been a lack of analysis of the gendered uses and experiences of violence throughout history, there are key gendered elements, in terms of reasons for the use of these harms as well as who is affected by them, which need to be explored.[251] The pervasiveness of gender inequalities across different societies means that subsistence harms almost always have gendered connotations, with men and women experiencing these harms differently.[252] Essentially, existing gender hierarchies and gendered traditional roles within

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[247] World Health Organisation, 'Mental Health and Psychosocial Well-being among Children in Severe Food Shortage Situations' (Report) (2006) <http://www.who.int/child_adolescent_health/documents/msd_mer_06_1/en/index.html> accessed 12 May 2009.

[248] World Food Programme, 'World Hunger Series 2007: Hunger and Health' (Report) <http://www.wfp.org/sites/default/files/World_Hunger_Series_2007_Hunger_and_Health_EN.pdf> accessed 9 May 2008.

[249] For evidence of the physical impact of trauma on the brain see, for example, research undertaken by Anna Katarina Braun and colleagues on infant brush tail rats has shown that the stress caused by separating from their mother for only one hour per day after birth can be seen as scars on sections of brain tissue, post-mortem. See the film, 'The Source of Evil: Does Crime Originate in the Brain?' (DW-TV, 2006).

[250] Brent Garland (ed), *Neuroscience and the Brain: Mind, Brain and the Scales of Justice* (New York: Dana Press, 2004).

[251] For a critique of the lack of literature on the issue of women and armed conflict see Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence' (1997) *International and Comparative Law Quarterly* 55.

[252] For literature which examines the different ways in which women experience harms (though not subsistence harms) see Fionnuala Ní Aoláin, 'Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War' (2000) 1 *Theoretical Inquiries in Law* 307; M. Okello, 'Gender and Traditional Justice in

the home and the family feed into experiences of subsistence harms. Indeed, it is often the case that existing inequalities are exacerbated by conflict and situations of repression or discrimination.[253]

This is not to say that male civilians do not also experience these harms, clearly they do. Rather, the argument is that existing gender hierarchies mean that women are often disproportionately affected.[254] Although some women do participate in contemporary conflicts, women still predominantly experience conflict as civilians and are disproportionately affected by violence centred on subsistence needs.[255] In light of these issues, it is important to acknowledge the possibility that the purpose of such violence may be gendered in terms of perpetrator intent to harm women as a group or knowledge that such strategies would be particularly harmful to women.

Cultural norms and socio-economic and political inequalities provide the basis for the gendered experience of subsistence harms. In some societies women and girls have less access to food and other basic survival needs and suffer more from malnutrition and related health problems than men, which render them particularly vulnerable in the wake of the perpetration of subsistence harms.[256] Women may be the last to eat in a family and girls tend to be fed less, meaning that they suffer more when subsistence harms are perpetrated.[257] In addition, women may have traditional roles of providing and preparing food and looking after the home, which again affects the way they experience subsistence harms.[258] In many third

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Northern Uganda: Progressive or Conservative?' (2008) Center for the Study of Violence and Reconciliation Concept Paper
<http://www.csvr.org.za/docs/genderbased1108.pdf> accessed 2 November 2009.

[253] Judith Gardam and Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 148.

[254] For evidence of the disproportionate effect of conflict on women see UNHCR, n 231 above.

[255] For analysis of women as actors in armed conflict see Ana Cristina Ibanez, 'El Salvador: War and Untold Stories' in Caroline O. N. Moser and Fiona C. Clark (eds), *Victims, Perpetrators or Actors: Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001) 117-130.

[256] Special Rapporteur on the Right to Food, Report of the Special Rapporteur on the Right to Food A/58/330, 7. See also Amartya Sen 'More Than 100 Million Women Are Missing' (1990) 37(20) *New York Review of Books*.

[257] Sundari Ravindran, *Health Implications of Sex Discrimination in Childhood* (Geneva: World Health Organisation, 1986); Christine Chinkin and Shelley Wright, 'The Hunger Trap: Women, Food and Self-Determination' (1992) 14 *Michigan Journal of International Law* 262.

[258] Action Against Hunger, 'Women and Hunger: Women Play a Central Role in the Fight Against Hunger' (2007)

world countries women produce sixty to eighty per cent of food crops and play a key role in the production and preparation of food, as well as earning incomes to provide for other subsistence needs.[259]

The gendered experience of subsistence harms may relate particularly to loss of social survival networks and the social dislocation resulting from removal from homes, livelihoods and social survival networks.[260] When deprived of homes, livelihoods and access to basic resources, women may be forced to cope as the heads of their household, often in the context of gender discrimination, as well as other forms of discrimination on the grounds of group status.[261] This may mean limited opportunities of employment in the aftermath of subsistence harms, as well as discrimination regarding rights to own land and thus to return to their homes.[262] In Guatemala, for example, women traditionally were not recognised as having rights to land or property, which was instead designated to male heads of households.[263] In the post-conflict situation, such discrimination was particularly damaging for women and has resulted in the growth of local movements which successfully lobbied for greater gender equality in land and property rights.[264]

The issue of women's vulnerability to subsistence harms must therefore not be over-emphasised so as to eclipse the agency of women, and indeed of men, who seek to resist the experience of these harms. Representations of women as victims can have an infantilising

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<http://www.actionagainsthunger.org/resources/publications/women-hunger-women-play-central-role-the-fight-against-hunger> accessed 6 June 2009; Penny Van Esterik, 'Right to Food; Right to Feed; Right to be Fed: The Intersection of Women's Rights and the Right to Food' (1999) 16 *Agriculture and Human Values* 225.

[259] United Nations, 'Report of the Special Rapporteur on the Right to Food', 10 January 2008, A/HRC/7/5.

[260] Cathy Blacklock and Alison Crosby, 'The Sounds of Silence: Feminist Research Across Time in Guatemala' in Wenona Giles and Jennifer Hyndman (eds), *Sites of Violence: Gender and Conflict Zones* (Berkeley, Ca.: University of California Press, 2004) 45, 53; Royce Bernstein Murray, 'Sex for Food in a Refugee Economy: Human Rights Implications and Accountability' (2000) 14 *Georgetown Immigration Law Journal* 98.

[261] Elisabeth Rehn and Ellen Johnson Sirleaf, '*Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building* (New York: UNIFEM, 2002); J. Oloko-Onyango, 'The Plight of the Other Half: Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa' (1995) 24 *Denver Journal of International Law and Policy* 349, 383.

[262] UN-Habitat, 'Women's Land and Property Rights in Situations of Conflict and Reconstruction' (2001) <http://www.reliefweb.int/library/documents/2001/unifem-landrights2-jul.pdf> accessed 10 April 2008; Judy el Bushra and Eugenia Piza-Lopez, 'Gender, War and Food' in Macrae and Zwi (eds), n 185 above.

[263] Susana Lastarria-Cornhiel, 'Gender and Property Rights within Postconflict Situations' USAID Issue Paper No. 12 (April 2005)
<http://www.oecd.org/dataoecd/15/62/36137340.pdf> accessed 8 August 2010.

[264] *ibid*, 14-15.

effect, particularly as women are often portrayed together with children.[265] It is especially important not to fall into the trap of essentialising women's experiences of subsistence harms and instead to recognise the variety of ways that these harms may impact on women and how, in turn, women resist and cope with such experiences.[266] Women's tenacity in coping with subsistence harms may indirectly promote positive outcomes, in terms of opportunities to act in ways that go beyond their traditional gender roles.[267] However, whether these outcomes are long-term is more doubtful, since greater short-term economic or social opportunities for women rarely involve a concomitant decrease in gender inequalities.[268]

The contexts of existing gender inequality, social exclusion and exploitation undoubtedly do render women vulnerable to physical and sexual violence, in the aftermath of deprivations of subsistence needs.[269] This has again been perpetuated by discriminatory practices from external sources, such as the distribution by humanitarian agencies of aid to male heads of households, rather than to women.[270] Gender relations may also feed into further experiences of violence as a result of subsistence harms. Dependency and destitution may manifest itself in increased violence against women, particularly domestic violence, as some men attempt to re-assert their masculinity in violent ways.[271] While there is a need to be cautious as to drawing generalised conclusions, studies have shown high rates of domestic violence within

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[265] Cynthia Enloe, 'Womenandchildren: Making Feminist Sense of the Persian Gulf Crisis' (1990) *Village Voice* 29. See also Liisa Malkki, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (Chicago: University of Chicago Press, 1995).

[266] REHMI, n 148 above, 81-85.

[267] Cockburn, n 214 above, 41.

[268] In general, women may experience greater opportunities during conflict, due to the absence of men, but these gains may be quickly taken away in the aftermath of conflict. See Sheila Meintjes, 'War and Post-war Shifts in Gender Relations', in S. Meintjes, A. Pillay and M. Turshen (eds), *The Aftermath: Women in Post-Conflict Transition*, (London: Zed Books, 2001) 64; El-Bushra and Sahl, n 226 above, 199.

[269] United Nations High Commission for Refugees, Guidelines on the Protection of Refugee Women (1991) <http://www.unhcr.org/3d4f915e4.html> accessed 24 September 2008.

[270] Rehn and Johnson Sirleaf, n 261 above, 23-24.

[271] El-Bushra and Sahl, n 226 above. They examined predictors of distress among 84 Iraqi refugee men, found that perceived level of affective social support in exile was associated significantly with levels of PTSD and depression; in fact, perceived level of affective social support was a stronger predictor of depression in this sample than was level of exposure to war-related events. For discussion of the issue of domestic violence see Rosalind P. Petchesky and Melissa Laurie, 'Gender, Health and Human Rights in Sites of Political Exclusion' (2007) Background paper prepared for the Women and Gender Equity Knowledge Network of the WHO Commission on Social Determinants of Health <http://www.who.int/social_determinants/resources/gender_health_human_rights_wgkn_2007.pdf> accessed 14 July 2009.

IDP camps.[272] As highlighted above, sexual violence has also been used against women who venture out of displaced persons camps in order to gather food or fuel for cooking.[273]

The need to collect food or fuel has largely been perceived within NGO and academic literature as merely the context wherein sexual violence is perpetrated, rather than as another aspect of the attack.[274] While the thesis does not question the seriousness or centrality of the rape or sexual violence itself, it is important to acknowledge that such violence may be perpetrated for more than one purpose and may have impacts beyond the experience of sexual harm. Such violence may be used as a means of preventing women from adopting coping strategies in the aftermath of subsistence harms and thus to reinforce their marginalisation and suffering in this respect. Indeed, sexual violence has often been perpetrated in the knowledge that survivors may be marginalised within or excluded from their own communities because of their experience of such harms and that in turn such isolation may mean that they struggle to meet their subsistence needs.[275] It is therefore important to acknowledge the continuities of gender violence and inequalities both before and following the perpetration of subsistence harms.

These issues illustrate the need for far greater understanding of these harms both within and outside of law. The next section will develop this discussion by analysing international humanitarian law, international criminal law and human rights law in relation to the recognition of subsistence harms. While there undoubtedly is some legal recognition of harms related to subsistence needs, this is partial and fragmented. Moreover, the current

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[272] See R. Ondeko and S. Purdin, 'Understanding the Causes of Gender-based Violence' (2004) 19 *Forced Migration Review* 30.

[273] Human Rights Watch, 'Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad', (Briefing Paper) (12 April 2005) <http://www.hrw.org/en/reports/2005/04/12/sexual-violence-and-its-consequences-among-displaced-persons-darfur-and-chad> accessed 12 July 2008. See also Jennifer Hyndman, 'Refugee Camps as Conflict Zones: The Politics of Gender' in Wenona Giles and Jennifer Hyndman (eds), *Sites of Violence: Gender and Conflict Zones* (Berkeley, Ca.: University of California Press, 2004) 193-98.

[274] See, for example, Women's Commission for Refugee Women and Children, 'Beyond Firewood: Fuel Alternatives and Protection Strategies for Displaced Women and Girls' (2006) <http://www.projectgaia.com/files/FuelAlternativesProtectionStrategiesDisplacedWomenBFW.pdf> accessed 18 November 2009; Kelly Dawn Askin, 'Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur' (2006) 1(1) *Genocide Studies and Prevention* 13.

[275] Human Rights Watch, n 273 above; Human Rights Watch, 'Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda' (Report) (2004) <http://www.hrw.org/en/reports/2004/09/30/struggling-survive> accessed 17 June 2009.

legal framework does not sufficiently recognise the physical, mental and social aspects of these harms and their gendered nature, such that the essence of these harms, in terms of the deprivation of subsistence needs, is not sufficiently reflected in international law.

3) How far does the current legal framework recognise and address subsistence harms?

International law has traditionally had an ambiguous approach towards deprivations of subsistence needs. Until relatively recently, the laws of armed conflict tolerated the perpetration of many forms of subsistence harms.[276] Moreover, as TWAIL literatures have highlighted, international law played a key role in condoning the deprivations of the subsistence needs of indigenous peoples during the colonial period, through understandings of sovereignty and concepts such as *terra nullius*, as applied to Aboriginal Australia.[277] The growth of international humanitarian law and the development of human rights law and international criminal law now provide some means of protecting against and addressing certain aspects of subsistence harms. However, while the current framework of international law may appear to recognise and address subsistence harms, a closer examination of the main areas of international law reveals a far more complex picture. Although some aspects of subsistence harms are reflected within international humanitarian law, human rights law and international criminal law, the framework of international law remains problematic and fails to fully encompass subsistence harms.

Essentially, while the thesis largely focuses on addressing subsistence harms through international criminal law, human rights law can also play a role in addressing certain types of subsistence harms, as well as the more long-term issues surrounding these harms. International criminal law, inevitably, is selective and focuses only on the most serious situations involving international crimes.[278] Thus, human rights law could play a role in addressing harms in situations considered to be below the gravity threshold or resources of international criminal law. Since international criminal law draws to a large extent on

[276] Marcus, n 164 above, 266; Claire Thomas, 'Civilian Starvation: A Just Tactic of War?' (2005) 4(2) *Journal of Military Ethics* 108.
[277] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) 111-12; Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly* 739.
[278] See the preamble to the Rome Statute of the International Criminal Court, A/CONF.183/9 (1998).

international humanitarian law as well as to some extent on human rights law, an understanding of the position of subsistence harms in relation to all three areas of law is necessary. The relationship between these areas of law is complex and subject to considerable debate.[279] Clearly, they are separate areas of law, as shown by their historical development, but also have some commonalities in terms of the protection of human life and minimising or addressing some forms of suffering.[280]

Nevertheless, there remains considerable debate over the role of human rights in situations of armed conflict and the relationship between human rights law and international humanitarian law, which the jurisprudence of international courts has yet to fully clarify.[281] On the one hand, there is increasing recognition that some human rights may continue to operate during conflict and that there is convergence between the two areas of law.[282] On the other hand, some commentators have argued that international humanitarian law and human rights law are incompatible, since the former continues to emphasise military necessity rather than a primary concern for the rights of the individual.[283]

While the differences between the three legal frameworks should not be underestimated, it should also be acknowledged that both humanitarian law and human rights law protect the individual or community in limited ways and accept certain forms of suffering, which in turn is reflected within international criminal law.[284] In particular, the hierarchies of rights and

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[279] See, for example, the recent symposium on the relationship between international humanitarian law and human rights law within the *Journal of Conflict and Security Law*. Paul Eden and Matthew Happold, 'Symposium: The Relationship between International Humanitarian Law and International Human Rights Law' (2009) 14(3) *Journal of Conflict and Security Law* 441.

[280] International humanitarian law, developing from traditional laws of war, largely stems from the nineteenth century, while international criminal law and human rights law stem from the aftermath of the Second World War. See Jeremy Sarkin, 'The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and their Application from at least the Nineteenth Century' (2007) 1 *Human Rights and International Legal Discourse*.

[281] Robert Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY' (2009) 14(3) *Journal of Conflict and Security Law* 511.

[282] Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239; Y. Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law' in T. Meron (ed), *Human Rights in International Law*, vol 2 (Oxford: OUP, 1986) 346-62; L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 *International Review of the Red Cross* 94.

[283] Bill Bowring, 'Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009) 14(3) *Journal of Conflict and Security Law* 485.

[284] A. T. Williams, 'Human Rights and Law: Between Sufferance and Insufferability' (2007) 123 *Law Quarterly Review* 133.

harms evident within human rights law and reflected within international criminal law serve to marginalise subsistence harms. Socio-economic rights still suffer from this hierarchy in which civil and political rights have traditionally been seen as more serious and hence subject to stricter enforcement mechanisms.[285] The emphasis on civil/political rights over socio-economic rights issues within human rights law is reflected within aspects of international criminal law, in particular the focus on physical integrity harms and property offences.[286] While subsistence harms amount to more than socio-economic issues, this bias towards either physical integrity harms or civil/political rights is detrimental to their recognition in law.

i) The laws of war and international humanitarian law: a history of toleration of subsistence harms

It is only relatively recently that humanitarian law has evolved to provide protection against some aspects of subsistence harms, through the Hague and Geneva Conventions and more particularly the Additional Protocols.[287] In some ways, it could be argued that law's traditional tolerance of the use of subsistence harms reflected a similar tolerance of other forms of harm in conflict perpetrated against civilians. However, the situation is rather more complex, with the protection against deprivations of subsistence needs often lagging behind more general protection of civilians. As Marcus concludes, the 'law reflected a history of military strategy that valued the tactical possibilities of starvation'.[288] Moreover, while there have been some important developments regarding subsistence harms, law has not fully responded to shifts in the nature of conflict, in particular the prevalence of non-international conflicts, and the impact this has had on the perpetration of subsistence harms.

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[285] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) *International Law and Politics* 1, 6.

[286] For a critique of this hierarchy see, *ibid* 5-6.

[287] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907; International Committee of the Red Cross, The Geneva Conventions of August 12 1949; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[288] Marcus, n 164 above, 266.

The laws of war in the medieval and early modern period reflected an ambiguous attitude towards non-combatant protection, based on a chivalric code which reflected reciprocal treatment between combatants and sought to restrain conduct against non-combatants to a very limited degree.[289] While there was growing concern in Europe within the later medieval period regarding the plight of the non-combatant in war, this did not bring about major rethinking regarding the use of subsistence harms.[290] The later nineteenth century witnessed attempts to legally control the methods of warfare and to begin to protect non-combatants to some degree.[291]

However, while the Lieber Code, articulated in 1863 during the US Civil War, is often hailed as a foundational document in the codification of the modern laws of war, the protection provided in relation to subsistence harms remained extremely limited.[292] Although 'wanton devastation' was not allowed, the Lieber Code explicitly permitted the use of deprivations of subsistence needs against non-combatants, where militarily advantageous.[293] The Code defined military necessity as allowing 'all destruction of property ... and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army'.[294] Article 18 even permitted forcing civilians to remain in a besieged place, and thus suffer from the deprivation of subsistence needs during a siege, as an extreme measure in order to hasten surrender.[295]

The development of international humanitarian law (as it is increasingly now termed) in the early twentieth century did signal a significant shift in attitude towards the need to humanise the rules of conflict.[296] In particular, the Martens Clause, which was inserted into the

[289] M. H. Keen, *The Laws of War in the Late Middle Ages* (Toronto: University of Toronto Press, 1965); Randall Lesaffer, 'Siege Warfare in the Early Modern Age: A Study on the Customary Laws of War' in Amanda Perreau-Saussine, James Bernard Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2007) 176-202.
[290] Allmand, n 134 above.
[291] Meron, n 282 above.
[292] Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863, Article 21.
[293] *ibid*, Article 15.
[294] *ibid.*
[295] *ibid*, Article 18, 'When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.'
[296] Meron, n 282 above.

preamble of the 1899 Hague Convention II and restated in the Hague Convention IV of 1907, sought to emphasis the principle of humanity in order to counter traditional concerns of military necessity.[297] Nevertheless, treaty law continued to provide limited protection regarding subsistence harms and customary law remained unclear regarding these harms.[298] Article 25 of the Hague Convention of 1907 did state that the 'attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited'.[299]

Nevertheless, the Hague Convention continued to allow for traditional methods of siege warfare and said nothing about the protection of crops or agriculture, nor did it prohibit forced displacement. While Article 23(a) prohibited the employment of poison or poisoned weapons, it is doubtful whether this covered the use of herbicides such as "Agent Orange". In 2005, a lawsuit brought by "Agent Orange" victims, using the Alien Tort Claims Act in the US, was dismissed on the basis that there was no violation of international law, in particular that the use of herbicides in Vietnam was not prohibited by the Hague Convention of 1907 as they did not constitute 'poison or poisoned weapons'.[300] Although the use of herbicides may have been banned by the later Geneva Protocol of 1925, there was not universal agreement that this was the case, which illustrates the continued toleration of these practices by law.[301]

The Geneva Conventions of 1949 certainly did promote much greater protections for civilians, though certain aspects of subsistence harms were not addressed. Article 23 of Fourth Geneva Convention protected access to consignments of medical supplies and food

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[297] See Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 *International Review of the Red Cross* 125; Theodor Meron, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience' (2000) 94(1) *American Journal of International Law* 78.

[298] George Alfred Mudge, 'Starvation as a Means of Warfare' (1969) 4 *International Lawyer* 228.

[299] Convention (IV), n 287 above, Article 25.

[300] Order and Judgment In re : *"Agent Orange" Product Liability Litigation, The Vietnam Association For Victims of Agent Orange/Dioxin* against *The Dow Chemical Company* MDL No. 381 United States District Court Eastern District of New York (2005). See the Agent Orange Relief and Responsibility Campaign website <http://www.vn-agentorange.org/index.html> accessed 8 February 2010. See also Aviva E. A. Zierler, 'The Vietnamese Plaintiffs: Searching for a Remedy after Agent Orange' (2007) 21 *Temple International and Comparative Law Journal* 477.

[301] Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925, entered into force 8 Februrary 1928. Moreover, the US had not ratified the Protocol. See Arthur H Westing, 'Herbicides as Agents of Chemical Warfare: Their Impact in Relation to the Geneva Protocol of 1925' (1971)1 *Environmental Affairs* 578.

for certain civilians (such as children and expectant mothers).[302] In this way, the law began to recognise women as a specific category in need of protection, which, while a step towards gendered awareness, was problematic in representing women purely in their reproductive role and as uniquely vulnerable.[303] Moreover, the Conventions acknowledged that relief supplies could be legitimately prevented due to military requirements and therefore upheld traditional concepts of military necessity.[304] The protection afforded within occupied territories was more comprehensive, not suffering from the restrictions of Article 23 and the Conventions also protected interned populations, requiring them to be provided with adequate shelter, food and water.[305]

Nevertheless, the Conventions said little about the conduct of hostilities, and while prohibiting pillage and unlawful deportation or transfer, did not prohibit sieges or blockades.[306] While, destruction and appropriation of property was prohibited within Article 147, this was only when 'not justified by military necessity and carried out unlawfully and wantonly', again reflecting a degree of toleration of these harms as a method of warfare.[307] Fundamentally, the Geneva Conventions largely used the language of property, rather than of basic resources, land and livelihoods, and thus failed to truly reflect or protect against the use of subsistence harms as physical, mental and social harms centred on the deprivation of subsistence needs.

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[302] The Geneva Conventions, n 287 above, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 23. See Marcus, n 164 above, 266 and Thomas, n 267 above.

[303] Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence' (1997) *International and Comparative Law Quarterly* 55; Judith Gardam, and Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 148.

[304] Geneva Convention IV, n 287 above, Article 23. The obligations to allow the free passage of consignments were on the basis that the High Contracting Party had no serious reasons for fearing '(a) that the consignments may be diverted from their destination, (b) that the control may not be effective, or (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.'

[305] *ibid*, Article 55 also stated that similar protection was afforded to the civilian population within occupied territories. See Marcus, n 164 above, 266-67. For the protection of interned populations see Article 85 and 89 of Geneva Convention IV.

[306] Geneva Convention IV, *ibid.* Pillage regarding protected persons is prohibited within Article 33. Article 147 establishes grave breaches of the Conventions which includes unlawful deportation or transfer of a protected person.

[307] *ibid*, Article 147.

The Geneva and Hague Conventions therefore left considerable uncertainty and debate over whether certain subsistence harms, such as the use of starvation, were prohibited by law.[308] It was not until the entry into force of the Additional Protocols in 1978 that many forms of subsistence harms were condemned and prohibited within international humanitarian law. Most significantly, Article 54 of Additional Protocol I, relating to international armed conflict, and Article 14 of Additional Protocol II, relating to non-international armed conflict, represented the first time that 'objects indispensable to the survival of the civilian population' were fully protected in law and 'starvation of civilians as a method of warfare' was prohibited.[309] In response to the use of herbicides and napalm in Vietnam, there was also growing concern over the need for direct environmental protection in law, as reflected in Articles 35(3) and 55 of Additional Protocol I.[310] However, the fact that similar protection is not provided in non-international armed conflict under Additional Protocol II, leaves considerable gaps regarding the protection of the natural environment and thus a lack of significant recognition of the relationship between human subsistence and the environment. While it may be argued that customary law prevents such destruction in non-international armed conflict, this remains open to debate.[311] Essentially, the separate articulation of the Additional Protocols reinforced the traditional distinction between international and non-international armed conflict, which limits the extent of protections provided in non-international conflicts, despite the contemporary prevalence of the latter.[312]

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[308] See Esbjörn Rosenblad, 'Starvation as a Method of Warfare: Conditions for Regulation by Convention' (1973) 7 *International Lawyer* 252; Mudge, n 298 above.

[309] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, entered into force 7 December 1978. 'It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive'. This is similarly, but more briefly articulated in Article 14 of Aditional Protocol II, relating to non-international armed conflict.

[310] Additional Protocol I, *ibid*, Article 55 Art 55(1) 'Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of 'the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population'. See Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Leiden: Martinus Nijhoff Publishers, 2004).

[311] Jean-Marie Henckaerts, and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

[312] Deidre Willmott, 'Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2004) 5 *Melbourne Journal of International Law* 196.

There also remains some uncertainty regarding protection against blockades and the issue of state agreement over aid provision, perhaps due to continued sensitivities over issues of sovereignty and the implications of humanitarian relief.[313] Antonio Cassese highlights that 'this is an area where there exists great confusion and uncertainty concerning the content of [the] law'.[314] The official commentary to Additional Protocol I does not rule out blockades, but rather refers to Article 70 which contains the caveat that relief should be provided 'subject to the agreement of the Parties concerned'.[315] Consequently, this still leaves some room for perpetrations of subsistence harms to continue, since it may not be in the interests of the parties to agree to such relief.[316] Moreover, while it is desirable that international humanitarian law protects access to aid to some extent, legal discourse should also have a more nuanced understanding of the implications of humanitarian aid and the problems that such aid may foster.[317] Therefore, while the law has slowly developed in order to address some aspects of the age old use of subsistence harms in armed conflict, such developments have often lagged behind protections against other forms of harm. Moreover, humanitarian law has failed to sufficiently respond to the prevalence of subsistence harms within non-international armed conflict.

ii) International criminal law and the limitations of the current framework

For harms to constitute international crimes, they must come within one of the core crimes of war crimes, crimes against humanity or genocide. Each of these crimes can be perpetrated in various ways and has requirements as to the circumstances surrounding the crime and the *mens rea* element. War crimes encompass grave breaches of the Geneva Conventions, serious violations of the laws and customs of war and violations of Common Article 3 of the Conventions.[318] Many of the provisions of humanitarian law discussed above are now reflected within the offences of war crimes, stemming from the provisions of Additional Protocol I.[319] Crimes against humanity include offences such as murder, extermination and

[313] Antonio Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 *UCLA Pacific Basin Law Journal* 55.
[314] *ibid*, 90.
[315] Additional Protocol I, n 309 above.
[316] Thomas, n 267 above, 110; Marcus , n 164 above, 267-68.
[317] Regarding such problems, see Adam Branch, 'Against Humanitarian Impunity: Rethinking Responsibility for Displacement and Disaster in Northern Uganda' (2008) 2(2) *Journal of Intervention and Statebuilding* 151.
[318] Rome Statute, n 278 above.
[319] *ibid.*

deportation or forcible transfer and must be committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', which establishes a relatively high threshold of harm.[320]

Genocide has the strictest requirements in terms of the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. The group requirement of genocide is particularly controversial as it places an emphasis on national, ethnic, racial or religious identity which may not always reflect the nature of contemporary conflicts and situations of repression and requires a clear distinction between different groups which may not always reflect reality, as seen in Rwanda and Darfur.[321] As defined within the 1948 Genocide Convention, genocide can be committed in five ways: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.[322]

While there are some offences within the current framework of international criminal law which relate to subsistence harms, there remain key problems regarding inclusion of subsistence harms within such offences, both in terms of the *actus reus* and *mens rea* requirements. Even the offences which do relate to subsistence harms fail to capture the essence of these harms as deprivations of subsistence needs and the interrelated physical, mental and social harms involved. Consequently, the perpetration and experience of these harms is not fully recognised and condemned by law, which is problematic not only in normative terms, but also regarding the needs of survivors. Where subsistence harms could

[320] *ibid*, Article 7.

[321] The ICTR had particular difficulty in terms of the issue of whether Tutsis formed a distinct ethnic group. In *Kayishema* the Court adopted a relatively subjective approach in determining the existence of an ethnic group either in terms of self-identification or identification by others, including the perpetrators. This approach therefore stretches the provisions of the Genocide Convention, due to the problems of defining ethnic groups where there is a shared history and considerable intermarriage. *Prosecutor v. Clément Kayishema and Obed Ruzindana* Trial Chamber Judgment, 21 May 1999, ICTR-95-1, ICTR-96-10. See Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3 *Journal of International Criminal Justice* 989.

[322] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (entered into force 12 January 1951).

be seen to be encompassed within existing offences, it is only the biological survival which is reflected, leaving the mental and social dimensions of the harms ignored.

Despite some acknowledgement within international legal discourse of post-traumatic stress disorder (PTSD), mental health issues largely remain sidelined within this discourse and within the framework of the law.[323] There are only a few offences which explicitly include mental harms, none of which have been interpreted so as to include subsistence issues.[324] The legal framework is particularly problematic in terms of not reflecting the gendered elements of subsistence harms. The only gendered harms currently recognised within the framework are sexual offences and sexual slavery.[325] None of the offences relating to subsistence harms within international criminal law are defined to include issues of gender.

In terms of war crimes, there are some offences which clearly relate to subsistence harms, in particular the offence of 'using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'.[326] This offence reflects developments within Additional Protocol I, regarding the prohibition of starvation under Article 54. However, while this offence would appear to capture subsistence harms, it must be recognised that it only reflects physical survival and does not acknowledge the gendered harms involved. Moreover, the requirement of intent is problematic, considering that starvation has often been successfully portrayed by perpetrators as well as by the media as a natural disaster or as an

[323] Yael Danieli, Nigel S. Rodley, and Lars Weisæth (eds), *International Responses to Traumatic Stress: Humanitarian, Human Rights, Justice, Peace and Development Contributions, Collaborative Actions, and Future Initiatives* (New York: Baywood, 1996). Much of this recognition of PTSD within existing international legal literature has stemmed from feminist discourse. See for example Kirsten Campbell, 'Legal Memories: Sexual Assault, Memory and International Humanitarian Law' (2002) 28 (1) *Signs: Journal of Women in Culture and Society.*

[324] Rome Statute, n 278 above. Within genocide there is the *actus reus* of 'causing serious bodily or mental harm to members of the group', Article 6(b) and under crimes against humanity there is the offence of 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health', Article 7(k). The crime against humanity of torture is also defined to include mental harm.

[325] *ibid.*

[326] *ibid*, Article 8(2)(b)(xxv). Starvation of civilians is not included as a grave breach of the Geneva Conventions, due to the historical lack of attention and recognition given to these harms within the Geneva Conventions. Interestingly, civilian starvation was not included as a war crime (under Article 20) within the Draft Code of Crimes against the Peace and Security of Mankind (1996).

unforeseen consequence of physical integrity harms.[327] It may be argued that indirect intent could be sufficient, and, indeed, the ICC Statute defines intent as meaning to cause the consequence or being aware that it will occur in the ordinary course of events.[328] However, the lack of case law on this offence leaves the issue open to debate.

It is also significant that damage to the natural environment has been included as a war crime in international armed conflict for the first time under the Rome Statute.[329] Nevertheless, there are again problems with using this offence to address subsistence harms. Not only does the offence require a high threshold of damage, in being widespread, long-term *and* severe, but the proportionality standard is also heavily weighed in favour of military necessity, since the requirement is that the damage is 'clearly excessive in relation to the concrete and direct overall military advantage anticipated'.[330]

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[327] The obvious example is the portrayal of the Ethiopian famine by the international media as a natural disaster, merely complicated by war. See the famous report by BBC correspondent Michael Buerk on the Ethiopian famine, first broadcast 23 October 1984
<http://news.bbc.co.uk/1/hi/world/8315248.stm> accessed 9 October 2010.

[328] See Rome Statute, n 278 above, Article 30(2)(b). While direct intent is the specific aim or purpose to bring about the result, indirect (or oblique) intent is constituted by awareness on the part of the perpetrator that the result may occur in the ordinary course of events. The Pre-Trial Chamber of the ICC in *Bemba* has interpreted Article 30 to mean that the Statute includes two forms of *dolus*: *Dolus directus in the first degree* (direct intent) and *dolus directus in the second degree* (oblique intent). The Chamber has stated that '*Dolus directus in the first degree* (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime ... *Dolus directus in the second degree* does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions'. ICC Pre-Trial Chamber II, *Prosecutor* v. *Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 67(1)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-803
<http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> accessed 10 May 2011. For analysis of intent in relation to domestic and international criminal law see Catherine Elliott, 'The French Law of Intent and its Influence on the Development of International Criminal Law' (2000) 11(1) *Criminal Law Forum* 35; Mohamed Elewa Badar, The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19 *Criminal Law Forum* 473.

[329] *ibid*, Article 8(2)(b)(iv). 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

[330] For literature on the limitations of Article 8(2)(b)(iv) and the potential problems which will be faced in bringing prosecutions regarding environmental damage see Ines Peterson, 'The Natural Environment in Times of Armed Conflict : A Concern for International War Crimes Law?' (2009) 22 *Leiden Journal of International Law* 325; Jessica C. Lawrence and Kevin Jon Heller, 'The Limits of Article 8(2)(b)(IV) of the Rome Statute, the First Ecocentric Environmental War Crime' (2007) 20 *Georgetown Environmental Law Review*; Tara Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' (2004) 17 *Georgetown International Environmental Law Review* 697.

While it is arguable that customary law has reduced the distinction between war crimes which can be committed within non-international and international armed conflicts, the statutes of international or internationalised tribunals tend to retain this distinction to varying degrees.[331] In particular, the Rome Statute articulates far fewer war crimes relating to non-international armed conflict as compared with offences listed when perpetrated within international conflict, which, considering the prevalence of contemporary non-international conflict, is particularly problematic.[332] The offences relating to civilian starvation and environmental damage only exist in the Rome Statute when perpetrated during international armed conflict, despite the prohibition of civilian starvation in non-international armed conflict within Additional Protocol II.[333] The recent ICC Review Conference provided a unique opportunity for this distinction between international and non-international armed conflicts to be addressed and for the Statute to be amended.[334] While the Belgian proposal to include the use of certain weapons such as poisons and "dum dum" bullets as a war crime within non-international armed conflict was adopted during the Conference, no attempt was made to similarly include offences of civilian starvation or of damage to the natural environment.[335]

Other war crimes which relate to deprivations of subsistence needs are also problematic, particularly in not reflecting the nature of these harms. While it may seem that deprivation or destruction of food, livelihoods and homes could come within war crimes as property offences, such as pillage or extensive destruction and appropriation of property, these offences do not reflect the nature of these harms.[336] Rather than emphasising the physical, mental and social elements of subsistence, these offences focus on property and thus on material harm. The very language of property, when it involves livelihoods and basic resources is inappropriate and prevents recognition of subsistence harms, such that the law

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[331] *Prosecutor* v. *Duško Tadić*, Appeal on Jurisdiction, No. IT–94–1–AR72, 2 October 1995, para. 129. See Henckaerts and Doswald-Beck, n 311 above. See also Statute of the Special Court for Sierra Leone which only includes violations of Common Article 3 and some violations of Additional Protocol II as war crimes. Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000.

[332] Rome Statute, n 278 above, Article 8.

[333] *ibid.*

[334] Review Conference of the Rome Statute, May - June 2010, Kampala <http://www.icc-cpi.int/NR/exeres/BC97BF9A-4399-4EF2-90CA-A90FF0892C22.htm> accessed 1 July 2010.

[335] International Criminal Court, Resolution RC/Res.5: Amendments to Article 8 of the Rome Statute, 16 June 2010.

[336] Rome Statute, n 278 above, Article 8(2)(b)(xvi) of the Rome Statute, pillaging a town or place, even when taken by assault; Article 8(2)(a) (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

fails to condemn such behaviour or acknowledge the impacts on survivors. The language of 'pillage' is especially dangerous, since it reflects historically accepted means of violence rather than emphasising the seriousness of deprivations of food and other basic resources.[337] The failure of international criminal law to use the language of 'home', 'livelihoods' and 'basic resources' means that it continues to emphasise property to the neglect of the impact on lives and human subsistence needs.

The offences of deportation or forcible transfer exist as both a war crime and a crime against humanity, meaning that these offences may be perpetrated during non-conflict situations as well as during times of armed conflict.[338] However, perceiving subsistence harms as included within the offences of deportation or forcible transfer, as either a war crime or crime against humanity, is problematic since the nature of this harm, as attacks upon deprivations of subsistence needs, is not recognised.[339] As the term *transfer* suggests, this offence is essentially focused on removal of people from a certain area. The Rome Statute defines this offence as the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.[340] Forced displacement is very much associated in the jurisprudence of the ICTY with "ethnic cleansing", in terms of removal of groups from certain territory.[341] While "ethnic cleansing" is not a legal term, its use by tribunals and scholars serves to further associate displacement with territory on a cultural basis, rather than acknowledging the deprivations of subsistence needs often involved.[342]

Although displacement does not always involve deprivations of subsistence needs, examples such as East Timor and Darfur illustrate that subsistence harms are frequently intrinsic to

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[337] *ibid*, Article 8(2)(b)(xvi).
[338] As affirmed by the *Tadić* case, the ICTR and Rome Statute, crimes against humanity do not require a nexus with armed conflict. n 331 above.
[339] Rome Statute, n 278 above, Article 7(1)(d), Article 8(2)(a) (vii) and Article 8(2)(b)(viii).
[340] International Criminal Court, Elements of Crimes (2002) ICC-ASP/1/3(part II-B), Article 7(2)(d).
[341] Ethnic cleansing has been defined by the United Nations Commission of Experts charged with investigating war crimes in the former Yugoslavia as 'rendering an area ethnically homogeneous by using force or intimidation to remove from a given area persons of another ethnic or religious group'. United Nations, Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, 1990: Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 Vol. 1.
[342] See Alfred de Zayas, 'The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia' (1995) 6 *Criminal Law Forum* 257; Klejda Mulaj, 'Forced Displacement in Darfur, Sudan: Dilemmas of Classifying the Crimes' (2008) 46(2) *International Migration* 27.

displacement. When this is the case, such offences do not acknowledge the experience of the harm in terms of the deprivation of homes, livelihoods and social survival networks, loss of meaning in life stemming from an inability to meet subsistence needs and resultant loss of health and wellbeing. Instead, such impacts are treated as unfortunate humanitarian consequences of deportation or forcible transfer. Moreover, law's current framing fails to reflect the interrelationships between these harms. Thus, forcible transfer is not linked in any way in the framework with the war crime of civilian starvation or with property offences.

Within crimes against humanity, the offence of extermination, defined to include 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population', also relates to subsistence harms.[343] This illustrative definition shows that extermination no longer simply relates to deaths through physical integrity harms and can include deprivations of basic resources. This is particularly significant since crimes against humanity, as defined within the Nuremberg Charter, the Statute of Control Council Law No.10, the Ad Hoc Tribunals or the Rome Statute, do not include a separate offence of starvation.[344] Interestingly, starvation was explicitly enumerated within the Statute of the Israeli Court used in the *Eichmann* trial.[345] Although the reasons for this inclusion are unknown, it does suggest that there was recognition by the Israeli drafters at the time that starvation was not covered by the other acts under crimes against humanity. However, while the offence of extermination can now be seen to relate to subsistence harms, there remain key problems with this offence in terms of the *mens rea*: '*deliberately* inflicting conditions *calculated* to bring about the destruction of

[343] Rome Statute, n 278 above, Article 7(2)(b). Such an example is significant in terms of including so-called "slow deaths" within extermination, when this was not explicitly included in either the ICTY or ICTR Statutes.

[344] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945; Charter of the Nürnberg International Military Tribunal, 8 August 1945; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993; Statute of the International Criminal Tribunal for Rwanda, 8 November 1994.

[345] Government of Israel, The Nazi and Nazi Collaborators Punishment Law 5710, 1 August 1950. '"Crime against humanity" means any of the following acts: murder, extermination, enslavement, *starvation* or deportation and other inhumane acts committed against any civilian population, and persecution on national racial religious or political grounds' (italics added). Commentaries on the *Eichmann* Trial stated that the Statute was intended to be the same as that of Nuremberg Statute and failed to notice this key difference. See, for example, the contemporary account: Peter Papadatos, *The Eichmann Trial* (London: Stevens and Sons, 1964) 34. Indeed the author states that the law is identical with the Agreement of London and then goes on to state the offences included under crimes against humanity, without noticing that starvation has been added.

part of a population', which suggests the need for a plan, meaning that indirect intent may not be sufficient to prove this offence.[346]

Similar issues are evident in regard to including subsistence harms within the crime of genocide. The *actus reus* of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' is particularly relevant to subsistence harms.[347] Significantly, 'conditions of life' have been defined as including 'deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'.[348] However, the *mens rea* of genocide is even more stringent, requiring specific intent in relation to the group requirement. It requires the deliberate infliction of the 'conditions of life *calculated* to bring about its physical destruction in whole or in part', meaning that prosecuting subsistence harms as genocide would be particularly difficult.[349]

Indeed, while international criminal law has previously defined the *mens rea* of offences separately, the Rome Statute has now sought to provide a standardised approach in basing criminal responsibility on the existence of the *mens rea* requirement of intent *and* knowledge for all crimes before the Court.[350] Although Article 30 allows other requirements regarding the individual offences to be adhered to, it essentially confirms the importance of intent as a requirement for international crimes and seems to exclude the possibility of lower *mens rea*, such as recklessness.[351] While this obviously only applies to the ICC, and other international

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[346] Rome Statute, n 278 above, Article 7(1)(b), emphasis added. The Pre-Trial Chamber of the ICC has recently emphasised the importance of the term "calculated", in regard to both extermination and genocide, as an additional element which would need to be proved. *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010 ICC-02/05-01/09-94, para. 33. See also Badar, n 328 above, 500.

[347] Article II (c) of the Genocide Convention, n 322 above; Article 6(c) of the Rome Statute, n 278 above.

[348] William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007), 165.

[349] Rome Statute n 278 above, Article 6(c), emphasis added.

[350] *ibid*, Article 30. 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

[351] The Pre-Trial Chamber in *Lubanga*, drawing on the *Stakić* case before the ICTY, sought to include *dolus eventualis* (which essentially equates to advertant recklessness) within its understanding of Article 30 of the ICC

criminal tribunals may adopt different approaches, the approach of the Rome Statute may well be influential.

Essentially, given the current framework of international criminal law, it is questionable whether many of the examples discussed within this chapter could be positioned as international crimes. For example, while some commentators have argued that Operation Murambatsvina in Zimbabwe constituted a crime against humanity, the UN has not interpreted the law in this way.[352] In particular, the population was not considered as 'lawfully present' according to Zimabawean law which is a requirement of the crime against humanity of 'deportation or forcible transfer of population'.[353] Moreover, the UN Report stated that discussion of whether Operation Murambatsvina came within the jurisdiction of the ICC 'would serve only to distract the attention of the international community from focusing on the humanitarian crisis facing the displaced who need immediate assistance'.[354] This highlights current attitudes towards subsistence harms within international institutions, wherein addressing their perpetration is often not considered important or necessary.

Statute. Nevertheless, in subsequent cases, notably *Katanga* and *Bemba*, the Pre-Trial Chamber has clearly stated that Article 30 only includes *dolus directus* and *dolus indirectus*, such that *dolus eventualis* is not sufficient *mens rea*. *Prosecutor* v. *Jean-Pierre Bemba Gombo*, n 328 above. See Johan Van De Vvyer, 'International Decision: *Prosecutor* v. *Jean-Pierre Bemba Gombo*: International Criminal Court Pre-Trial Decision on Burden of Proof and *Mens Rea* in Prosecutions under the ICC Statute' (2010) 104 *American Journal of International Law* 241; Gerhard Werle and Florian Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 35. The exclusion or recklessness as a culpable *mens rea* under the Statute has been criticised by Cassese, at least in terms of war crimes. See Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 144, 154.

[352] See Jeff Nicholai, 'Operation Murambatsvina: A Crime Against Humanity Under the Rome Statute?' (2006) 21 *American University International Law Review* 813; United Nations, 'Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe Mrs. Anna Kajumulo Tibaijuka' (18 July 2005) <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> accessed 2 February 2008. Although the issue of the relevance of the Rome Statute was not in the Special Envoy's mandate, she did conduct a brief analysis of the issue based on legal opinion from a confidential source. While the Report widely condemned the government's actions and recognised the suffering involved, it stopped short of seeing such policies as constituting an international crime.

[353] Rome Statute, n 278 above. The ICC's Elements of Crimes Document defines this offence under Article 7(2)(d) as the 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'.

[354] United Nations, n 352 above, 66.

Similarly, it is difficult to argue that the actions of the Myanmar regime following Cyclone Nargis constituted crimes against humanity.[355] While the blocking of humanitarian aid might be seen to come within extermination or the offence of causing great suffering or serious injury to body or to mental or physical health, proving the *mens rea* with regard to either offences would be extremely difficult. Despite evident disregard towards the civilian population, there is no evidence that government officials intended to cause these results. Moreover, it is doubtful whether the situation could be seen to reach the requirement of 'a widespread or systematic attack directed against any civilian population'.[356]

In terms of the example of the Ukrainian famine, it is also questionable whether it would be possible to prove sufficient *mens rea* for either crimes against humanity or genocide, as responsibility for the famine was so well hidden by the regime.[357] While the Ukrainian famine occurred prior to the articulation of crimes against humanity in the Nuremberg Charter and Tribunal and to the Genocide Convention of 1948, the famine does illustrate that even if perpetrated today it would be difficult to prosecute as an international crime. Although in November 2003, a Joint Statement was signed at the UN by some 60 countries commemorating the famine, the document did not mention genocide and only portrayed the famine in terms of violations of human rights.[358] These issues therefore illustrate the particular problems of including subsistence harms within the current legal framework. The next section will argue that while human rights law also provides some measure of recognition of deprivations of subsistence needs, again it does so in a problematic and partial way.

[355] There have been some commentators who have attempted to argue that the situation following Cyclone Nargis could constitute a crime against humanity, but such interpretations have received little support within international legal discourse. See EAT and JHU CPHHR, n 209 above, 6 and 22; John D. Kraemer, Dhrubajyoti Bhattacharya and Lawrence O. Gostin, 'Blocking Humanitarian Assistance: A Crime Against Humanity?' (2008) 372 *The Lancet* 1203.
[356] Rome Statute, n 278 above, Article 7.
[357] Marcus, n 164 above, 279.
[358] Serbyn, n 170 above, 181; United Nations, 'Joint Statement on the Great Famine of 1932-1933 in Ukraine', n 168 above.

iii) Subsistence harms and human rights

Although there are rights within the current framework of human rights law which relate to subsistence harms, there again remains a lack of coherent and comprehensive recognition of these harms. On face value, it may seem that subsistence harms can easily be recognised within socio-economic rights, through the rights to an adequate standard of living, the fundamental right of everyone to be free from hunger and the right to the highest attainable standard of health, articulated within the International Covenant on Economic, Social and Cultural Rights (ICESCR).[359] While not articulated in terms of subsistence needs, these rights do clearly relate to basic human needs of food, water and shelter. In addition, the right to health has been interpreted to include mental health as well as conditions necessary for health, such as food, water and housing, which render the right to health particularly relevant to issues of subsistence needs.[360]

However, while subsistence harms may be seen to fit within a human rights framework on a superficial level, there are underlying issues which present fundamental problems regarding recognition of such harms and the underlying grievances which feed into them. The fact that subsistence harms relate most strongly to socio-economic rights may pose problems regarding the traditional hierarchy of human rights.[361] There have undoubtedly been developments in this area, including proclamations as to the indivisibility of all human rights and increasing recognition of the justiciability of certain socio-economic rights.[362] Nevertheless, there remains some tendency within areas of international legal discourse to

[359] International Convention on Economic, Social and Cultural Rights, 16 December 1966, Articles 11 and 12.
[360] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000), E/C.12/2000/4, para 4. See also Brigit C. A. Toebes, *The Right to Health as a Human Right in International Law* (Antwerp: Intersentia, 1999) 254-59; Yutaka Arai-Takahashi 'The Right to Health in International Law: A Critical Appraisal' in Robyn Martin and Linda Johnson (eds), *Law and the Public Dimension of Health* (London: Cavendish, 2001) 143-72.
[361] Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 125.
[362] Limberg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights, E/CN.4/1987/17. The Limberg Principles state that 'As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights'. The South African Constitutional Court has been the most progressive in terms of acknowledging the justiciability of socio-economic rights and developing a methodology to assess whether states are respecting, protecting and fulfilling these rights. See *Government of the Republic of South Africa and Others* v *Grootboom and Others* 2000 (1) SA 46 (11) BCLR 1169 (CC) and *Minister of Health and Others* v *Treatment Action Campaign and Others* 2002 (5) SA 721 (10) BCLR 1033 (C).

consider civil and political rights as more important than socio-economic rights.[363] Indeed, despite understandings of the indivisibility of rights, socio-economic rights issues remain sidelined within transitional justice and peace-building policies, as will be discussed in chapter 6.[364]

While there is increasing recognition within human rights discourse of the justiciability of socio-economic rights, there remains an emphasis on progressive fulfilment rather than on deprivations of rights. Despite the tripartite obligations attendant on all human rights; to *respect*, *protect* and *fulfil*, in reality, the duty to respect, and thus not to deprive, is frequently overlooked and downplayed within human rights practice and discourse, due to the traditional divide between so-called "negative" and "positive" human rights.[365] For example, General Comment No 12, which interprets the right to food, recognises the deliberate deprivation of food in wars to some degree, but primarily focuses on issues of poverty.[366] While recognition of the justiciability of socio-economic rights may promote greater attention to negative duties and thus deprivations of subsistence needs, at present there is little sign of such developments promoting widespread recognition of subsistence harms.[367]

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[363] Indeed, this is illustrated with regard to the relative absence of the right to food from regional instruments such as the African Charter of Human and People's Rights, the European Social Charter, and the American Convention on Human Rights, while the International Convention on the Elimination of All Forms of Racial Discrimination is primarily concerned with discrimination in terms of political rather than economic acts. For literature which critiques and challenges this hierarchy, see David Marcus, 'The Normative Development of Socioeconomic Rights through Supranational Adjudication' (2006) 42 *Stanford Journal of International Law* 53; Philip Alston, 'International Law and the Human Right to Food' in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (Dordrecht: Martinus Nijhoff, 1984) 27; J. Oloka-Onyango, 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?' (2000) 6 *Buffalo Human Rights Law Review* 39; Shedrack C. Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights & Development Law Journal* 177. However, other scholars have even questioned the nature of the right to food as a right. See for example Robert L. Bard, 'The Right to Food' (1985) 70 *Iowa Law Review* 1279.

[364] See Arbour, n 285 above.

[365] The notion of tripartite obligations was first introduced by Henry Shue in order to move beyond the emphasis on "positive" and "negative" rights. Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, (Princeton, NJ.: Princeton University Press, 2nd edn, 1996). This idea was later taken up by the Special Rapporteur to the UN Sub-Commission in his Report on the right to food. Special Rapporteur to the UN Sub-Commission, The Right to Food as a Human Right, 7 July 1987, E/CN.4/Sub.2/1987/23. The system of tripartite obligations has subsequently been applied by the Committee on Economic, Social and Cultural Rights in their General Comments. See General Comment No. 14, n 360 above. For discussion of the tripartite obligations see Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5(1) *Human Rights Law Review* 81. See also Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 81.

[366] See Committee on Economic, Social and Cultural Rights, General Comment No.12. The Right to Food (Art. 11), adopted 12 May 1999, E/C.12/1999/5.

[367] Marcus, n 164 above, 87.

While subsistence harms also relate to civil/political rights, most notably the right to life, as articulated within the International Covenant on Civil and Political Rights (ICCPR), subsistence has had little bearing on the right to life, which has predominantly been interpreted in terms of direct killings.[368] There have been some developments by the Human Rights Committee and within some domestic jurisdictions in understanding the right to life in a more expansive way, so as to include survival needs.[369] The Indian Supreme Court has led the way in emphasising the importance of basic resources such as food and water, as well as the right to a livelihood, as part of the right to life, but such an approach is yet to be widely accepted.[370] Such developments therefore remain limited and have yet to promote substantial rethinking regarding the relationship between subsistence needs and the right to life within human rights praxis. Moreover, although subsistence harms clearly are related to certain civil/political rights violations and may be perpetrated through physical integrity harms, they transgress current definitions of these rights. Subsistence harms go beyond current interpretations of civil/political rights by emphasising life in a broader sense as physical and mental health and wellbeing, and in emphasising livelihoods and social relations as central to human survival.

As such, it is questionable whether current interpretations of either socio-economic or civil/political rights would be able to capture the essence of subsistence harms as attacks on the physical, mental and social aspects of human subsistence. While some of the physical and mental aspects of subsistence harms may be reflected to a degree within human rights law, its ability to reflect social harms is more doubtful. The general emphasis within socio-economic and civil/political rights on the individual violation, with regard to specific rights, makes it difficult for human rights discourse and practice to perceive communal harms and violations, such as subsistence harms.[371] In this respect, Article 1 common to the ICESCR and the ICCPR, which articulates the right to self-determination and states that 'in no case may a people be deprived of its own means of subsistence', may be particularly relevant. It is

[368] International Convention on Civil and Political Rights, 16 December 1966, Article 6, the Right to Life.
[369] Human Rights Committee, General Comment No. 6: The Right to Life (Art. 6) 1982. The Committee has stated that 'The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures, including 'measures to eliminate malnutrition and epidemics', but does not address subsistence harms in any way.
[370] *PUCL* vs *Union of India and others* (Writ Petition [Civil] No. 196 of 2001). This case has led to various interim Supreme Court Orders regarding the right to food.
[371] Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 199-200.

significant that this Article mentions the term subsistence and this Article could potentially be used to recognise the issue of deprivations of subsistence needs in a way which is sensitive to communal aspects of subsistence.[372] Nevertheless, it must be remembered that this Article is about the self-determination of peoples rather than primarily concerning issues of subsistence.[373] Moreover, the usefulness of this Article in relation to subsistence harms would depend on whether subsistence is seen in a minimal, economic way or whether an holistic definition, such as that provided by the thesis, is applied.[374]

Human rights law also does not fully recognise and address the gendered nature of subsistence harms. The instrument which deals most clearly with women's rights, CEDAW, does not focus sufficiently on socio-economic issues related to subsistence needs.[375] As such it provides little basis upon which to recognise the gendered nature of subsistence harms. While the ICCPR and ICESCR both state the principle of non-discrimination in the exercise of rights, neither Covenant acknowledges the specific way in which women experience violations of rights and the impact of underlying gender inequality.[376] The gendered awareness of the ICESCR is limited to presenting women as mothers and predominantly as dependants of male providers. This limits understanding of the crucial role that women play in the production of food and their role in feeding their families, as highlighted above.[377] Moreover, in emphasising the importance of the family, the ICESCR fails to reflect women's often unequal status within families and the impact this may have on their access to

[372] For literature on how subsistence has been used by some groups in relation to self-determination claims, see David S. Case, 'Subsistence and Self-Determination: Can Alaska Natives Have a More Effective Voice' (1989) 60 *University of Colorado Law Review* 1009.

[373] See Human Rights Committee, General Comment No.12, 'The Right to Self-Determination of Peoples' (Art. 1), 13 March 1984, HRI/GEN/1/Rev.6 at 134.

[374] For literature which views subsistence in minimal economic or material terms see Shue, n 365 above; Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (Oxford: OUP, 2009); Wesley T. Milner, et al., 'Security Rights, Subsistence Rights and Liberties: A Theoretical Survey of the Empirical Landscape' (1999) 21 *Human Rights* 23.

[375] Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979. On the failure of the human rights processes since the Beijing Conference of 1995 to reflect the linkages between gendered rights issues and economic justice, see Diane Otto, 'The Limitation and Potential of Human Rights Discourse for Women' in Kelly D. Askin and Dorean M Koenig (eds), *Women and International Human Rights Law* Vol. 1 (New York: Transnational Publishers, 1999) 115.

[376] Article 2 of both the ICCPR and ICESCR states that 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

[377] United Nations, n 259 above.

subsistence needs.[378] Gendered awareness regarding socio-economic rights issues is similarly absent within regional human rights instruments, such as the Additional Protocol to the American Convention on Human Rights.[379]

However, the recent Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa does suggest a move towards greater awareness of issues relating to women's socio-economic rights, within the African Commission on Human Rights.[380] Indeed, Article 15 of the Protocol affirms women's rights to food security by requiring states parties to 'take all appropriate measures' to 'provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food'.[381] The use of the concept of food security is problematic given its association with global political and economic systems which are detrimental to women's subsistence needs and given that the concept says little about the means of attaining the right to food.[382] Nevertheless, Article 19(b) of the Protocol does explicitly recognise the 'negative effects of globalisation' and the 'adverse effects of the implementation of trade and economic policies and programmes' and requires state parties to ensure that these negative effects are 'reduced to the minimum for women'.[383] Such acknowledgement of the impacts of the global economic system on women

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[378] Article 10 of the ICESCR does state that 'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits'. However, this reflects issues related to women's reproductive role in society rather than gendered-awareness as such. See Shelley Wright, 'Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions' (1988) 12 *Australian Year Book of International Law* 242.

[379] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", Adopted at San Salvador, El Salvador, November 17, 1988, entered into force 16 November 1999.

[380] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 13 September 2000, entered into force 25 November, 2005.

[381] *ibid*, Article 15.

[382] See, for example, the Food and Agriculture Organization's definition of food security, which emphasises neoliberal economic systems in the production of food and perceives individuals as "economic agents". 'Food security has been defined as the access for all people at all times to enough food for an active, healthy life. The three key ideas underlying this definition are: the adequacy of food availability (effective supply); the adequacy of food access, i.e. the ability of the individual to acquire sufficient food (effective demand); and the reliablity of both ... Inherent in this modern concept of food security is an understanding of food producers and consumers as economic agents.' Food and Agriculture Organization, *The State of Food and Agriculture 1996: Food Security, Some Macroeconomic Dimensions* (Rome: FAO, 1996). See also Philip McMichael, 'Food Security and Social Reproduction', in Stephen Gill and Isabella Bakker (eds), *Power, Production and Social Reproduction* (New York: Palgrave MacMillan, 2003); William D. Schanbacher, *The Politics of Food: The Global Conflict between Food Security and Food Sovereignty* (Santa Barbara, Ca.: Praeger, 2010). The limitations of the concept of food security, and the alternative paradigm of food sovereignty, will be discussed further in chapter 6.

[383] *ibid*, Article 19.

is clearly significant, given the lack of similar recognition within other human rights instruments. However, rather than requiring states parties to ensure that such negative effects do not occur, Article 19(b) uses the language of 'reduced to the minimum', which reflects the weakness of this provision.[384] It therefore remains to be seen how Articles 15 and 19 will be interpreted within the African Commission and Court and whether such recognition truly constitutes a means to challenge the deep-seated inequalities which ensure the continued deprivations of women's subsistence needs.

Apart from the Protocol on the Rights of Women in Africa, human rights law currently fails to acknowledge the relationship between socio-economic marginalisation and gender inequality, which feeds into the perpetration and experience of subsistence harms.[385] Recognition of the gendered nature of subsistence needs in human rights law would require more than simply non-discrimination principles or an emphasis on women's reproductive roles, but a rethinking of the law in order to more fully reflect the way socio-economic issues and harms related to subsistence are inherently gendered.[386] Again the lack of communal emphasis in terms of socio-economic rights is problematic in failing to reflect the way that women experience subsistence harms in social ways and how communal relations impact on the ability to meet their subsistence needs.

Essentially, human rights are also problematic in articulating the existence of rights without any real understanding of how these rights can be realised or protected in practice. This is the major reason why human rights seem so elusive and chimerical and have often failed to prevent or address widespread suffering.[387] The fact that human rights law articulates a right

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[384] *ibid.* For further analysis of the limitations of Article 19(b) see Emezat H. Mengesha, 'Reconciling the Need for Advancing Women's Rights in Africa and the Dictates of International Trade Norms: The Position of the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 208.

[385] For critiques of the ICESCR regarding issues of gender, see Diane Elson and Jasmine Gideon, 'Organising for Women's Economic and Social Rights: How Useful is the International Covenant an Economic, Social and Cultural Rights?' [sic] (2004) 8 *Journal of Interdisciplinary Gender Studies* 133; Mariama Williams, 'What are Economic and Social Rights? Women's Economic and Social Rights' (1998) *Women in Development Europe Bulletin* 12.

[386] See Fredman's article, which argues for the need to rethink human rights law in order to incorporate women's concerns. Sandra Fredman, 'Engendering Socio-Economic Rights' (2010) University of Oxford Legal Research Paper Series <http://www.ssrn.com/link/oxford-legal-studies.html> accessed 12 November 2010.

[387] Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Human Rights Quarterly* 796.

to food and water but not to livelihoods is indicative of this issue. In stating that everyone has rights to food, human rights law does not reflect the complex socio-economic and political reasons for the denial of such rights. As Tomasevski argues, the 'establishment of the right to food, like other economic, social and cultural rights, has resulted only in empty promises, raised expectations and widespread frustration. To say that everybody has the right to food, which the decisive wording of international human-rights instruments implies, is obviously false'.[388] Instead, the emphasis on poverty and progressive realisation of rights within socio-economic rights practice and discourse serves to accept such suffering, rather than interrogate the underlying causes and their gendered nature.[389]

While it is important not to see human rights discourse as homogenous, mainstream human rights discourse has largely taken the global economic order as a given, rather than challenging this as a cause of poverty and grievances that underlie conflict and repression.[390] As TWAIL and other critical literatures have shown, human rights law, as currently conceived, is incapable of addressing long-term structural violence in terms of global economic and power relations, as it is fundamentally associated with supporting the global status quo.[391] This situation is particularly problematic considering the relationship between subsistence harms and structural violence.[392] The discourse of human rights could hide the significance of economic policies and political circumstances, which allow the violation of socio-economic rights to occur with impunity.[393] Accordingly, this would prevent human rights law from fully recognising the nature of subsistence harms and thus its ability to

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[388] Katerina Tomasevski, 'Human Rights and Wars of Starvation' in Macrae and Zwi, n 185 above, 71.

[389] For a critique of the language of progressive realisation see Marcus, n 164 above, 247.

[390] For literature which critiques of the ability of human rights, specifically the right to food, to address such structural issues regarding the global economic system and the impact of this on hunger, see Jacqueline Mowbray, 'The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger' (2007) 20 *Leiden Journal of International Law* 545. She analyses and critiques the 2004 Food and Agriculture Organization's Voluntary Guidelines on the right to food as a key indication of the way human rights support the economic status quo.

[391] Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27(5) *Third World Quarterly* 767, 768. Rajagopal highlights that 'the human rights discourse has also turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics'. B. S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3, 16-18. See also Mark Goodale, 'Empires of Law: Discipline and Resistance within the Transnational System' (2005) 14 *Social & Legal Studies* 553.

[392] Frances Stewart, 'Horizontal Inequalities: A Neglected Dimension of Development', Centre for Research on Inequality, Human Security and Ethnicity Working Paper; Gudrun Østby, 'Polarization, Horizontal Inequalities and Violent Civil Conflict' (2008) 45(2) *Journal of Peace Research* 143.

[393] Makua wa Mutua, 'Hope and Despair for a New South Africa: The Limits of the Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63, 113.

address instances of subsistence harms which fall below the gravity threshold of international criminal justice.

Moreover, the emphasis within human rights law on state responsibility obscures wider forms of responsibility and the responsibility of non-state actors.[394] Thus, while human rights law could be used to some extent to address some perpetrations of subsistence harms and underlying grievances, it is unlikely to be able to fully address the range of responsibilities for these harms and thus reflect how and why they are perpetrated. Due to these problems within the current framework of human rights law, alternative interpretations of rights, in particular those stemming from social movement praxis will be examined in later chapters.[395] Such alternative interpretations of rights may provide ways of addressing subsistence harms which cannot be achieved through conventional interpretations of the current legal framework.

Conclusion

Although their use has varied to some degree throughout history, there are also discernable patterns in the perpetration and experience of subsistence harms which are reflected in contemporary contexts. This chapter has outlined some of the continuities in the perpetration of these harms, as well as shifts in twentieth-century and contemporary subsistence harms stemming from new technologies in warfare, such as the use of herbicides, and contemporary political and economic circumstances, which have led to the prevalence of non-international armed conflict. These insights have also allowed the chapter to expand on its analysis of the nature of subsistence harms, in terms of their physical, mental and social elements as well as their often gendered nature, in order to provide an holistic understanding of these harms. This understanding of subsistence harms illustrates the fundamental limitations of the current framework of the law. While there are elements within international humanitarian law,

[394] Chris Jocknick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 56, 59; Fionnuala Ní Aoláin and Catherine O'Rourke, 'Gendered Transitional Justice and the Non-State Actor', Transitional Justice Institute Research Paper No. 10-02 (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580048> accessed 2 June 2010.

[395] For literature which argues in terms of the importance of analysing social movement interpretations and uses of human rights see Rajagopal, n 371 above; Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009).

human rights law and international criminal law which clearly relate to subsistence harms, law is yet to acknowledge these harms in a coherent and comprehensive way. Essentially, the current framework is incapable of fully reflecting the physical, mental and social aspects of subsistence harms and their gendered nature.

In beginning to outline the current legal framework with regard to subsistence harms, the chapter has begun to unearth the promise of law as a means of addressing harms but also the pitfalls of current legal concepts and frameworks. Law provides one crucial means of beginning to address certain aspects of subsistence harms but in itself, and indeed because of the nature of international law, this will not be sufficient. The perpetration and experience of subsistence harms is a widespread issue, which will require not simply that the aftermath of these harms is dealt with, but that structural issues and grievances which lead to the perpetration of these harms are also acknowledged. Essentially, there is not a simple solution to the problem of subsistence harms either within or outside of law. However, one step towards beginning to address these harms would be to break through their current silencing and promote a more comprehensive and coherent recognition of subsistence harms in international law. The next chapter is focused on the theme of legal recognition. It will address in far more detail the reasons for the current lack of comprehensive recognition, as well as the role law could play in providing some form of recognition, such as access to justice mechanisms. However, again, the chapter will also focus on the limits of law and the need for additional forms of recognition outside of and beyond conventional legal frameworks.

Chapter 2

Legal recognition of subsistence harms and the limitations of law

While law holds perhaps unequalled power and authority to name and recognise harm, at the same time it is often responsible for silencing certain harms and thus for perpetrating the "crime of silence".[396] As non-governmental tribunals have proclaimed, 'the crime of silence is the silence which refuses to name the violence that is inflicted upon marginalised populations as a crime'.[397] It is this relationship between law's power to recognise harm and its willingness to silence subsistence harms which is the focus of this chapter. Although the current legal framework ignores and sidelines subsistence harms, this chapter will argue that legal recognition is central to addressing subsistence harms, in providing a powerful normative signal that such harms are no longer considered acceptable. Drawing on the discussion of the previous chapter, regarding the recognition of subsistence harms as a category of violence and the limitations of the current framework of law, this chapter examines the reasons for the traditional silencing or sidelining of these harms. It then focuses on recognition in the third sense of this term, as the forms of recognition provided by legal mechanisms, and the ways in which recognition is performed within the different mechanisms. It therefore examines both the potential of legal mechanisms to address and redress subsistence harms and also their inherent limitations.

The emergence of international criminal and transitional justice, particularly within the last two decades, has provided various spaces for the recognition of international harms, through international criminal tribunals, truth commissions and even some traditional mechanisms, such as the Gacaca Courts in Rwanda. These mechanisms provide various forms of recognition, in particular the recording of harms and truth-telling, instituting some degree of

[396] Jayan Nayar, 'A People's Tribunal Against the Crime of Silence? The Politics of Judgement and an Agenda for People's Law' (2001) 2 *Law, Social Justice and Global Development Journal* <http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html> accessed 12 October 2008.
[397] Permanent Peoples' Tribunal on Global Corporations and Human Wrongs (2000) <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/ppt> accessed 1 September 2008.

accountability and providing recommendations for redressing harms.[398] The chapter argues that law could play a role in recognising subsistence harms, but, at the same time, law has inherent limitations, stemming from its narrow conceptions of harm and its focus on "crisis" situations.[399] The chapter also begins to examine alternative ways of recognising harms beyond the confines of conventional law and thus begins to explore the complex relationship between subsistence harms, legal recognition and alternative spaces of recognition.

The first part of the chapter will argue that there are three crucial and interrelated reasons for the silencing of subsistence harms: the narrow scope of the concept of harm, the "crisis" emphasis of international law and the model of individual criminal responsibility dominant within international criminal and transitional justice. The chapter will then argue in terms of the importance of legal recognition of subsistence harms and of broadening the scope and underlying concepts of transitional justice. It will discuss both the significance of forms of truth-telling, accountability and redress, as well their inherent limitations within the context of current models of transitional justice. The chapter will lastly turn to the alternative forms of recognition provided by non-governmental tribunals and social movement activism, but will also acknowledge the limitations of these spaces, particularly the limitations imposed by law.

1) ***Subsistence harms and legal recognition***

i) *The limitations of current legal concepts of harm*

Understanding the reasons for the limitations of current legal recognition of subsistence harms is crucial in order to determine whether law can play an important role in addressing

[398] For literature on transitional justice mechanisms and the forms of recognition they provide see Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998); Ruti G. Teitel, *Transitional Justice* (Oxford: OUP, 2000); Phil Clark, 'Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda' (2007) 39 *George Washington University International Law Review* 765; Eric Stover and Harvey M. Weinstein (eds), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004); Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2001); Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008).

[399] Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queen's Law Journal* 219; Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

these harms and the limitations of such a role. One of the major reasons why law does not recognise subsistence harms in any coherent or comprehensive way is its concern with physical integrity harms, to the exclusion of other forms of harm and violence. The use of the term subsistence *harms* in the thesis to describe and define deprivations of subsistence needs both locates this violence within a legal framework and at the same time challenges the current narrow focus on physical integrity harms. The concept of harm is therefore both a reason why law has traditionally marginalised deprivations of subsistence needs, but also provides some possibility for their future recognition.

The current lack of legal recognition of subsistence harms is partly a product of traditional understandings of harm, stemming from domestic law, which emphasise a liberal, minimalist approach and the centrality of notions of choice and personal autonomy to the concept of harm.[400] Although deprivations of subsistence needs could be fitted to some extent into a traditional, legal conceptualisation of harm, in terms of the 'thwarting, setting back' or 'defeating of an interest' in survival needs, doing so essentially distorts the nature of the subsistence harm.[401] Freedom of choice and personal integrity, which are central to legal concepts of harm, do not underpin the essence of subsistence harms, which are instead based upon deprivations of human subsistence needs.

Physical injury is another central aspect of the concept of harm, which again tends to marginalise subsistence harms. As Feinberg states, 'In ordinary speech persons are not said to be injured by inflictions of harm to interests other than that in physical health and bodily integrity, except by analogy ... The more distant the analogy to physical wounds, the less appropriate is the term "injury"'.[402] Despite the clear impacts of subsistence harms on the human body and physical health, violations of integrity and physical wounds do not form the essence of the harm perpetrated or experienced. The concept of harm institutes a demarcation

[400] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford: OUP, 1984).
[401] See Andrew von Hirsch, 'Injury and Exasperation: An Examination of Harm to Others and Offense to Others' (1986) 84 *Michigan Law Review* 700, 702-03.
[402] Feinberg, n 400 above, 106.

between issues of physical violence, which are seen as a matter for law, and subsistence needs, which are often seen as issues beyond the purview of criminal law.[403]

The narrow understanding of harm within law and legal discourse has been challenged by some commentators, such as Hirsh and Jareborg who argue against an understanding of harm in terms of personal freedom and instead emphasise the issue of living-standard as crucial to understanding and grading harms.[404] Moreover, feminist discourse has increasingly critiqued the marginalisation of harms experienced by women and argued for a rethinking of legal concepts of harm.[405] Such research has highlighted the gendered nature of existing conceptualisations of harm, in focusing on harms experienced by men, or men and women, but ignoring harms experienced predominantly by women.[406] The narrow focus on direct physical harms will capture some harms experienced by women, but will leave many forms of gendered harms unrecognised and thus fail to reflect the way that men and women may experience harms differently.[407] MacKinnon's work on issues of sexual harassment and pornography as harms against women within domestic law has been particularly important in promoting a feminist discourse around gendered harms and a critique of traditional, narrow legal conceptualisations of harm.[408]

In particular, such discourse is relevant to subsistence harms in terms of contesting the liberal focus on individual harm within traditional legal conceptualisations. The emphasis upon individual autonomy within traditional understandings of harm obscures the social aspects of harm, which is problematic in terms of not reflecting the centrality of sociality within subsistence harms. MacKinnon's work on pornography and sexual harassment instead

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[403] *ibid.* Within the concept of harm, physical health is predominantly associated with physical integrity harms to the exclusion of other impacts on health such as those directly caused by deprivations of subsistence needs.
[404] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.
[405] See in particular, Robin West, *Caring for Justice* (New York: New York University Press, 1997); Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) 22(3) *Legal Studies* 319; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Annandale, NSW: The Federation Press, 1990).
[406] West, *ibid*, 97-100.
[407] Ní Aoláin, n 399 above, 234.
[408] Catharine MacKinnon, 'Sexual Harassment: Its First Decade in Court' in Patricia Smith, *Feminist Jurisprudence* (Oxford: OUP, 1993) 145; Catharine MacKinnon, 'Pornography as Defamation and Discrimination' (1991) 71 *Boston University Law Review* 793.

emphasises the social and group impacts of gendered harms.[409] Moreover, Conaghan's research on tort law has been particularly significant in emphasising that harm is social in two important ways; firstly, 'social location plays a role in determining the incidence and distribution of particular harms' and secondly, understandings of harm stem from 'social relations and the meanings they generate'.[410]

Similarly, feminist discourse on international law has sought to expand the types of experiences and behaviours described as international harms. Feminist research has focused particularly on highlighting various forms of violence against women as harms that need to be addressed by international law.[411] In particular, feminist discourse on international criminal law has predominantly focused on the treatment of sexual harms within the legal framework and on analysing the nature and impact of these harms.[412] Moreover, the work of feminist movements has been significant in arguing for a broader understanding of harm and legal recognition of suffering.[413] For example, the Courts of Women Movement has voiced a range of gendered harms from domestic violence and sexual violence, to the impact of armed conflict upon women and the impact of structural and socio-economic forms of violence.[414] Such movements therefore contest traditional legal understandings of harm and seek to voice harms which law silences.[415]

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[409] *ibid.*

[410] Conaghan, n 405 above. Although Conaghan is discussing harm in terms of tort law, the same observations apply in relation to harm in a criminal sense. See also Albert C. Lin, 'The Unifying Role of Harm in Environmental Law' (2006) *Wisconsin Law Review* 897, 984. He also highlights that harm 'is not an objective concept possessing a fixed meaning. Rather, harm is a normative concept dependent on social judgments about the interests that matter, bound up in social visions of the good and the bad'.

[411] See for example, Catherine Dauvergne and Jenni Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73(1) *Modern Law Review* 57; Bonita Meyersfeld, 'Domestic Violence, Health and International Law' (2008) 22 *Emory International Law Review* 61.

[412] In particular this discourse has argued for the inclusion of sexual violence as an international harm and crime. See, for example, Fionnuala Ní Aoláin, 'Sex-Based Violence and the Holocaust: A Re-evaluation of Harms and Rights within International Law' (2000) 12 *Yale Journal of International Law* 43; Kelly D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288; Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243.

[413] Corinne Kumar, 'Our Memories are Our Histories: Conversations on the Courts of Women' in Kumar (ed), *Asking, We Walk : the South as New Political Imaginary*, Book 2 (Bangalore: Streelekha Publications, 2007).

[414] See the website of the Courts of Women
< http://www.eltaller.in/?page_id=73> accessed 29 July 2010.

[415] Kumar, n 413 above.

Nevertheless, despite the importance of these various attempts to analyse and highlight gendered harms, there has been a lack of coherent feminist work on conceptualising harm within international law, which has recently led Ní Aoláin to argue for a feminist theory of harm, in the context of conflicted and post-conflict societies.[416] While Ní Aoláin's work does not yet provide such a theory, in drawing on the work of MacKinnon and Conaghan it does seek to develop a far more social and group-based understanding of harm and critique understandings of harm as merely affecting 'unattached, autonomous individuals'.[417] Her understanding of female connectedness and interdependency is useful in reflecting the centrality of sociality within subsistence harms, in terms of social survival networks and the gendered impact of these harms.[418]

Recent theories of international harm may also provide some scope for a broader conceptualisation of harm.[419] In general, the literature on the concept of international harm and crime tends to ignore and marginalise harms centred on subsistence needs, focusing again on physical integrity harms.[420] However, the work of legal philosopher Larry May provides some theoretical grounds for including deprivations of subsistence needs within the notion of international harm.[421] Although May draws to some extent on traditional understandings of harm, he also perceives harms relating to subsistence alongside harms to physical security as being sufficiently serious to constitute international harms.[422] May's "security principle" argues that international criminal jurisdiction can arise 'if a state deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence'.[423] For an offence to constitute an international crime, May argues that this "security principle" should arise alongside his "international harm principle".[424] May therefore argues that international criminal jurisdiction is founded on the basis that humanity is harmed when attacks are committed against individuals due to group

[416] Ní Aoláin, n 399 above, 222.
[417] *ibid.*
[418] *ibid.*
[419] Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005); Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007).
[420] For accounts which do not address issues of subsistence needs, see Kirsten J. Fisher, 'The Distinct Character of International Crime: Theorizing the Domain' (2009) 8(1) *Contemporary Political Theory* 44; Richard Vernon, 'What is Crime Against Humanity?' (2002) 10 (3) *Journal of Political Philosophy*, 231; David Luban, 'A Theory of Crimes Against Humanity' 29 *Yale Journal of International Law* 85.
[421] May (2005), n 419 above, 68.
[422] *ibid.*
[423] *ibid.*
[424] *ibid,* 70.

membership or when committed by states or other group entities, which will be discussed below.[425]

This theory places deprivations of subsistence on a level with harms to physical security and marks a significant move away from the traditional focus on physical integrity issues. May understands physical security and subsistence in terms of constituting basic human rights and uses this to argue that international criminal law should only be concerned with violations of basic human rights rather than all human rights violations.[426] Although May does not define subsistence, the fact that he perceives this as a basic right suggests that he is indebted to Shue's understandings of subsistence, as constituting minimum economic rights, which is therefore much narrower than the understanding of subsistence proposed within this thesis.[427] Nevertheless, May's theory is an important step towards broadening the concept of harm, and removing some of the traditional obstacles to recognising subsistence harms.

ii) International law as a "crisis discipline" and the narrow conception of responsibility

In addition to the concepts of harm underpinning law, there are other key factors which act to marginalise deprivations of subsistence needs. The current limitations of legal recognition of subsistence harms are deeply embedded in the purposes and goals of international law, in its focus on crises and situations of transition, rather than more endemic forms of violence and harm. The emphasis on physical integrity harms and civil/political rights issues is a feature of law's focus on crises and direct or visible harms to the neglect of more subtle and continuous forms of violence, which are largely deemed to be beyond its concern.[428] As Charlesworth critiques, the 'lens of crises in our discipline means that international lawyers concentrate on the public realm, of war and conflict and violence, where crises now occur

[425] *ibid*, 81-90.
[426] *ibid*, 35.
[427] *ibid*, 13 and 70. May does refer directly to Shue in discussing the importance of security. See also Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 2nd edn, 1996) 23.
[428] Charlesworth, n 399 above.

under the glare of television lights...In this way international law steers clear of analysis of longer-term trends and structural problems'.[429]

This crisis-focus is reflected not only in the type of situations which law is concerned with, i.e. situations of visible conflict or repression, but also in terms of the type of harms and violence which law recognises. The visible violence of physical integrity harms therefore corresponds much more closely with the concerns of international law than subsistence harms, and indeed than the socio-economic grievances and structural violence which feed into the perpetration of these harms. Although deprivations of subsistence needs fundamentally do constitute public, political violence, the violence involved is less obvious and immediate, and thus can easily fall outside the agenda of law.

The crisis emphasis of international law is particularly evident in the concerns of international criminal and transitional justice.[430] Current understandings of justice within international legal discourse and practice focus on responding to a particular moment of violence and a particular type of violence, i.e. civil and political rights violations and physical integrity harms.[431] This reflects the mission and purpose of the transitional justice project in promoting transition from conflict to "peace" and from authoritarianism to a (predominantly Western) notion of liberal democracy.[432] The emphasis on transition means that only the direct violence of the recent past falls into the frames of reference of transitional justice.[433] Consequently, transitional justice is predominantly concerned with "extraordinary" violence associated with the excesses of a previous repressive regime or the visible, direct atrocities of a conflict.[434] This will be seen in later chapters, for example, in the mandate and aims of the

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[429] *ibid.* See also Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' (2007) 101(3) *Northwestern University Law Review* 1257.

[430] N. Roht-Arriaza, 'The New Landscape of Transitional Justice', in N. Roht-Arriaza and J. Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (New York: Cambridge University Press, 2006); Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 *Human Rights Quarterly* 321.

[431] Louise Arbour, 'Economic and Social Justice for Societies in Transition' 2007) 40(1) *International Law and Politics* 1; Zinaida Miller, 'Effect of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 (3) *International Journal of Transitional Justice* 266.

[432] For an understanding of the centrality of transition to a liberal democracy within transitional justice discourse and the impact of this on the forms of justice advocated, see Arthur, n 430 above, 326. See also Arbour, *ibid.*

[433] Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 275, 280.

[434] *ibid*, 280.

South African Truth and Reconciliation Commission, which focused on direct, political violence and sidelined and ignored more endemic socio-economic violence, which was an integral feature of Apartheid.[435]

The transitional justice project largely presents the transition from violence to "peace" as a linear process and thus does not seek to recognise the continuities of violence and the spectrum of harms experienced.[436] This has particular gendered impacts in terms of the lack of recognition of many forms of harm which are predominantly experienced by women, including subsistence harms.[437] The emphasis on "extraordinary" violence within transitional justice also places the focus away from situations of ongoing violence, which obscures perpetrations of subsistence harms and their interrelationship with structural forms of violence.[438] In addition, the centrality of transition to liberal democracy within transitional justice again emphasises civil/political rights issues, such as freedom of expression and the rule of law to the exclusion of socio-economic based issues and subsistence needs.[439]

Moreover, international legal discourse has largely failed to engage with recent conflict studies theories, which highlight the relationship between underlying grievances and conflict and thus the importance of recognising all aspects of violence.[440] While subsistence harms may be perpetrated during a particular moment of violence, they reflect continuities of violence which essentially serve to challenge transitional justice's emphasis on transition and its demarcation between violence and peace. International criminal and transitional justice essentially obfuscates wider contexts of violence, particularly underlying structural causes of

[435] Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South African (TRC)' (2002) 32(3-4) *Diacritics* 33.
[436] Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) 1(1) *International Journal of Transitional Justice* 23, 43; Nagy, n 433 above, 280.
[437] Wenona Giles and Jennifer Hyndman, 'Introduction: Gender and Conflict in a Global Context' in Giles and Hyndman (eds), *Sites of Violence: Gender and Conflict Zones* (Berkeley, Ca.: University of California Press, 2004) 3-23; Evelyne Schmid, 'Gender and Conflict: Potential Gains of Civil Society Efforts to Include Economic, Social and Cultural Rights in Transitional Justice' SHUR Project Final Conference "Human Rights in Conflict – The Role of Civil Society" 4-6 June 2009, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1423410> accessed 20 May 2010.
[438] Anne Orford, 'Commissioning the Truth' (2006) 15 *Columbia Journal of Gender and Law* 852. See also Nagy, n 433 above, 281.
[439] For a discussion of the historical development of transitional justice and the importance of transition to democracy within this discourse see Arthur, n 430 above.
[440] Mats Berdal and David M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (London: Lynne Rienner, 2000); Karen Ballentine and Jake Sherman, *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder, Colo.: Lynne Rienner, 2003).

violence and the role of neoliberal economic systems.[441] The lack of legal engagement with the "horizontal inequalities" literature, which emphasises the linkages between socio-economic grievances and conflict, is particularly damaging in terms of recognising the significance of subsistence harms and underlying socio-economic concerns.[442] Moreover, the lack of legal engagement with literature on the economic benefits of violence serves to obscure socio-economic roots of violence and repression.[443] Where, in rare cases, some legal literature does acknowledge socio-economic issues as fostering violence, it sees this as secondary to violations of civil and political rights.[444] Indeed, the language of poverty or lack of development tends to predominate, which suggests acceptance of socio-economic violence, rather than framing it as violations of rights and as harms.[445]

Transitional justice discourse and practice has predominantly focused on producing a form of recognition which reflects understandings of justice and priorities "from above", rather than reflecting grassroots concerns.[446] This has allowed the emphasis on certain types of harm to continue relatively unchallenged.[447] The focus on producing a model of justice informed by concerns at the international and state level is partly historical, since retributive justice is traditionally envisioned as the state's justice, and partly due to the concerns of moulding justice to the short-term needs of political transition. While, on the surface, transitional justice can be seen to include restorative justice concepts, it remains primarily concerned with performing justice as a means of political transition, which, due to time and resource

[441] See Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009) 46-47.
[442] For literature on "horizontal inequalities" see, Frances Stewart (ed), *Horizontal Inequalities and Conflict: Understanding Group Violence in Multiethnic Societies* (Basingstoke: Palgrave Macmillan, 2008); Gudrun Østby, 'Polarization, Horizontal Inequalities and Violent Civil Conflict' (2008) 45(2) *Journal of Peace Research* 143; Frances Stewart, 'Horizontal Inequalities: A Neglected Dimension of Development', Centre for Research on Inequality, Human Security and Ethnicity Working Paper 1 (2003) <http://www.crise.ox.ac.uk/pubs/workingpaper1.pdf> accessed 12 July 2007.
[443] Clarke, n 441 above, 78-79.
[444] For an example of literature which does acknowledge the role of socio-economic grievances in conflict situations but perceives them to play a secondary role to civil/political rights violations see Oskar N. T. Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?' (2007) 29 *Human Rights Quarterly* 674, 704.
[445] See Shedrack C. Agbakwa, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa' (2003) 47(1) *Journal of African Law* 38, 48-49; A Dieng, 'Addressing the Root Causes of Forced Population Displacements in Africa: A Theoretical Model' (1995) *International Journal of Refugee Law* 119, 127. It is interesting that this article is one which concerns harms related to subsistence needs, but yet largely fails to highlight the socio-economic causes and aspects of these harms.
[446] McEvoy and McGregor, n 398 above; Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, Ca.: Stanford University Press, 2010).
[447] McEvoy and McGregor *ibid.*

constraints, limits its participatory potential.[448] In this way, the mechanisms of transitional justice are often distant from those affected by the violence.[449] For example, both the ICTY and ICTR have been physically distant from affected populations and been concerned with formal criminal justice, without providing much space for community control over or engagement with such processes.[450]

Clearly, transitional justice mechanisms have had to engage to some extent with the lobbying of victims' groups and western NGOs, meaning that such processes have not been purely "top-down".[451] Indeed, the advocacy of women's groups in the former Yugoslavia was critical to placing the issue of sexual violence on the agenda at the ICTY.[452] However, such interaction remains the exception rather than the rule and has not yet led to fundamental rethinking of the types of harms recognised, as well as who initiates justice mechanisms and whose voices are actually heard.[453] Moreover, while law does engage to some extent with certain aspects of civil society, this is often a narrow form or conception of civil society, dominated by NGOs, which is not necessarily representative of the varying concerns of survivors.[454] All these issues reinforce law's focus on visible violence and perpetuate the understanding that other forms of violence, such as subsistence harms, are beneath the concerns of law. It is for this reason that the thesis focuses on the work of social movements and non-governmental tribunals as offering a different perspective from the more usual focus

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[448] *ibid.*

[449] Kieran McEvoy, 'Letting Go of Legalism: Developing a "Thicker" Version of Transitional Justice' in *ibid*, 17.

[450] Janine Natalya Clark, 'International War Crimes Tribunals and the Challenge of Outreach' (2009) 9 *International Criminal Law Review* 99; Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 *Journal of International Criminal Justice* 950.

[451] Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice' in McEvoy and McGregor, n 398 above, 99, 120. For the relationship between law and civil society see Emily Haslam, 'Law, Civil Society and Contested Justice' in Marie-Benedicte Dembour and Tobias Kelly (eds), *Paths to International Justice: Social and Legal Perspectives* (Cambridge: Cambridge University Press, 2007). See also Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 259-60.

[452] For literature which discusses the role of women's NGOs and women's rights advocates in promoting the prosecution of sexual violence at the ICTY see Angela M. Banks, 'Social Movements and the Development of Sexual Violence Jurisprudence within International Criminal Law' International Society For The Reform Of Criminal Law 22nd International Conference (2008) <http://www.isrcl.org/Papers/2008/Banks.pdf> accessed 4 March 2010; Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217; Julie Mertus, 'When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia' (2008) 38 *Seton Hall Law Review* 1297.

[453] Marlies Glasius, 'What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations' (2009) 31 *Human Rights Quarterly* 496.

[454] McEvoy and McGregor, n 398 above.

on the relationship between (western) NGOs and international law in current legal discourse.[455] Social movements in particular offer the possibility of greater survivor input and thus provide perspectives that may offer a counter-view to transitional justice "from above".

Causation and responsibility for harms are also key issues which affect the ability and willingness of law to recognise subsistence harms. There are two aspects to this issue, namely law's need for a particular form of responsibility and the complexities of determining the causal link between the deprivation of subsistence needs and the harm involved. Legal recognition of harms requires not only that the particular form of suffering falls within law's categorisation of harm, but also that specific responsibility for that harm can be determined. Agency and responsibility essentially make the difference in law between perceptions of suffering as misfortune or as harm.[456] 'If the dreadful event is caused by the external forces of nature, it is a misfortune and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent ... have brought it about, then it is an injustice and we may express indignation and outrage.'[457] Issues of agency are particularly problematic in the context of the ability of subsistence harms to be presented as resulting from natural disasters or as unforeseen consequences of physical integrity harms, and the difficulty in pinpointing the human and individual agency involved, as seen with regard to the Ukrainian famine.[458] Presenting deprivations of subsistence needs as natural disasters prevents the existence of harm, by precluding the existence of human agency.

The issue of causation is not commonly discussed in international criminal law, since with many of the physical integrity and property offences the causal link between the perpetration and the harm is clear.[459] The thesis argues that there is a clear causal link between

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[455] For literature which perceives civil society predominantly in terms of NGOs, see Holly Cullen and Helen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1(1) *Non-State Actors and International Law* 7; S. Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan Journal of International Law* 183.

[456] Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990); Nayar, n 396 above.

[457] Shklar, *ibid*, 1.

[458] David Marcus, 'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245.

[459] Issues of causation have arisen more recently in regard to incitement to commit genocide, particularly centring on the cases of media incitement in the Rwandan Genocide. In the Media Case the Trial Chamber found that 'the causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement'. *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Trial Chamber Judgement, 3 December 2003, ICTR-99-52-T. See Larry May,

acts/omissions that deprive individuals or groups of their subsistence needs and the resulting physical, mental and social harm. However, proving such harm may be difficult considering that hunger, malnutrition and loss of physical and mental health are often considered as expected and indirect consequences of conflict and open violence.[460] Moreover, outside interventions, such as humanitarian aid, may pose issues in regard to the causation of the harm.

The problem of causation is reflected in the so-called "toxic torts" in international law, such as the Bhopal situation.[461] Such cases, while obviously very different from subsistence harms, have starkly illustrated the problems of imposing responsibility for harms where the causal link between the act/omission and the harm is difficult to perceive. In such cases, which often involve long-term impacts to health and survival, proving that the harm resulted from the act/omission rather than from other factors is problematic.[462] However, subsistence harms present fewer problems regarding causation. While they do result in long-term physical, mental and social health problems which could also be put down to other factors, unlike with toxic torts situations there should be no doubt as to the impact of the act/omission on human survival. While in "toxic torts" cases scientific proof may be necessary to ascertain whether a particular chemical could cause the particular health problems, the causal link between depriving people of their means of subsistence and the resulting harm is much easier to imagine and prove.

Subsistence harms fundamentally are perpetrated, often deliberately, but at least with knowledge or foresight of the consequences of such harms. Accordingly, portrayals of such harms as natural disasters or unforeseen consequence of other violence, within legal

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Genocide: A Normative Account (Cambridge: Cambridge University Press, 2010) 186-87; Joshua Wallenstein, 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide' (2001) 54 *Stanford Law Review* 351.

[460] For example, the ICC Prosecutor has recently used the language of direct and indirect deaths. 'It is not my role to have a total number of figures but we evaluate the numbers, and there is a series of studies saying at least 40,000 people were killed directly and 100,000 people died as an indirect consequence, of the removal, from starvation and diseases'. Interview on Al Jazeera Television, 20 June 2008, quoted in Andrew T. Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 829, 834.

[461] Jamie Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29 *Osgoode Hall Law Journal* 1.

[462] Steve Gold, 'Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence' (1986) 96 *Yale Law Journal* 376.

discourse, academic literature and the media, need to be vehemently rejected and shown to be false.[463] The danger in perceiving deprivations of subsistence needs as unforeseen consequences of physical integrity harms is that the harm itself and responsibility for it is negated. Harm only exists in terms of the physical integrity attack, rather than the perpetration and experience of deprivations of subsistence needs. Likewise the responsibility lies only in terms of the physical integrity harm, the consequences of this harm are therefore not attributable to direct human agency. Despite clear links between human agency and the perpetration of subsistence harms, law's current conception of responsibility does pose some problems regarding the recognition of these harms, as seen in regard to the substantive offences.

International criminal law's emphasis on individual responsibility and autonomy in many ways denies the existence of other forms of agency such as social interactions and relationships to structures of violence and dominant economic systems, which are crucial to the perpetration of subsistence harms.[464] Fundamentally, this allows law to treat many types of deprivations of subsistence needs as simply *misfortunes* which *occur* rather than as harms which are perpetrated and thus present such deprivations as matters not to be dealt with by law.[465] As Simpson summarises, 'the criminal law is an exercise in abstracting motivation from situation, in decontextualizing events, and in substituting individual culpability for social or political responsibility'.[466] Transitional justice is focused on presenting a clear demarcation between victims and perpetrators, which is not always tenable and promotes obscured understandings of events. The phenomenon of child soldiers illustrates that distinctions between perpetrators and victims are blurred within situations of contemporary conflict and political repression.[467] Indeed, the victim/perpetrator dichotomy prevents a recognition of the underlying socio-economic injustices and grievances which fostered

[463] On the issue of human responsibility for famine see Marcus, n 458 above, 245.
[464] Clarke, n 441 above, 55; Antony Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) *Chinese Journal of International Law* 77.
[465] For the issue of the distinction between misfortune and legally recognised harm, i.e. injustice, see Upendra Baxi, 'Operation "Enduring Freedom": Towards a New International Law and Order?' (2001) 2 *Law, Social Justice and Global Development Journal*
<http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/baxi/> accessed 23 June 2009.
[466] Gerry Simpson, *Law, War and Crime* (Cambridge: Polity, 2007) 157.
[467] Erin K. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen' (2009) 47 *Journal of Modern African Studies* 163.

conflict and violence in the first place.[468] Some perpetrators may be victims of underlying socio-economic marginalisation and exclusion, which may be central to their involvement in the violence.

This is even more problematic in the international arena, given the widespread and systematic nature of the violence, which relies on larger structures to create the conditions for the individual acts to occur.[469] International law frequently fails to understand that the perpetration of massive harms requires social relations in terms of roles, bureaucracies and hierarchies which often 'splinter any coherent sense of congruity between acts and consequences'.[470] This is often the case regarding subsistence harms, which may be perpetrated through bureaucratic structures that obscure the causal link between the action and the harm as well as obfuscating responsibility, as is the case within Burma's military regime.[471]

Although the emphasis on individual responsibility represents a deliberate strategy to prevent the condemnation of whole communities, and hence, supposedly, promote societal reconciliation, this essentially distorts the nature of responsibility and conceals the agency involved in certain harms.[472] As Veitch highlights, 'between the harm and the human agency lie a whole series of forms and structures of action that simultaneously connect and disconnect the two'.[473] It is this complexity regarding social relations of action which law glosses over in favour of a more simplistic, but an inherently distorted, understanding of agency, which obfuscates the perpetration of and responsibility for subsistence harms. The role of structural violence and the complicity of western powers in the perpetration of

[468] Shaw and Waldorf, n 446 above, 8-10.
[469] Martii Koskenniemi, 'Between Impunity and Show Trials' (2002) *6 Max Planck Yearbook of United Nations Law* 1.
[470] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon: Routledge-Cavendish, 2007) 11. See also Neta C. Crawford, 'Individual and Collective Moral Responsibility for Systemic Atrocity' 15(2) (2007) *Journal of Political Philosophy* 187, 190.
[471] People's Tribunal on Food Scarcity and Militarization in Burma, *Voice of the Hungry Nation* (1999) <http://www.foodjustice.net/burma/1996-2000tribunal/report/index.htm> accessed 8 September 2008.
[472] Mirjan Damaska, 'What is the Point of International Criminal Justice' (2008) 83 *Chicago-Kent Law Review* 329. See Veitch, n 470 above, 31.
[473] Veitch, *ibid*, 42.

subsistence harms is also obscured through the model of individual criminal responsibility, and indeed of state responsibility under human rights law.[474]

Therefore, the reasons for the lack of legal recognition of subsistence harms stem essentially from traditional understandings within law as well as the limited priorities of transitional justice. The next section will highlight the reasons why the thesis argues that legal recognition of subsistence harms is so important. Clearly, legal recognition presents significant problems, given law's current narrow understanding of harm and its focus on transitional or crisis situations. Nevertheless, promoting greater recognition of subsistence harms within law would send out a powerful normative signal that such harms do constitute a certain form of violence and will no longer be tolerated by law.

iii) The importance of legal recognition of subsistence harms

Subsistence harms are often sufficiently serious and widespread to constitute international crimes, and recognition of this is essential if such harms are to be addressed and redressed. The thesis is premised on the belief that law can make some difference regarding responses to, and in time possible preventions of, subsistence harms. The argument is therefore normative, in the sense that law can play some role in addressing subsistence harms and that such a role would be beneficial in providing some sense of justice and beginning to redress the impact of the harm. Considering the widespread and devastating effects of subsistence harms, if law can play a role in addressing these harms and mitigating their effects, this, at the very least, needs to be explored.

The fact that international law can now be seen to play any real role in addressing harms lies in the emergence of international criminal justice and transitional justice mechanisms within the last two decades. International law now has some mechanisms of dealing with international harms, which it had lacked since the end of the Nuremberg and Tokyo Tribunals

[474] For literature which discusses structural violence and its silencing by law see Paul Farmer, *Pathologies of Power: Health, Human Rights and the New War on the Poor* (Berkeley Ca. University of California Press, 2003) 40; Joseph Nevins, '(Mis)Representing East Timor's Past: Structural Symbolic Violence, International Law and the Institutionalization of Injustice' (2002) 1(4) *Journal of Human Rights* 523. See also Anghie and Chimni, n 464 above, 89-90.

and the deadlock of the Cold War.[475] Consequently, discussion of whether subsistence harms can be dealt with by these systems is not just a hypothetical exercise but one which can have real world implications. Despite the obvious limitations in the scope and power of international justice at present, which will be discussed below, legal mechanisms are now in place to allow law to at least begin to have some impact on these harms.[476] This ability presents a powerful reason why subsistence harms should now be recognised by law. The previous chapter has shown that subsistence harms continue to be significant, and are perhaps of renewed importance, as a weapon of contemporary conflict, political repression and discrimination. The scale of the perpetration of these harms and their devastating impacts necessitates that international criminal and transitional justice, which now have some power to act, do so in relation to these harms.

The primary importance and impact of legal recognition of subsistence harms lies in the ability of law to name harms. As opposed to other forms of recognition, law's power and significance is its authoritative role in acknowledging and condemning wrongs through its articulation of crimes.[477] The procedure of justice confers legitimacy in terms of claims of objectivity, fairness and rationality, which cannot be matched outside of law. While this legitimacy is in many ways illusory, the power of this claim should not be underestimated.[478] As Nayar highlights, 'Law has the power and authority, it seems, to "categorise" suffering, its determination, "judgement", inscribing upon the social memory the thin, but crucial, line between "violation" and "misfortune"'.[479] Legal recognition involves an understanding of the wrongfulness of the perpetration of the harm concerned and a collective condemnation of that harm. As such, law performs a crucial normative function, outlining what constitutes

[475] Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2; Priscilla Hayner, 'Fifteen Truth Commissions, 1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly*.

[476] Most notably, the US is yet to ratify the Rome Statute, which has led to questions over the significance and power of the ICC to prosecute perpetrators of international crimes. For literature which discusses the issues surrounding the US stance on the ICC and the impact this may have on prosecuting international crimes see, for example, Jamie Mayerfeld, 'Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights' (2003) 25 *Human Rights Quarterly* 93; Jelena Pejic, 'The United States and the International Criminal Court: One Loophole too Many (2000) 78 *University of Detroit Mercy Law Review* 257.

[477] Nayar, n 396 above.

[478] For a critique of this claim see Veitch, n 470 above. See also B. S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3, 15.

[479] Nayar, n 396 above.

harm and what behaviour is not acceptable, by condemning that harm.[480] The harm perpetrated and experienced is recognised as an international crime, the heinous nature of the crime is acknowledged and the law prohibiting the perpetration of the violence is upheld. Through law, the impact and experience of such behaviour is also endowed with a special significance.

Thus, in naming deprivations of subsistence needs as harms, the law would be affirming the wrongfulness of such deprivations and establishing a framework wherein subsistence harms would be condemned as international crimes, and thus legally recognised as among the most heinous forms of violence. A further impact of legal recognition is the mobilising power of law. Law's naming of certain harms as a category of violence amenable to legal recognition allows groups to voice their concerns through the discourse of law. The language of harm and crimes confers a particular significance upon the suffering involved, which allows NGOs and survivors' groups to demand that authorities act to address and redress these harms. In this way, social movements draw on the legitimacy and moral force of law to voice their concerns regarding harms recognised. The legal recognition of subsistence harms would therefore open up a space for discussion of the perpetration and experience of these harms in wider society and provide survivors with some tools to be able to pursue their demands.

Legal recognition of subsistence harms would also have clear impacts in relation to the acknowledgement of gendered harms and of the types of violence experienced by women. International law traditionally recognises and addresses harms predominantly experienced by men, while ignoring and marginalising harms experienced by women.[481] The current narrow focus of transitional justice on direct, "extraordinary" violence and civil/political rights concerns often fails to capture the types of harms experienced by women.[482] Ní Aoláin and Rooney argue that 'transitional justice discourse, with its almost exclusive focus on male actors, sees only half, albeit the most publicly apparent and visible half, of what is

[480] Damaska, n 472 above.
[481] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: a Feminist Analysis* (Manchester: Manchester University Press, 2000). See also Ní Aoláin, n 412 above, 43.
[482] See Nagy, n 433 above, 285-86; Fionnuala Ní Aoláin, 'Political Violence and Gender during Times of Transition' (2006) 15 *Columbia Journal of Gender and Law* 829; Fionnuala Ní Aoláin and Catherine Turner, 'Gender, Truth and Transition' (2007) 16 *UCLA Women's Law Journal* 229.

happening'.[483] The current gender awareness of transitional justice is essentially limited to fitting women into existing understandings of justice and harm, rather than rethinking these male-defined understandings themselves.[484]

Physical integrity harms and sexual violence are largely (though not necessarily unproblematically) covered by transitional justice, but it ignores many other harms which women experience.[485] As Bell and O'Rourke have highlighted, 'injuries related to narrow understandings of political violence are privileged at the expense of socio-economic injuries suffered predominantly by women as internally displaced persons, head of households and refugees'.[486] Legal recognition of subsistence harms would therefore allow another aspect of women's experiences of violence to be acknowledged. This would mark a shift away from a focus purely on sexual harms, towards recognising a greater variety of gendered harms. As Ní Aoláin argues, 'Placing too great an emphasis on sexual violence risks creating a perception that the "gender" aspect has been covered, thus marginalizing other experiences'.[487] Recognising a wider variety of gendered harms may prevent women from being essentialised within international law, in terms of their experiences being largely equated to the sexual aspects of their identity and to their vulnerability to sexual harms.[488] Such recognition would also open up the issue of the underlying inequalities and everyday violence that render subsistence harms particularly devastating to marginalised groups and especially to women.

On the other hand, the impact of continued non-recognition of these harms would be particularly damaging in presenting such behaviour and suffering as legally acceptable. Non-recognition of harms silences the suffering of survivors and conceals the perpetration of the harm. 'By silencing the victims, their personal and social grievances have no reality ... This

[483] Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women' (2007) 1(2) *International Journal of Transitional Justice* 338, 343.
[484] Ní Aoláin (2006), n 482 above.
[485] Ní Aoláin and Turner, n 482 above, 260.
[486] Bell and O'Rourke, n 436 above, 34.
[487] Ní Aoláin, n 399 above, 240.
[488] For the way in which law essentialises women and their experiences see K. M. Franke, 'Gendered Subjects of Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 813, 822-23; Vasuki Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 799, 805; Nagy, n 433 above, 286.

sort of treatment adds insult to injury, and one can describe its devastating effects as "the wounds of silence"'.[489] Not only is the lack of recognition damaging to survivors of subsistence harms, it also reinforces impunity for these harms. By not recognising subsistence harms fully, law is essentially condoning such wrongdoing and sending out a signal that their perpetration will not be condemned or addressed. This may encourage future perpetrations of similar harms, since perpetrators can be assured that repercussions will not follow, thus perpetuating cycles of violence.[490]

2) The forms of recognition provided by legal mechanisms

Recognition through legal mechanisms does not simply involve acknowledgment but also involves some element of response to the wrongdoing and the suffering experienced, in the form of prosecution of perpetrators and some measures to redress the harm.[491] Clearly, this response is severely limited, due to the inherent selectivity of international criminal and transitional justice regarding the situations and harms addressed, as well as the limited measures provided for redress, as will be discussed below.[492] Nevertheless, law's acknowledgement of the harm permits it to respond to such wrongdoing and begin to address, to some degree, both its perpetration and impact. The recognition conferred by legal mechanisms goes beyond the legal surroundings of the courtroom or truth commission to ensure the recognition and condemnation of harms within wider discourse. Essentially, therefore, the third understanding of recognition as provided by legal mechanisms could potentially feed back into further recognition of subsistence harms as a category of violence, as well as legal recognition of harms through interpretations of the legal framework.

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[489] Frank Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition' (2008) 41 *Cornell International Law Journal* 675, 683.

[490] On the issue of impunity see Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *American Journal of International Law* 7, 11.

[491] Haldemann, n 489 above, 686.

[492] For general discussion of issues of selectivity in international criminal justice see Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005). For specific criticisms of the selectivity shown by the ICC in regard to its early cases, see Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics & International Affairs* 179; Suzan M. Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 265.

The chapter groups the forms of legal recognition into three areas: truth-telling, which includes the acknowledgement of harms told, the development of some form of historical record and claims as to healing; accountability, which includes issues of responsibility, retribution and deterrence; and redress which involves reconciliation and reparations. These forms of recognition clearly interrelate with one another and are all necessary in varying degrees. The discussion of these forms of recognition will therefore outline both the promise of such recognition and the potential pitfalls which need to be acknowledged and avoided, if recognition of subsistence harms through legal mechanisms is to have any beneficial effect. Essentially, the recognition provided by different legal and non-legal mechanisms is crucial to addressing subsistence harms. These different mechanisms provide the forms of recognition of truth-telling, accountability and redress to varying degrees and therefore perform different types of recognition. The current limitations of legal recognition of subsistence harms means that any form of recognition provided by these mechanisms may be crucial in feeding back into law and thus promoting recognition of these harms within the legal framework.

i) Truth-telling and the acknowledgement of harms

One crucial form of recognition is the acknowledgement of testimony through the official recording of harms perpetrated. Both international criminal justice and wider transitional justice mechanisms, such as truth commissions, provide some form of space for the articulation and acknowledgement of harms. International criminal tribunals employ survivor/witness testimony in their processes and allow a limited number of individuals to articulate harms perpetrated or experienced. Truth commissions place much greater emphasis than criminal proceedings on the importance of survivor/witness testimony and are fundamentally premised on the importance of the articulation of harms perpetrated and experienced.[493] Recognition of harms is then achieved through the validation of such testimony by the reaction of the court or commission and their verdict or findings. Transitional justice increasingly prescribes some role to certain traditional justice mechanisms, such as the Gacaca Courts in Rwanda, as a space for truth-telling and recognition of harms. The Gacaca Courts, for example, provide some form of space for truth-telling through victim and perpetrator testimony and community discussion of harms

[493] Minow, n 398 above, 59-60.

perpetrated.[494] In this way, all these mechanisms provide some form of space for the articulation of harms, although the degree of space allowed varies between the mechanisms.[495]

The verdict of a court or the findings of a truth commission also provide some form of historical record of the harms.[496] This fulfils a didactic role in allowing wider society and future generations to understand the perpetration and experience of violence. These legal mechanisms provide information as to the perpetration of particular harms as well as potentially providing some understanding of the overall context wherein harms were perpetrated.[497] Such a record can go some way towards establishing an understanding of a particular episode of violence and challenging representations of the past which may have been central to the outbreak of violence.[498] In this way, the perpetration of subsistence harms could be acknowledged and publicised by these processes, allowing future generations to understand the use of these harms as weapons of conflict and repression.

Nevertheless, international law is limited in its ability to provide a record of violence and harms. The truth presented by a tribunal or truth commission is often fundamentally restricted by its original agenda or mandate.[499] While truth commissions have greater potential to uncover the contexts surrounding the perpetration of violence and harms, in reality the scope of investigation is again profoundly limited. As will be seen in Chapter 4,

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[494] Clark, n 398 above, 765.

[495] This issue of traditional justice, however, is not addressed here in any detail as this lies beyond the scope of the thesis.

[496] Minow, n 398 above, 60. For arguments against the ability of international criminal trials to provide an historical record see Damaska, n 472 above, 338. He argues that 'The best that can be expected of [criminal trials] is to provide fragmentary material as a scaffolding for subsequent historical research'. On the other hand, Wilson argues that the crimes of genocide and crimes against humanity necessitate a wider understanding of harms perpetrated because they require more than just individual action. Thus, he argues that this, together with the fact that these tribunals are international and thus less bound up with distorted national identity narratives, forces tribunals to investigate harms and the context of them more widely and develop historical inquiry. 'Where narrative and the law have been held to be incompatible, international criminal law now appears to rely on historical consideration and contextualization to secure convictions.' Richard A. Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the former Yugoslavia' (2005) 27 *Human Rights Quarterly* 908, 940.

[497] Haldemann, n 489 above, 675.

[498] Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 *Human Rights Quarterly* 95.

[499] Nagy, n 433 above, 276; Vasuki Nesiah, 'Gender and Truth Commission Mandates' International Center for Transitional Justice <http://www.ictj.org/static/Gender/0602.GenderTRC.eng.pdf> accessed 12 November 2009.

existing truth commissions have often restricted the truth told to meet the boundaries of their original mandates, which have frequently been informed by political aims and goals.[500]

Similarly, whilst appearing more participatory and less restrictive in terms of their agendas, traditional justice mechanisms, such as the Gacaca Courts in Rwanda, may well also privilege certain harms and constrain testimony.[501] These informal mechanisms may not promote sufficient space to voice the range of harms experienced, particularly regarding women, who may well be marginalised within such traditional processes and have their voices stifled.[502] As McGregor highlights, 'what may appear as an "organic" response may actually reflect an internal power manifestation by community leaders or prominent and professionalised civil society organisations'.[503] Essentially, any historical record or collective memory produced by legal mechanisms presupposes a degree of selectivity in that some "truths" will be ignored or sidelined, as a result of the nature of the questions asked and the original mandates.[504] As Miller comments, 'Despite its claims to exposure, revelation and memorialisation, the project of transitional justice may simultaneously perpetuate invisibility and silence'.[505]

However, the limitations of existing truths should not mean that such mechanisms are abandoned, but rather that their limitations are acknowledged and the scope of these mechanisms is extended to allow a wider range of truths to be told. Essentially, recognition through truth-telling is crucial in ensuring that harms are taken seriously and that the injustice of their perpetration is not simply ignored. Both international criminal trials and truth commissions have the potential to play a key role in validating survivors' experiences by recognising their suffering as constituting a legal harm and thus helping to restore the dignity

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[500] *ibid*, 276-79: Ní Aoláin and Turner, n 482 above, 274; Miller, n 431 above, 268.
[501] Lorna McGregor, 'International Law as a "Tiered Process": Transitional Justice at the Local, National and International Level' in McEvoy and McGregor, n 398 above, 61.
[502] Sarah L. Wells, 'Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda' (2005) *Southern California Review of Law and Women's Studies* 167. See also Lino Owor Ogora, 'Moving Forward: and Traditional Justice in Northern Uganda' (2009) Institute for Justice and Reconciliation <http://www.ijr.org.za/publications/publications-v2-1/moving-forward-traditional-justice-and-victim-participation-in-northern-uganda/> accessed 12 January 2010.
[503] McGregor, n 501 above, 61.
[504] See Emilios Christodoulidis and Scott Veitch, 'Reflections on Law and Memory' in Susanne Karstedt (ed), *Legal Institutions and Collective Memories* (Oxford: Hart Publishing, 2009) 76.
[505] Miller, n 431 above, 267.

of the survivor.[506] This relates to the theories of recognition which emphasise the importance of recognition to self-respect and identity.[507] Law 'recognizes the claim of the subject to be a member of "humanity" and in this way repudiates the traumatic act that "dehumanizes" the victim. It understands justice as the institution of collective international norms, which recognize the victim as a member of humanity'.[508] In recognising the victim in this way, the mechanisms of international justice have the potential to begin to counter the injustice of the harm by condemning its perpetration and the violence survivors have suffered.

While not all survivors will have the opportunity to tell their experience of harm in this way, the recognition of the same harm experienced by others may provide some sense of validation in itself, and crucially acts to prevent the harms committed from being ignored.[509] This form of recognition therefore potentially serves to counter a further harm and injustice to survivors of the silencing of the wrongdoing. However, as already argued, existing theories of recognition are problematic in tending to over-emphasise victim identity.[510] While recognition should be seen in terms of the importance of victim validation, applying theories of recognition could promote an over-emphasis on victim identity. It is the experiences of the harms themselves which the thesis argues should be central to recognition, rather than an emphasis on victim identities, which could be divisive and obscure wider forms of victimhood.

While truth-telling may be significant to many survivors, the thesis does not subscribe to an understanding of such recognition as inevitably leading to psychological healing of harms.[511] Examination of the practices and concerns of international justice mechanisms has raised doubts over whether they actually do treat witnesses and survivors with dignity and

[506] Kirsten Campbell, 'The Trauma of Justice: Sexual Violence, Crimes Against Humanity and the International Criminal Tribunal for the Former Yugoslavia' (2004) 13(3) *Social and Legal Studies* 329, 339.
[507] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, Mass.: MIT Press, 1996); Axel Honneth, 'Recognition and Justice: Outline of a Plural Theory of Justice' (2004) 47(4) *Acta Sociologica* 351; Nancy Fraser, 'Rethinking Recognition' (2000) *New Left Review* 107.
[508] Campbell, n 506 above, 339.
[509] Minow, n 398 above, 69.
[510] Seyla Benhabib, *Claims of Culture: Equality and Diversity in the Global Era* (Princeton NJ.: Princeton University Press, 2002) 55-68.
[511] Minow, n 398 above.

consequently whether such recognition provides a sense of justice and promotes healing.[512] The practice of framing and restricting testimony within transitional justice mechanisms, which will be discussed in subsequent chapters, and the distance of many tribunals from affected communities, certainly calls into question claims that truth-telling is necessarily cathartic.[513] Moreover, it must be recognised that psychological healing is complex and long-term, and is not a simple, linear process.[514] Indeed, the assumption within much transitional justice discourse that there is a causal relationship between truth-telling and healing is based on a 'profoundly simplistic view of how psychotherapy works'.[515] As Summerfield reminds, 'The question of how people recover from the catastrophe of war is profound, but the lesson of history is straightforward. "Recovery" is not a discrete process: it happens in people's lives rather than in their psychologies. It is practical and unspectacular, and it is grounded in the resumption of the ordinary rhythms of everyday life - the familial, sociocultural, religious, and economic activities that make the world intelligible'.[516]

Essentially, the approach of current transitional justice misunderstands both the nature of many forms of harm and their effects. The process of healing following the perpetration of subsistence harms is complex and cannot be brought about simply through the ability of certain survivors to testify to the harms experienced. Rather, far more concrete and tangible measures are also needed, as will be discussed below. The primary significance of recognition, in the form of truth-telling and validation, is rather in acknowledging harms and going some way towards validating survivors' experiences. This would be significant in exposing the often silenced issue of subsistence harms.

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[512] See Marie-Benedicte Dembour and Emily Haslam, 'Silencing Hearings? Victims-Witnesses at War Crimes Trials' (2004) 15(1) *European Journal of International Law* 151.

[513] See for example, *ibid.* See also Barbara Russell, 'A Self-Defining Universe? Case Studies from the "Special Hearings: Women" of South Africa's Truth and Reconciliation Commission' (2008) 67(1) *African Studies* 49; Fiona C. Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (London: Pluto Press, 2002). While there have been some outreach efforts by the ICC to lessen the impact of this physical distance from the Court, such efforts have received some criticism in terms of being inadequate. See Glasius, n 453 above, 511.

[514] See David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 *Human Rights Quarterly* 592. For a discussion of the psychological impact of trials on survivors see Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?'(2005) 46(2) *Harvard International Law Journal* 295.

[515] Laurel E. Fletcher and Harvey M. Weinstein, 'A World Unto Itself? The Application of International Justice in the Former Yugoslavia' in Stover and Weinstein, n 398 above, 593-94.

[516] Derek Summerfield, 'Effects of War: Moral Knowledge, Revenge, Reconciliation, and Medicalised Concepts of "Recovery"' (2002) 325 *British Medical Journal* 1105.

ii) Accountability and responsibility

Testimony fundamentally involves some articulation of responsibilities for harms, particularly within criminal trials where acknowledgement of harms is centred on the prosecution of those held responsible. The retributive justice model of criminal tribunals provides the most obvious form of accountability through trial and punishment of individual offenders. However, accountability is also important to restorative justice theory, but is expressed in terms of acknowledgement of harms by perpetrators and some form of atonement, rather than through punishment.[517] As highlighted above, the recognition of responsibility is inherently limited within international criminal law.

Firstly, this limitation relates to practical issues of resource constraints, in that only a small number of perpetrators will be brought to justice in this way.[518] In light of these constraints, a certain degree of selectivity is also instituted in terms of the types of harms deemed politically significant enough to prosecute, as will be discussed in the following chapter.[519] Secondly, and more profoundly, the emphasis on individual criminal responsibility within transitional justice serves to obscure and render invisible other responsibilities.[520] In particular, this hides the complicity of beneficiaries of harms and the role of external influences such as multinational corporations and foreign (often Western) governments in the perpetration of harms, as seen in relation to Guatemala and East Timor.[521]

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[517] This form of accountability is based on the understanding of the need to restore social relationships damaged by the perpetration of harm, through acknowledging harms perpetrated and employing measures to repair the harm. Jennifer Llewellyn, 'Truth Commissions and Restorative Justice' in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (Cullompton: Willan Publishing, 2007) 351, 355.

[518] Branch, n 492 above, 179, 194. Branch argues that to 'talk about justice as being realized through the capture of five men and to spend millions of dollars and a massive international effort on capturing them in the midst of a humanitarian disaster ... is myopic and morally indefensible'.

[519] This selectivity is particularly evident within the prosecutions in the ICC, for example the *Lubanga* case which is focused upon crimes involving child soldiers. See Glasius, n 453 above, 506.

[520] Ní Aoláin and Turner, n 482 above, 231.

[521] As already seen, foreign governments, such as the US, were complicit in the violence in these countries, through the provision of military funding or simply by turning a blind eye to the violence. In addition, structural violence, perpetrated partly through multinational corporations and the policies of foreign governments, has been a significant feature of the violence in both Guatemala and East Timor. See Recovery of Historical Memory Project, *Guatemala: Never Again!* (Maryknoll, NY: Orbis Books, 1999) 523; Susanne Jonas, Ed McCaughan and Elizabeth Sutherland Martínez, *Guatemala Tyranny on Trial: Testimony of the Permanent People's Tribunal* (San Francisco, Ca.: Synthesis Publications, 1984); Nevins, n 474 above. However, as will be seen, truth commissions have generally failed to fully explore these complicities, particularly in relation to issues of structural violence.

Nevertheless, despite such inherent limitations, recognition through accountability mechanisms can have some normative effect, particularly if political and military leaders are brought to trial.[522] Such accountability is also often portrayed as fulfilling a deterrent role through preventing absolute impunity.[523] This deterrent function is widely disputed, in part due to the selectivity of international justice and its relatively nascent state.[524] While the selectivity of international justice is problematic, it does not completely preclude a deterrent effect, since 'deterrence does not require that every offender be punished, only that the threat of punishment is sufficiently real'.[525]

In essence, then, this deterrent role may be largely symbolic and work on a long-term basis, since, by creating some system of accountability, future perpetrators may be forced to "think twice" and moderate their behaviour so as not to be seen to violate accepted norms.[526] Even the small possibility that future prosecution of subsistence harms may act as a deterrent in the long-term illustrates the significance of recognition through international criminal tribunals. Accountability is equally important in preventing the perceived injustice of impunity, and providing survivors and wider society with a sense that when harms are committed some of those responsible will be held to account.[527] Again, few survivors will ever see the perpetrators of harms committed against them brought to justice in this way, meaning that accountability remains predominantly symbolic.

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[522] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton NJ.: Princeton University Press, 2000).

[523] Julian Ku, 'Do International Criminal Trials Deter or Exacerbate Humanitarian Atrocities' (2006) 84 *Washington University Law Review* 777.

[524] David Wippman, 'Atrocities, Deterrence and the Limits of International Justice' (2000) 23 *Fordham International Law Journal* 473. See also Pablo Castillo, 'Rethinking Deterrence: The International Criminal Court in Darfur' (2007) 13 UNISCI Discussion Paper <http://revistas.ucm.es/cps/16962206/articulos/UNIS0707130167A.PDF> accessed 9 May 2008. Kim's and Sikkink's research on the available data from domestic human rights trials has suggested that there is some deterrent effect and that there has been an improvement of human rights protections following trials within the countries concerned, and to some extent within neighbouring countries. These findings are encouraging, but far more research is needed on the issue of deterrence in the international arena. Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Trials' (forthcoming) <http://www.tc.umn.edu/~kimx0759/Kim.Sikkink%20ISQ_title.pdf> accessed 25 July 2010.

[525] Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities' (2006) 5 *Journal of Human Rights* 107, 119.

[526] Akhavan, n 490 above, 11.

[527] Neil J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law and Contemporary Problems* 127, 128.

Nevertheless, the significance of retributive justice to survivors may vary, depending on individual or community understandings of justice and the particular local contexts.[528] As Lambourne argues, 'When people have been wronged they express a desire for justice, which can be interpreted as a human need to feel a sense of justice. But what type of justice is necessary varies with individual circumstances and predispositions, the type of wrong and the local context'.[529] Retributive justice theory often simplistically asserts victims' desires for retribution where, in reality, survivors' needs and their conceptions of justice are complex and diverse.[530] Retributive justice may be important to some survivors but may not be the only type of recognition desired or demanded. The inherently contested and social nature of justice means that different individuals and communities will naturally have different understandings of justice and of needs relating to recognition.[531]

Research conducted in Uganda and the Central African Republic, where the ICC has embarked on criminal prosecutions, suggests that there is a desire for retributive justice amongst some survivors, but that many survivors express the concomitant need for other forms of recognition.[532] In particular, this research has suggested that many survivors are concerned with their ongoing struggle to meet their subsistence needs and tend to frame this need for basic resources as a role that should be fulfilled by transitional justice mechanisms. Some survivors have articulated the need for legal recognition of their subsistence needs and have expectations of direct assistance from the ICC.[533]

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[528] Sverker Finnström, 'Reconciliation Grown Bitter? War, Retribution and Ritual Action in Northern Uganda' in Shaw and Waldorf, n 446 above, 135.

[529] Wendy Lambourne, 'Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation' (2004) 4 *Peace, Conflict and Development* 8.

[530] For a critique of this approach see Fletcher and Weinstein, n 515 above. See also Ellen Waldman, 'Restorative Justice and the Pre-Conditions for Grace: Taking Victims' Needs Seriously' (2007) 9 *Cardozo Journal of Conflict Resolution* 91.

[531] Tobias Kelly and Marie-Benedicte Dembour, 'Introduction: The Social Lives of International Justice' in Dembour and Kelly (eds), *Paths to International Justice: Social and Legal Perspectives* (Cambridge: Cambridge University Press, 2007) 1, 9.

[532] Phuong N. Pham, Patrick Vinck et al., 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda' (2005) International Center for Transitional Justice <http://www.ictj.org/images/content/1/2/127.pdf> accessed 4 July 2009; Glasius, n 453 above, 516; Office of the High Commissioner for Human Rights, 'Making Peace our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda' (2007) <http://www.unhcr.org/refworld/country,,OHCHR,,UGA,456d621e2,46cc4a690,0.html> accessed 12 April 2010.

[533] Glasius, *ibid.*

Essentially, recognition can only ever be limited since the diversity of understandings of justice and the different justice needs of survivors mean that law can never satisfy all those seeking recognition.[534] Nevertheless, decisions on the type of recognition pursued in the wake of violence are often taken away from the local populations who experienced the harms.[535] While there has recently been an increasing number of surveys conducted on survivors' priorities for justice, as Shaw and Waldorf remind, such priorities are unlikely to be adhered to if this contradicts the norms of transitional justice.[536] This has often led to an emphasis on retributive justice, to the detriment of other forms of recognition, which may leave grievances unaddressed and a continued sense of injustice. [537] It is therefore important not to assume that we understand the significance of different types of recognition to survivors and can speak for them, which is why it is necessary to engage with a range of forms of recognition, such as truth-telling, accountability mechanisms and, crucially, mechanisms for redressing harms experienced. The next section will therefore look at the importance of truth-telling and accountability mechanisms to societal reconciliation, but also argue that mechanisms of redress are crucial to reconciliation in the long-term.

iii) Reconciliation and redress

Within the discourse of transitional justice, the process of voicing harms and providing testimony leading to the construction of a collective memory is widely perceived as necessary for societal reconciliation and the reconstitution of a troubled society.[538] The role of legal recognition in reconciliation is premised on both a backward and forward-looking approach, in terms of acknowledging past atrocities and drawing a line under them as a means for society to move towards a "brighter" future.[539] The relationship between truth and reconciliation is premised on the assumption that confronting harms and violence will help to prevent such violence from recurring.[540] 'The goal of reconciliation, ideally, is thus not to forget the past but to make it possible for those wronged and those who have committed

[534] Haslam, n 451 above, 59.
[535] Shaw and Waldorf, n 446 above, 4.
[536] *ibid.*
[537] See Branch, n 492 above, 179.
[538] Campbell, n 506 above, 340.
[539] Teitel, n 398 above, 218.
[540] Hayner, n 398 above, 30.

wrongs to live together in a manner that is respectful and healthy.'[541] Truth-telling is therefore supposed to foster societal reconciliation by preventing wounds from being left to fester.[542] Within this model, reconciliation represents 'a strategy of trauma management writ large in which the nation appears as the subject of war trauma, thus appearing amenable to therapeutic intervention'.[543] Reconciliation is premised on the idea that in hearing about the perpetration and experience of harms, all survivors are encouraged to rethink deeply held beliefs concerning certain groups or individuals.[544]

However, the claim that truth-telling and accountability mechanisms inevitably promote and lead to societal reconciliation should be questioned. Reconciliation is a complex process with various meanings and thus, as with individual healing, does not follow a simple or a linear trajectory.[545] Indeed, this promise of societal reconciliation is placed in doubt by the very limitations of the current truths presented and proclaimed within transitional justice mechanisms, and thus by the lack of recognition currently afforded to subsistence harms. According to the goals of transitional justice, legal recognition tends to promote the immediate needs of reconciliation through drawing a line under the violence and sweeping underlying grievances under the carpet. According to this strategy, through truth-telling the victim/survivor becomes psychologically healed and accepts reconciliation, therefore no longer posing a threat through potential revenge attacks on perpetrators or beneficiaries.[546] A wider focus on healing the physical and social harms experienced is not deemed necessary, since the emphasis is primarily on providing sufficient reconciliation to end violence rather than focusing on the long-term needs of survivors and the deep-seated inequalities and grievances within the society concerned.[547]

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[541] Joseph Nevins, 'Restitution over Coffee: Truth, Reconciliation and Environmental Violence in East Timor' (2003) 22 *Political Geography* 677, 685.
[542] Orford, n 438 above, 856.
[543] Claire Moon, 'Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation' (2009) 8(1) *Journal of Human Rights* 71, 84.
[544] James L. Gibson, 'On Legitimacy Theory and the Effectiveness of Truth Commissions' (2009) 72 *Law and Contemporary Problems* 123, 136; Minow, n 398 above.
[545] On the complexity of the issue of reconciliation in transitional societies, see Stover and Weinstein, n 398 above, 5; Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661.
[546] Robert Meister, 'Human Rights and the Politics of Victimhood' (2002) 16(2) *Ethics and International Affairs* 91, 95-96.
[547] *ibid.*

The current model of international justice provides short-term recognition of certain harms, but this means that underlying inequalities and grievances may be silenced, as seen, for example, with regard to the silencing of socio-economic grievances within the South African Truth and Reconciliation Commission.[548] This model is therefore inherently gendered in terms of focusing on "public" violence, often defined in masculine terms, and silencing subsistence harms and "private" violence predominantly experienced by women.[549] Essentially, the needs of women are sacrificed in order to promote an immediate form of reconciliation which often does not explore or challenge the gendered status quo.[550] Recognition of subsistence harms may therefore go some way towards promoting a deeper form of reconciliation than is currently the case, through the acknowledgement of harms which are currently ignored or sidelined.

The scope of transitional justice needs to be broadened if law is to play a beneficial role in reconciliation. For example, in South Africa the lack of focus on socio-economic issues within the truth and reconciliation process has led to increasing grievances concerning access to socio-economic needs.[551] Thus, societal healing may be achieved on the surface but, in reality, the wound may be left to fester.[552] Notions of societal reconciliation can hold little value for those who have experienced subsistence harms and for whom the continued experience of lack of subsistence needs means that they do not perceive themselves as having a future and a stake in the reconciliation process. Research into attitudes towards reconciliation suggests that the continued experience of harms, including harms involving deprivations of subsistence needs, acts to prevent community and societal reconciliation.[553]

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[548] Mamdani, n 435 above.

[549] For discussion of the way transitional justice focuses on "public" violence see Ní Aoláin and Turner, n 482 above, 239.

[550] For analysis of the gendered nature of the form of reconciliation promoted within the South African TRC see Louise du Toit, *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (London : Routledge, 2009) 9-25.

[551] Derek Powell, 'The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition' (2010) 4(2) *International Journal of Transitional Justice* 1.

[552] Miller, n 431 above, 267.

[553] See in particular Phuong N. Pham, Harvey M. Weinstein and Timothy Longman, 'Trauma and PTSD Symptoms in Rwanda: Implications for Attitudes toward Justice and Reconciliation' (2004) 292(5) *Journal of the American Medical Association* 602. This research links continuing mental suffering, in particular PTSD, to issues of reconciliation and attitudes towards justice. Although the results are complex, the research did find that there was a clear link between these issues, in that those continuing to suffer from PTSD were less likely to support reconciliation and legal justice processes. Thus, for those continuing to experience the mental, and indeed the physical and social impacts of harms, societal reconciliation and legal justice held little value.

In particular, such research has suggested a correlation between access to basic needs and livelihood opportunities and attitudes to former combatants. This research found that perceptions of lack of access to such resources may translate into a negative attitude towards former combatants.[554] Research into reconciliation in Rwanda has highlighted that some women have rejected calls to forgive and reconcile with returning combatants based on their continued experience of deprivations of subsistence needs. These women cite 'their own wants and deprivations - be it a shortage of milk or a roof to cover their heads - as part of what keeps them in an unforgiving frame'.[555]

Similarly, Lambourne's research suggests that there remains a feeling amongst some people in Rwanda that reconciliation is difficult, if not impossible, in the face of the lack of basic needs and that socio-economic justice is necessary, alongside retributive forms of justice.[556] This reluctance to forgive 'to some extent results from the immense fatigue felt by survivors who have so many other priorities in the current Rwandan context'.[557] In Guatemala, many victims also emphasised that 'the only way to put an end to violence is by resolving issues such as land tenancy and living conditions ... Better land distribution is not only a form of restitution; it is, more importantly, a measure to prevent new problems and social conflicts'.[558] Long-term reconciliation relies on the employment of more concrete forms of legal recognition which actually redress the harms and wider grievances experienced by survivors.

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[554] Patrick Vinck and Phuong Pham, 'Peacebuilding and Displacement in Northern Uganda: a Cross-sectional Study of Intentions to Move and Attitudes Towards Former Combatants' (2009) 28(1) *Refugee Survey Quarterly* 59, 74. Studies on attitudes towards justice in eastern DRC have shown that retributive and restorative justice is widely considered as important, but that justice is not an immediate priority. 'As long as basic survival needs are not met and safety is not guaranteed, social reconstitution programmes, including transitional justice mechanisms, will not be perceived as a priority and will lack the level of support needed for their success.' Patrick Vinck and Phuong Pham, 'Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC' (2008) 2 *International Journal of Transitional Justice* 398, 404.

[555] Waldman, n 530 above, 94, citing the research of the film 'In Rwanda We Say ... The Family That Does Not Speak Dies' (Dominant 2004).

[556] Lambourne, n 529 above, 14-15. Her research was based on interviews conducted with survivors and grassroots organisations.

[557] Thomas Brudholm and Valérie Rosoux, 'The Unforgiving: Reflections on the Resistance To Forgiveness After Atrocity' (2009) 72 *Law and Contemporary Problems* 33, 45. They cite the work of Esther Mujawayo which describes her experiences during and following the genocide in Rwanda and her struggles regarding the issue of forgiveness. Amongst her other concerns about forgiveness they cite that she calls for 'some bread for those who survived'. Ester Mujawayo and Souad Belhaddad, *Survivantes: Rwanda, Histoire d'un Genocide* (2004), cited in Brudholm and Rosoux, 45.

[558] Recovery of Historical Memory Project, n 521 above, 97.

Legal mechanisms do have some potential to provide more long-term and tangible forms of recognition and measures to address the consequences of the harms experienced, which in turn could promote reconciliation. The recognition provided by measures of redress is essentially victim/survivor orientated in terms of acknowledging and redressing the impact of the harm rather than focusing on the fact of its perpetration. Such redress is mainly provided through reparations programmes, which offer some degree of repair for harms experienced, through measures such as restitution, compensation, rehabilitation and guarantees of non-recurrence.[559] While reparations have traditionally been associated with truth commissions, significantly the ICC also has the ability to provide reparations to some victims, under Article 75 of the Rome Statute.[560] The ICC has the ability to develop reparation principles, make orders regarding reparations and order that the proceeds of offences be forfeited for the benefit of victims.

Reparations can build on the recognition provided by trials and truth-telling processes, preventing such recognition from appearing to be an empty gesture.[561] They perform a significant symbolic role in being 'the physical embodiment of a society's recognition of, and remorse and atonement for, harms inflicted'.[562] Again, this builds on the validation of survivors' testimonies and experiences provided by truth-telling processes to, in theory, restore the dignity of victims and survivors and promote the equal standing of survivors as citizens of the society concerned.[563] In reality, such validation may depend upon the actualities of the reparations provided and whether they address the needs and concerns of survivors. While symbolic reparations could hold some value in recognising the perpetration

[559] Susan Sharpe, 'The Ideal of Reparation' in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (Cullompton: Willan, 2007) 24. See United Nations Sub-Commission on the Promotion and Protection of Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report, submitted by Theo van Boven, Special Rapporteur, 2 July 1993, E/CN.4/Sub.2/1993/8.

[560] Article 75(1) of the Rome Statute states that 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decisions the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.' For scholarly articles on the ICC's reparations regime see Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3(2) *International Journal of Transitional Justice* 250; Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *Leiden Journal of International Law* 667.

[561] Pablo de Greiff, 'Justice and Reparations' in de Greiff (ed), *The Handbook of Reparations* (Oxford: OUP, 2006) 461.

[562] Naomi Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence' in Stover and Weinstein (eds), n 398 above, 121, 122.

[563] Ernesto Verdeja, 'Reparations in Democratic Transitions' (2006) 12 *Res Publica* 115.

and gravity of subsistence harms, material reparations are particularly pertinent to these harms. Symbolic reparations may seem to "restore" the dignity and equality of survivors with other members of a society, but failure to address issues of subsistence needs, will mean that such equality is essentially illusory.[564] Transitional justice needs to recognise the importance of socio-economic inequalities in regard to the marginalisation of individuals and groups.[565] Material reparation, through restitution or compensation, is a crucial form of recognition for subsistence harms, going some way towards enabling survivors to meet their subsistence needs and resist their existing marginalisation.[566]

However, it is doubtful whether many reparations programmes will address subsistence harms. The UN's recent Resolution regarding reparations policies fails to systematically include subsistence harms or other socio-economic rights violations. Although the UN document has defined victims relatively widely, including persons who have suffered "economic loss" and both individual and collective victims, the emphasis remains on physical integrity harms.[567] Indeed, socio-economic rights are not specifically mentioned within this Resolution and nor is the ICESCR, despite the mention of other human rights treaties. Therefore, while there is an emerging consensus regarding the provision of reparations for harms such as for disappearances and direct murders, there is currently a lack of consensus on whether there is an obligation to provide reparations for other harms, such as forced displacement.[568]

Indeed, the 2008 Office of the High Commissioner for Human Rights (OHCHR) Guidelines on reparations programmes also pay scant attention to subsistence harms. The Guidelines

[564] *ibid*, 122. He highlights that 'many survivors are often left impoverished after mass violence, especially where an entire ethnic or indigenous group was targeted (as in Guatemala), and an apology is not sufficient to reintegrate them into society as full citizens. Thus, material forms of inequality require theorization on a par with symbolic forms. A fundamental goal should be to ensure that any reparations model includes both material and symbolic components'.

[565] Fraser, n 507 above; Elizabeth Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 *British Journal of Criminology* 582.

[566] For the significance of material reparations in situations of deprivations of basic resources see Arbour, n 431 above, 17; Suliman Baldo and Lisa Magarrell, 'Reparation and the Darfur Peace Process: Ensuring Victims' Rights' (2007) International Center for Transitional Justice, Reparative Justice Series <http://www.ictj.org/images/content/8/8/886.pdf> accessed 12 May 2009.

[567] United Nations Resolution 60/147, 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', March 2006, UN Doc. A/RES/60/147.

[568] de Greiff, n 561 above, 7.

acknowledge that reparations programmes have privileged civil and political rights but state that this approach 'is not entirely unjustified', since when resources are limited 'it makes sense to concentrate on the most serious crimes'.[569] This approach serves to perpetuate perceptions that only violations of civil and political rights can constitute 'the most serious crimes'.[570] While it is obviously important to acknowledge resource constraints, this approach ignores the purposes and impacts of reparations in acknowledging harms and providing some degree of redress. It fails to recognise the fact that such restricted application of reparations may only foster further grievances amongst survivors who do not qualify under such a framework, and thus actually be detrimental to societal reconciliation.[571] Moreover, it also fails to acknowledge that the current, narrow scope of reparations is highly gendered, since while women may receive reparations as the relatives of victims, they are less likely within current models to receive redress for the harms they themselves have experienced.[572]

However, even if reparations were provided for subsistence harms, as currently conceived, they would not constitute a simple panacea for these harms. There is a need to be careful not to advocate that subsistence harms are simply added to the list of harms for which reparation is provided, without substantial rethinking as to how such harms can and should be recognised and redressed. Reparations do not lend themselves to recognising and healing underlying injustices which may have contributed to perpetration of harms. Indeed, they are often premised on restoring the victim to their original state, which may perpetuate pre-existing socio-economic grievances and violence and is particularly problematic in relation to the gendered aspects of subsistence harms.[573] As Carranza critiques, 'the existing paradigm

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[569] Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (New York: United Nations, 2008) 20-23. Despite the fact that the former UN High Commissioner for Human Rights, Louise Arbour, expressed a personal concern over the importance of including socio-economic rights within reparations programmes justice in her article, written during her time in this post, these concerns were not translated into official OHCHR policy or guidelines on reparations. See n 431 above.

[570] OHCHR, *ibid*, 21.

[571] Ruben Carranza, 'The Right to Reparations in Situations of Poverty' (2009) International Center for Transitional Justice Briefing <http://www.ictj.org/static/Publications/bp_carranza_reparations_EN_rev2.pdf> accessed 2 February 2010.

[572] Ruth Rubio-Marín and Pablo de Greiff, 'Women and Reparations' (2007) 1 *International Journal of Transitional Justice* 318.

[573] See Kathleen Daly and Julie Stubbs, 'Feminist Engagement with Restorative Justice' (2006) 10 *Theoretical Criminology* 9. For a critique of the notion of 'restoring' in relation to gendered harms see Bell and O'Rourke, n 436 above, 40-41; Kelli Muddell, 'Limitations and Opportunities of Reparations for Women's Empowerment', International Center for Transitional Justice Briefing, September 2009 <http://www.ictj.org/static/Publications/bp_muddell_gender_rev3.pdf> accessed 2 November 2009.

[of reparations] evades the predicament of victims whose poverty and marginalization is attributable to conflict or systematic repression, such as apartheid, or who were already poor to begin with'.[574]

As they stand, reparations have acted to prevent a wide-ranging form of redress and the emergence of a discourse within transitional justice which addresses distributive justice concerns.[575] 'Distributive justice has been off the agenda except as "reparation", which has usually consisted of symbolic acknowledgement more than remedies for past suffering. Certainly restorative justice in which perpetrators contributed to undoing the harm they had caused has not been seriously canvassed.'[576] In this way, reparations may provide a problematic form of legal recognition since they ignore existing vulnerabilities and inequalities which are central to the perpetration of these harms.

Furthermore, while legal recognition in the form of material reparation is important in providing for basic needs, it is crucial not to overemphasise this role and thus equate subsistence harms with material concerns, which leave the physical, social and mental aspects of these harms unaddressed. The increasing emphasis on collective reparations, as ways to address widespread harms and broaden the process of reparation, may go some way towards promoting a more expansive understanding of redress.[577] Nevertheless, while such projects may be beneficial for some victims, there are many challenges to implementing collective reparations, and they may not always benefit marginalised groups within communities.[578] Collective reparations are still primarily thought of in either symbolic or material terms, and have yet to address underlying grievances or provide meaningful reparation to survivors of

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[574] Carranza, n 571 above.

[575] For an approach which argues for distributive justice, alongside the rule of law and retributive justice, see Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, Ma.: Polity, 2002).

[576] Michael Humphrey, 'Human Rights Politics and Transitional Justice' Law and Society Association Australia and New Zealand (LSAANZ) Conference 2008, 7 <http://ses.library.usyd.edu.au/bitstream/2123/4000/4/LSAANZ%20Michael%20Humphrey%20final%20paper.pdf> accessed 12 October 2009.

[577] Lisa Magarrell, 'Reparations in Theory and Practice', International Center for Transitional Justice Reparative Justice Series (2007) <http://www.ictj.org/static/Reparations/0710.Reparations.pdf.> accessed 20 April 2008.

[578] For the benefits and the challenges of implementing collective reparations see International Center for Transitional Justice, 'The Rabat Report: The Concept and Challenges of Collective Reparations' (Report) (February 2009) <http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf> accessed 26 June 2010.

subsistence harms, as will be analysed later in the thesis.[579] Some traditional justice measures, such as the Gacaca Courts, play a more concrete role in redress by instituting punishment of perpetrators through community service, helping to rebuild homes or work on the land, which may go some way to addressing the needs of survivors.[580] However, on their own, such measures will not necessarily be sufficient, due to the scale of the impact of subsistence harms.

These forms of recognition instituted by legal mechanisms are significant, but clearly do not provide a simple solution to the issue of subsistence harms. There are certainly merits to all the forms of legal recognition discussed above. In particular, truth-telling and acknowledgement of harms is crucial in preventing the current silencing of these harms, both in providing a normative function and in providing survivors with a sense of recognition and validation. Moreover, some form of accountability, or at least acknowledgement of responsibility for harms would be important in acting against the current impunity regarding subsistence harms. However, these forms of legal recognition must also be balanced with mechanisms for redress, in terms of providing tangible acknowledgement of harms and meeting survivors' needs. Such redress will always inevitably be insufficient, but it may play some role in fostering a deeper sense of recognition, which may help to promote a move towards societal reconciliation in the long-term. The next section will discuss in more detail the impact that legal recognition of subsistence harms may have and also the limitations of such recognition. It will essentially argue that legal recognition is important, but that alternative approaches may also be necessary due to the inherent problems of law regarding subsistence harms.

3) The impact of legal recognition and the search for alternative approaches

i) Recognition of subsistence harms and the changes this would promote

While all these forms of recognition suffer from various limitations, which are inherently problematic in relation to subsistence harms, such recognition remains important. In

[579] de Greiff, n 561 above, 468-69.
[580] Lyn S. Graybill, 'Pardon, Punishment, and Amnesia: Three African Post-conflict Methods' (2004) 25(6) *Third World Quarterly* 1117, 1124.

particular, the performance of recognition within legal mechanisms would promote crucial changes in terms of a move towards addressing and redressing subsistence harms, which in turn may impact on the concepts and framework of international law. Legal recognition of subsistence harms would act to promote acknowledgement of the nature of subsistence harms, how and why they are perpetrated and their impact on survivors. It would prevent the current silence towards subsistence harms and open up a space for survivors to articulate their experience of these harms and for a wider debate to occur both within and outside of law. Importantly, legal recognition in the forms discussed above would go some way towards providing a sense of justice regarding subsistence harms and address the current impunity which surrounds certain aspects of these harms.

Such recognition would necessarily require shifts in the concepts and aims of transitional justice and, in turn, may be a force for legal change. In order for legal mechanisms to recognise subsistence harms through the forms of truth-telling, accountability and redress, there would need to be an expansion in the scope of international justice from a narrow "crisis" emphasis, to one which addressed long-term issues and socio-economic concerns. There is already some emerging literature which critiques the narrow understanding of justice and framing of harms within transitional justice.[581] This literature seeks to expand the boundaries of transitional justice towards including socio-economic rights and issues of underlying structural violence as causes and consequences of violence.[582] Significantly, Louise Arbour, the former UN High Commissioner for Human Rights, has argued that, 'transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future'.[583] The approach demanded by Arbour would therefore be twofold in recognising past socio-economic injustices and promoting the establishment and protection of socio-economic human rights concerns in the future.[584]

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[581] See Mani, n 575 above; Nagy, n 433 above, 275; Miller, n 431 above; Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) Vol. 2(3) *International Journal of Transitional Justice* 331.

[582] Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development' (2007) 10 *Yale Human Rights and Development Law Journal* 141; Powell, n 551 above, 6-7.

[583] Arbour. n 431 above. See also Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict', Office of the High Commissioner for Human Rights, Women's Human Rights and Gender Unit (2009)
<http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed 12 May 2010.

[584] Arbour, *ibid.*

Since Arbour's promotion of the need to address socio-economic rights issues within transitional justice settings, there have been some small moves towards greater awareness of these issues within the United Nations. Notably, the Secretary General's recent Guidance Note on Transitional Justice mentions socio-economic rights, in contrast to previous UN silence on these issues in relation to transitional justice.[585] However, while the Guidance Note highlights socio-economic rights as possible causes and consequences of conflict or repression, the approach remains limited and there is a lack of recognition of subsistence harms themselves.[586] Indeed, the Note states that 'Successful strategic approaches to transitional justice necessitate taking account of the root causes of conflict or repressive rule, and must seek to address the related violations of all rights, including economic, social, and cultural rights (e.g., loss or deprivation of property rights)'.[587] Again, the language of "property rights" illustrates a failure to recognise subsistence harms.

In addition, the literature which has recently emerged on socio-economic rights in transitional justice settings has so far largely focused on violations of these rights as causes or consequences of violence rather than recognising subsistence harms.[588] Consequently, it tends to perpetuate rather than challenge the existing demarcation in transitional justice discourse between civil/political rights and socio-economic issues and indeed between physical integrity harms and other forms of violence.[589] The legal recognition of subsistence harms would require and promote the expansion of the scope of international justice in ways other than currently visualised within this emerging literature. It would promote a broader understanding of harm within transitional justice and the need to understand more fully the relationship of harms to underlying socio-economic issues and grievances. Essentially, transitional justice needs a theory of recognition which focuses on harms perpetrated and experienced; a theory which does not reify victim/perpetrator identities, but which

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[585] United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010)
< http://www.unrol.org/doc.aspx?d=2957> accessed 29 July 2010.
[586] *ibid.*
[587] *ibid.*
[588] See, for example, Daniel Aguirre and Irene Pietropaoli, 'Gender Equality, Development and Transitional Justice: The Case of Nepal' (2008) 2 *International Journal of Transitional Justice* 356, 377. They still perceive retributive concerns as applying to civil and political rights, and socio-economic rights issues and development as important in terms of the context of violence and for the future of the society concerned.
[589] See, for example, Mani, n 575 above. Although she sees the links between different forms of justice and violence, she still subscribes to the view of international crimes as constituting physical violence, and thus does not acknowledge subsistence harms.

acknowledges the socio-economic as well as the political and cultural inequalities which lie at the heart of violence and act to prevent societal reconciliation. Such a theory needs to reflect the linkages between political marginalisation and socio-economic grievances and the centrality of gender inequalities to these issues.

Moreover, the approach advocated within this thesis would serve to promote a change in relation to the types of gendered harms acknowledged within transitional justice. While some of the emerging literature on the issue of socio-economic rights in transitional justice is relatively gender-sensitive, there remains insufficient attention, within this literature as a whole, to the gendered elements of socio-economic forms of violence.[590] Legal recognition of subsistence harms, if achieved successfully, would necessitate and promote a more diverse understanding of women's experiences of harm. In addition to understanding structural and private forms of violence, legal recognition of subsistence harms would promote understanding of the way in which women experience "public" harms other than sexual violence and thus serve to promote acknowledgement of a wider spectrum of gendered harms.

Recognition of subsistence harms would also require and promote shifts in the understanding of international harm. In particular, full recognition of subsistence harms would require and encourage a rethinking of understandings of harm to humanity. The meaning of a concept of "harm to humanity" is highly controversial and vague, which has led to different understandings of how humanity may be harmed by international crimes.[591] The term could be seen in regards to humaneness, which places an emphasis on the nature of the harm in terms of its inherent inhumaneness.[592] This links to certain substantive elements of the core crimes within international criminal law; war crimes are based to some extent on the principle of humanity in terms of humane treatment, whilst crimes against humanity and genocide either inherently or explicitly include elements of inhumane treatment.[593] While perceiving

[590] For literature which is gender-sensitive see Nagy, 433 above, 285-86 and Aguirre and Pietropaoli, n 588 above. However, other literature which looks at socio-economic issues in transitional justice often does not include or fully address issues of gender. See, for example, Mani, n 575 above.
[591] For discussion of the different conceptualisations of harm to humanity, see May (2005), n 419 above.
[592] Vernon, n 420 above, 236.
[593] Larry May, 'Humanity, International Crime and the Rights of Defendants' (2006) *Ethics and International Affairs* 373. May (2007), n 419 above, 71-74. May conceptualises war crimes as "crimes against humaneness".

humanity in terms of humaneness allows a wide interpretation which would easily include subsistence harms, since these harms are inherently inhumane, this very inclusiveness leaves the problem of the threshold necessary to raise harm to humanity to the level of an international crime. Although, a threshold based on the magnitude of the harms could be applied, this would necessitate quantifying the amounts of harm rather than focusing on the inherent nature of the harm.[594]

More commonly, harm to humanity can be seen in regard to the victim, i.e. humanity.[595] In this sense humanity can have a double meaning, being either the quality of being human; humanness, or the collective of all human beings; humankind.[596] This raises the key questions of how subsistence harms violate humanness and why they offend against all humankind. May argues that 'humanity has interests' including the interest that 'its members, as members, not be harmed'; thus the harm in this sense is to humankind.[597] May sees the harm not just to the individual but to the community, in this sense the world community or humanity. He concedes that there might not be an 'international community' but maintains that all humans have vulnerabilities and shared interests in peace and basic human rights, thus emphasising the consequentialist notion that harm to groups is likely to spill over into other countries and regions.[598] Nevertheless it is questionable whether the vital interests of most humans are at stake when there are harms and atrocities committed in one country or region.[599] Despite international involvement and refugee flows, conflicts and political repression may be largely contained within a particular country and dictators may be perceived primarily as a threat to their own people as, for example, in Zimbabwe.[600]

Perhaps the most convincing understanding of harm to humanity is in terms of harm to humanness. Within this understanding, humanity is normally harmed 'when an act is committed against individuals because of their group affiliations – that is according to things

[594] May (2005), n 419 above, 237.
[595] Vernon, n 420 above, 239.
[596] May (2005), 419 above.
[597] *ibid*, 82.
[598] May, n 593 above.
[599] Andrew Altman, 'The Persistent Fiction of Harm to Humanity' (2006) *Ethics and International Affairs* 367.
[600] International Crisis Group, 'Zimbabwe's Silent, Selective Starvation', 29 August 2002 <http://www.crisisgroup.org> accessed 5 October 2006.

that are beyond their autonomous agency'.[601] In this sense, attacking victims on the basis of group identity serves to deny their individuality, and hence their humanity.[602] Such an understanding of harm reflects the focus of crimes against humanity and genocide on group identity. However, such theorising of group harm, and the way it is often presented within law, over-emphasises identity issues to the neglect of other important aspects of the harm against humanness. Thus, these theories offer little scope for recognising certain international harms, including subsistence harms, unless identifiable and clearly defined victim groups exist.[603] Subsistence harms may be perpetrated on the basis of group affiliation, but this group affiliation may be more to do with perceptions of perpetrators and be based on underlying socio-economic and political grievances, as seen in Rwanda.[604]

The emphasis on group harm within the theories and practice of international criminal law leads to a distorted view of human individuality and sociability, which recognition of the nature of subsistence harms would challenge. Subsistence harms would promote understandings of harm to humanness in terms of what is required for human life and to live as a human being. Humanness incorporates our individual as well as our group consciousness as humans, which means that homes and livelihoods have particular meanings beyond simply the material, which in turn can impact on the physical, social and mental experience of harms.[605] Humans are characterised by the need for meaning in life and social qualities based on cooperation and communal survival networks which are crucial to physical existence.[606] Though the concept of crimes against humanity may in part suggest the importance of social and mental harm in terms of harm to humanness, the way crimes against

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[601] May (2005), n 419 above.

[602] This links to Arendt's view of harm to humanity as an attack on human diversity. Arendt argued that crimes against humanity constitute 'an attack upon human diversity as such, that is, upon a characteristic of the "human status" without which the words mankind or humanity would be devoid of meaning'. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1965) 268-9.

[603] Luban, n 420 above.

[604] *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgement, 2 September 1998, ICTR-96-4-T, para.513; *Prosecutor v. Clément Kayishema and Obed Ruzindana* Trial Chamber Judgment, 21 May 1999, ICTR-95-1, ICTR-96-10.

[605] Though we are social beings, human consciousness also works at the level of the individual, which is why this thesis stresses the mental element of the subsistence harm in terms of the way individuals attach meanings to events and the impact of social exclusion. 'Meaning is created in unique forms within ourselves through the actions and choices we all make.... Every choice we make in everyday life is a way of grasping our part of the world we all cohabit, but in our own terms, in accord with our unique experiences'. See W. Freeman, *How Brains Make Up Their Minds* (London: Weidenfield and Nicholson, 1999) 14.

[606] V. Frankl, *Man's Search for Meaning: An Introduction to Logotheraphy* (London: Hodder and Stoughton, 1964).

humanity are legally framed and philosophically discussed means that they are not reflecting the quality of humanness in terms of a holistic view of physical, mental and social existence, which is crucial for understanding subsistence harms as international crimes. Thus, there is a need to understand harm to humanity both in terms of individuality and our associative nature.

The recognition of subsistence harms would therefore require and promote an expanded conception of humanity, beyond that used within current legal discourse, by acknowledging the fundamental interconnection between humans and our environment and thus the potential harms inflicted on future generations. As seen in the previous chapter, certain types of subsistence harms have huge effects upon the wider environment and thus have long-term effects upon livelihoods and standards of living.[607] Thus, the quality of humanness cannot be divorced from an understanding of the wider environment in which we live, since human life is dependent on the natural environment. There is already considerable legal discourse on the relationship between human life and environmental issues, particularly in terms of linking environmental harms to human rights violations.[608] It may be seen that the thesis emphasises an anthropocentric approach to environmental protection in terms of human subsistence needs. However, understanding the fundamental relationship between long-term human survival and the health of our environment shows the distinction between anthropocentric and intrinsic value approaches to environmental protection to be overstated. Such acknowledgement of the relationship between human life and our environment could be built on in order to develop a broader understanding of humanity within international criminal law.[609]

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[607] On the issue of the relationship between international crimes and environmental harms see Tara Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' (2004) 17 *Georgetown International Environmental Law Review* 697. Jennifer Leaning, 'Environment and Health: The Impact of War' (2000) 163(9) *Canadian Medical Association Journal* 1157.

[608] See Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1991) 28 *Stanford Law Journal* 103; Prudence E. Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10 *Georgetown International Environmental Law Review* 309; Alan E. Boyle and Michael R. Anderson, *Human Rights Approaches to Environmental Protection* (Oxford: OUP, 1996).

[609] Peter Sharp, 'Prospects for Environmental Liability within the International Criminal Court' (1999) 18 *Virginia Environmental Law Journal* 217.

Even where the environment is not damaged, the removal of certain groups from their land and homes can impact on the survival and living standards of such groups for generations to come. There is already some limited basis within international law for understanding this relationship through the notion of intergenerational equity, which the recognition of subsistence harms would therefore build upon. In the *Nuclear Weapons Advisory Opinion*, the International Court of Justice explicitly recognised the significance of future generations. Although this constitutes a limited recognition, since the Court did not explicitly employ a concept of intergenerational equity, the Dissenting Opinion of Judge Weeramantry strongly argued for the Court to explicitly recognise the rights of future generations in terms of intergenerational equity.[610] Such acknowledgement therefore provides some conceptual basis for a broader understanding of humanity within international law, which recognition of subsistence harms both requires but also, hopefully, would promote.

ii) Law's complicities and the need for a "bottom-up" approach

However, while legal recognition of subsistence harms may promote these significant changes, there is a need to be realistic about how far law, as currently framed, can recognise these harms and what changes are simply too great to be possible without fundamentally rethinking international law's role and the concepts upon which it is premised. International law's focus on crises and transition essentially means that some forms of subsistence harms are unlikely to be recognised without such changes and that the structural violence underlying these harms will continue to be treated as an acceptable form of suffering. Thus, while increased legal recognition of subsistence harms would require and promote some shifts in international law, it is important not to overplay such changes and to be realistic about the nature of law itself. Fundamentally, the limitations in international law's ability to recognise and address subsistence harms do not simply result from failures, but reflect law's

[610] The emphasis on future generations was proclaimed in the 'Stockholm Declaration', United Nations, Declaration of the United Nations Conference on the Human Environment, (Stockholm, 1972), U.N. Doc. A/C.48/14. International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, ICJ Reports 1996, para. 35. The Advisory Opinion stated that 'the use of nuclear weapons could be a serious danger to future generations. Ionising radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations'. See also Dissenting Opinion of Judge Weeramantry, at 17 and 57. For literature on this issue see Edith Brown Weiss, 'Opening the Door to the Environment and to Future Generations' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 338, 350.

willingness to accept and implicitly condone certain suffering as well as the lack of political will to deal with these harms.[611]

Although law provides some degree of justice through recognition, paradoxically, it is often deeply implicated in upholding injustice as well, through the silencing of certain suffering, such as particular forms of subsistence harms and wider structural violence.[612] While law positions itself as legitimate and responsible, it plays 'a central role in the profoundly irresponsible production and legitimation of human suffering'.[613] Broadening the scope of international justice to focus on socio-economic concerns may go some way towards encouraging law to recognise suffering which it currently silences, but such shifts by themselves can only go so far. Thus, while the recent literature on socio-economic issues in transitional justice is significant, it does not fully explore the fundamental problems of law. It will not be enough to simply "add" socio-economic justice concerns, given the complicities of law and transitional justice's narrow "crisis" mandate. In failing to address structural violence, in largely supporting the political and economic status quo and in silencing or sidelining subsistence harms, law itself can be seen as complicit in both the underlying contexts and perpetration of these harms.[614] Thus, to analyse law's response to subsistence harms (or lack thereof) without excavating and acknowledging the involvement of law in such harms is to misunderstand the very essence of the problem.[615]

In light of these issues, perhaps the only way to encourage any form of change in relation to these problems of law is for there to be greater influence on international law "from below".[616] If subsistence harms are ever to be recognised fully in law this would probably be social movement led, since western NGOs and international lawyers have largely paid limited

[611] Rajagopal, n 451 above, 182-202.
[612] On the issue of law's acceptance of certain suffering see A. T. Williams, 'Human Rights and Law: Between Sufferance and Insufferability' (2007) 123 *Law Quarterly Review* 133, 144.
[613] Veitch, n 470 above, 11.
[614] For literature which highlights the role of law in supporting structural violence and the dominant political and economic order see Makua wa Mutua, 'Hope and Despair for a New South Africa: The Limits of the Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63, 113; Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27(5) *Third World Quarterly* 767.
[615] Veitch, n 470 above, 95.
[616] On the issue of the complicity of law the perpetration of violence, seeRajagopal, n 451 above; Boaventura de Sousa Santos and César A. Rodríguez-Garavito (eds), *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

attention to deprivations of subsistence needs as harms. Indeed, western NGOs are largely split into those which deal with human rights issues, and predominantly focus on violations of civil/political rights and physical integrity crimes, and those which address humanitarian issues and provide aid in the aftermath of harms, but are frequently not concerned with addressing the perpetration of the harm itself.[617] Such NGOs therefore are not equipped to prioritise or address the issue of subsistence harms. If the move towards recognition of subsistence harms is grassroots led, this may go hand in hand with further developments in regard to "bottom-up" approaches to international justice, in the sense of approaches which are decided at grassroots levels, and increased interaction between mainstream transitional justice and grassroots movements.[618] As Lundy and McGovern argue, a 'bottom-up participatory approach puts communities and those on the front line and receiving end of violent conflict at the very centre of transitional justice'.[619]

The significance of grassroots approaches is that they can voice some survivors' concerns, promote survivor agency and also begin to influence and transform law's own approach to justice and the harms it recognises.[620] 'In post-conflict societies in particular, properly resourced and translated grassroots rights talk and action has the capacity to inspire, to mobilise, and to restore a sense of agency to the powerless.'[621] By attending to the needs and views of survivors, broadly understood, this approach has the ability to apply far more to the specifics of the situation and deliver a deeper form of recognition to the society concerned.

This is not to argue that grassroots approaches are necessarily inclusive or representative of all survivors. Indeed, the term grassroots could be applied to a wide variety of groups with conflicting demands. Clearly, there is the danger that such approaches may institutionalise existing hierarchies and marginalise certain groups, such as women, and so there needs to be

[617] While Amnesty International has attempted to include socio-economic rights in its activism, at present it has done little work in this area and such inclusion remains a token gesture. Similarly, many humanitarian NGOs still are unwilling to engage with the nature of harms, in order to maintain their supposed neutrality. See the Amnesty International website <http://www.amnesty.org/en/economic-social-and-cultural-rights> accessed 18 June 2009.
[618] Shaw and Waldorf, n 446 above, 5.
[619] Lundy and McGovern, n 451 above, 119.
[620] *ibid.*
[621] McEvoy, n 449 above, 36.

a certain degree of caution when discussing grassroots approaches.[622] As McEvoy and McGregor warn, 'Bottom-up variants of transitional justice which are not carefully managed or regulated may reify existing practices of "silencing" the traditionally most disenfranchised'.[623] Therefore, there is a need to be cautious in proclaiming grassroots approaches, and an awareness of the possible diversity of demands they reflect. Nevertheless, in the wake of perpetrations of subsistence harms, a focus on the range of local concerns may allow at least some survivors to voice their needs, rather than having a limited form of recognition being foisted upon them.[624]

iii) Alternative uses of law and legal recognition

In light of these potential pitfalls concerning law's inherent inability and indeed willingness to address subsistence harms, the thesis examines alternative discourses on harms and ways of using law, through the praxis of non-governmental tribunals and social movements. As already argued, looking beyond the boundaries of conventional law is important in two ways: in examining other spaces for the recognition for subsistence harms and issues related to these harms, which draw on legal authority and language, and in analysing alternative ways of thinking about law, and law's understanding of justice, harms and rights, which may provide some basis for influencing conventional law in the future.

Non-governmental tribunals use law in alternative ways to recognise harms, which international law not only ignores but can also be seen to be complicit in, and thus challenge the role of law in categorising suffering. As Nayar highlights, law's ability to name harm and provide justice through recognition can be used to gain justice for harms currently ignored by law.[625] 'Between misfortune and violation: this then is the site of struggle for the politics of judgement on human suffering. The struggle to name wrongs is the struggle to judge violation where merely misfortune is presented. The struggle to hear silenced voices is the struggle against the "crime of silence".'[626] As Shklar highlights, in a more general context,

[622] Rajagopal, n 451 above, 236.
[623] McEvoy and McGregor, n 398 above, 10.
[624] Lundy and McGovern, n 451 above,102.
[625] Nayar, n 396 above.
[626] *ibid*, 1.

'we must recognize that the line of separation between injustice and misfortune is a political choice, not a simple rule that can be taken as a given'.[627]

While the silencing of harms can enforce and perpetuate powerlessness, the proclaiming of harms can act to counter powerlessness and can represent a crucial challenge to the use of such violence.[628] The various non-governmental or people's tribunals, which have emerged in the last fifty years or so, offer quasi-legal forms of justice to tackle social, economic, political and legal injustice.[629] Such tribunals have often focused on socio-economic violence and issues of structural violence and there have also been tribunals focused specifically on gendered harms.[630] The very existence of non-governmental tribunals questions the exclusive right of formal mechanisms to proclaim a truth and instead allows other truths to be voiced.[631] In recognising and addressing harms related to subsistence needs, such tribunals serve to highlight the injustice of conventional justice systems and legal understandings of harm. Non-governmental tribunals circumvent the concerns of transitional justice in terms of its focus on transition and a particular moment of violence, by recognising and condemning violence which is ongoing and which may also be condoned by international law.[632] These tribunals often imitate the process of formal legal mechanisms and use law to create their own forms of recognition.[633] They therefore provide crucial recognition of harms in the face of international legal silencing, and provide some sense of justice to survivors and wider society in regard to these harms. Despite their limited powers and issues over legitimacy, they can provide truth-telling as well as some limited forms of accountability and can also produce recommendations which demand the need for measures of redress.

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[627] Shklar, n 456 above, 5.

[628] Peter Evans, 'Fighting Marginalization with Transitional Networks: Counter-hegemonic Globalization' (2000) 29 *Contemporary Sociology* 230, 232.

[629] Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizen's Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002).

[630] See Permanent Peoples' Tribunal on Global Corporations and Human Wrongs, n 397 above. For example, see the People's Tribunal on Food Scarcity and Militarization in Burma, n 471 above. The work of this tribunal and its approach towards harms related to subsistence deprivations will be discussed in detail in chapter 5.

[631] See Peter Limqueco and Peter Weiss (eds), *Prevent the Crime of Silence: Reports from the Sessions of the International War Crimes Tribunal Founded by Bertrand Russell* (London: Allen Lane, 1971).

[632] Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability' (2008) 30(2) *New Political Science* 161, 174; Sally Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29 *Law & Society Review* 11, 21.

[633] Nayar, n 396 above.

In addition, social movement activism potentially provides a space for recognition of deprivations of subsistence needs by both drawing on and challenging conventional law. The concerns and demands of social movements can provide recognition of and draw attention to certain forms of subsistence harms. Social movements do not perform recognition in the same way as non-governmental tribunals, as they are not established as institutions based around truth-telling and judgement. However, they can promote recognition of harms through their campaigns to proclaim truths regarding silenced harms and their challenges to existing legal, political and economic frameworks.

Both non-governmental tribunals and social movements therefore provide the possibility of further recognition of subsistence harms in two ways, either by promoting legal recognition "from below" or by providing recognition beyond the framework of conventional law. These ways are clearly interrelated since neither presupposes a move away from law entirely. Recognition beyond law may therefore inform processes of promoting recognition by law "from below" in the future. International law and transitional justice needs to take these discourses and practices on board, as a way of rendering law and justice more relevant to those who experience violence and in order to acknowledge the way in which such alternative visions of law could potentially influence the development of law itself.[634]

However, there is also a need to be aware that if law engages and absorbs certain aspects of these discourses and praxis, they may in turn become tamed by law.[635] International law is to some extent a product of discourse and praxis "from below", as seen particularly in terms of the significance of historical social movements in the development of human rights.[636] Nevertheless, this influence "from below" remains limited and law, at the same time, often resists such influence and is used by states and institutions to maintain dominant versions of legal frameworks and concepts.[637] Thus, while human rights are themselves a product of historical activism and influence from below, the institutionalisation of rights has limited

[634] Rajagopal, n 451 above, 23.
[635] Dianne Otto, 'The Exile of Inclusion: Reflection on Gender Issues in International Law over the Last Decade' (2009) 10 *Melbourne Journal of International Law* 11.
[636] For analysis of the influence of social movements on the development of contemporary human rights, see Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009).
[637] Upendra Baxi, 'Politics of Reading Human Rights' in Saladin Meckled-García and Başak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Oxford: Routledge, 2006) 184; Rajagopal, n 451 above.

their emancipatory potential and enabled the use of rights by states and institutions as mechanisms to maintain the status quo.[638]

There are two main ways in which law can function to restrict alternative visions of rights and harms and influence "from below". Firstly, alternative visions of law are to some degree bound and restricted by existing frameworks of law. As Baxi reminds us, 'Interpretation is ceaseless but not unbounded by the texts that summon interpretation'.[639] While social movements and non-governmental tribunals may seek to extend or reinterpret the law in order to recognise silenced harms, the current legal framework continues to impose restrictions on this process. The key concepts of harms, rights and crimes therefore remain embedded in the law, such that, while alternative interpretations are possible, there are limits to the extent to which the law can be broadened and adapted.[640] Thus, while such movements voice wider conceptions of harm and violence, the degree of recognition they can provide may be constrained to some degree by the existing legal conceptions and definitions of international crimes and human rights.

Secondly, in attempting to influence law "from below", social movements are faced with the restrictions that law and legal institutions may apply to alternative interpretations and visions of law. Incorporation of alternative understandings of rights or harms within mainstream legal discourses or even legal frameworks poses the danger that these understandings will be subject to the interpretations of legal institutions and discourses which may seek to restrain and absorb them. As McCann highlights, 'institutions function to "police" the range of law's legitimate meanings, to enforce limits on those meanings'.[641] A tension therefore exists between using law as a tool to voice harms and avoiding the restrictions imposed by law in recognising subsistence harms.

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[638] Stammers n 636 above, 225.
[639] Baxi, n 637 above, 184.
[640] For discussion of the limitations imposed by human rights see Sally Engle Merry, *Human Rights and Gender Violence: Translating Internationl Law into Local Justice* (Chicago: University of Chicago Press, 2006). She analyses the process whereby human rights are translated into local contexts, but also highlights the way in which even as this process occurs, the core values and concepts of human rights remain the same.
[641] Michael McCann, *Law and Social Movements* (Aldershot: Ashgate, 2006) xiii.

This does not mean that social movement and wider civil society influence and recognition beyond conventional law is insignificant. Acknowledging the limitations of conventional legal discourses and the problems of institutionalisation of human rights should not result in a denial of the role played by social movements and other civil society actors and the possibility of some degree of legal transformation. As Stammers argues, despite the dangers of institutionalisation and the use of human rights as a tool of powerful states and institutions, law is not immutable or timeless, but can be subject to contestation and eventual transformation.[642] It is therefore crucial to understand both the paradoxes and tensions experienced by social movements in using law, but also the potential significance of such movements in promoting alternative visions of law and recognition of silenced harms. Thus, social movements and other civil society praxis may play a key role in promoting legal recognition of subsistence harms, but there should also be realisation of the limits of such influence and of the dangers of institutionalisation of alternative concepts of rights and harms.

Conclusion

Essentially, this chapter has highlighted the rather paradoxical and ambiguous relationship between subsistence harms, law and recognition. On the one hand, law's traditional understandings of harm have acted to prevent the recognition of subsistence harms in international law. On the other, law's power to name harm and its authority in doing so provide powerful resources which can be drawn on and employed in order to address subsistence harms. The current lack of comprehensive legal recognition of these harms essentially stems from both the narrow understanding of harm inherent within international criminal law and from law's focus on "crisis" situations and the needs of political transition. However, such limited conceptions of harm and responsibility provide a distorted understanding of violence. This may produce further harm to survivors by silencing suffering and be counter-productive to the very goals of transitional justice, leaving grievances to fester and possibly to ferment further violence. The chapter has therefore argued that despite the limitations in the forms of recognition provided by legal mechanisms, such recognition is crucial to acknowledging the seriousness of subsistence harms and preventing the silencing of these harms. While the forms of recognition, in terms of truth-telling, accountability and

[642] Stammers, n 636 above, 189.

redress, have clear limitations, they can at least represent a first step towards greater acknowledgement of subsistence harms.

However, law's understandings of harm and responsibility are deeply embedded, meaning that other forms of or spaces for recognition will need to be drawn on. The thesis looks at the work of non-governmental tribunals and social movements which go beyond law's limited conceptions of violence and harm and seek to voice silenced forms of violence. Such movements engage with and draw on the language and authority of law, but in using law to recognise and address forms of harm which conventional law silences, proclaim alternative understandings of harm, violence and justice. In their engagements with law they therefore provide insights into the promise and pitfalls of law as a means of recognising harm.

The next section of the thesis is focused on looking at the actualities of legal recognition and the performance of recognition within international criminal tribunals and truth commissions. These chapters will analyse how offences related to subsistence harms have been dealt with by international criminal law and transitional justice mechanisms in order to examine the fundamental problems of the current legal framework with regard to these harms and the limited ability of these mechanisms to address subsistence harms. This will highlight, far more concretely, the limited scope of legal recognition of subsistence harms and the fundamental limitations of the current legal framework.

Chapter 3

Subsistence harms and the case law of international criminal tribunals

In the last two decades a new hope has emerged in the field of international criminal law. The establishment of the ICTY, ICTR and of the ICC as well as the emergence of hybrid, internationalised tribunals, such as the Sierra Leone, East Timor and Cambodian tribunals, has spelt the beginnings of a new era of international criminal law in which it can at least begin to function again, following the deadlock of the Cold War.[643] While clear limitations to the power and reach of international criminal justice remain, recent developments have meant that it is no longer simply a utopian fantasy, such that legal mechanisms do now exist within which subsistence harms could begin to be addressed. However, in regard to subsistence harms, this new hope has largely proved to be unwarranted. This chapter will examine the treatment of subsistence harms within existing international criminal tribunals and ultimately argue that, despite some developments, such tribunals have yet to fully recognise these harms. The chapter analyses some of the norms of international criminal tribunals and the importance of issues of legitimacy, in terms of the dangers of not addressing subsistence harms.[644] Moreover, it argues for the importance of the recognition of subsistence harms through truth-telling and accountability, which international criminal tribunals could begin to provide.

Despite some attempts at broadening the scope of some offences related to deprivations of subsistence needs, there remain significant problems regarding the treatment of subsistence harms within existing international or hybrid tribunals. The chapter will analyse the problems of existing property offences in terms of encompassing subsistence harms and the developments within this area stemming from the case law of the ICTY and Special Court for Sierra Leone, as well as from early precedents from the Nuremberg Tribunal. It focuses on

[643] See Susannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 *Criminal Law Forum* 185.
[644] Marlies Glasius, 'What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations' (2009) 32 *Human Rights Quarterly* 496.

the ICTY and Special Court for Sierra Leone, as these tribunals provide some significant developments regarding property offences in contrast to the lack of specific attention given to such offences within other tribunals.

The last section of the chapter will then examine the treatment of deprivations of basic resources, particularly drawing on the case law of the ICTY, as well as the ICTR and ICC. It will compare the ability of international criminal justice to deal with some aspects of deprivations in detention situations with its problematic treatment of deprivations in other situations, involving forced displacement or destruction of homes, livelihoods and basic resources. Essentially, the current case law again highlights the inherent problems of the current legal framework, in particular the lack of awareness of the gendered nature of subsistence harms, but also the lack of attention given by prosecutors and judges to these harms. The *Al Bashir* case before the ICC represents the most significant opportunity for subsistence harms to be recognised, at least to some extent, within an international tribunal.[645] Nevertheless, even this case presents considerable difficulties in terms of the ability and willingness of international criminal tribunals to comprehensively recognise and address these harms.

1) The legitimacy, norms and goals of international criminal tribunals

i) Performing recognition through prosecution – limited recognition for subsistence harms

Despite the formal growth of international criminal justice in recent years, it must be remembered that the ability of justice mechanisms to recognise harms and the forms of recognition they provide remain limited. There is not yet universal ratification of the Rome Statute, meaning that the Court remains limited in the situations over which it has jurisdiction.[646] Other international or internationalised courts, such as the ICTY and ICTR are focused on particular situations, meaning that the reach of international criminal justice is far from universal. The Special Panels for East Timor were established by the United

[645] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir', 14 July 2008.

[646] Rome Statute of the International Criminal Court, A/CONF.183/9 (1998). Article 12 outlines the preconditions to the exercise of jurisdiction of the Court. Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618.

Nations Transitional Administration in East Timor (UNTAET) in 2000 as an internationalised tribunal to address international crimes perpetrated during the violence of 1999. The Special Court for Sierra Leone is similarly a hybrid, internationalised tribunal, which was established jointly by the Sierra Leone Government and the United Nations to prosecute serious violations of international humanitarian law and Sierra Leonean law committed in the country since 1996. The Extraordinary Chambers in the Courts of Cambodia were also established by the national government and the United Nations and have a limited mandate to prosecute serious crimes committed by the Khmer Rouge between 1975 and 1979.[647]

Therefore, such mandates have clear temporal restrictions in terms of jurisdiction, as well as restrictions regarding where the crimes were perpetrated. International tribunals only have jurisdiction over particular periods of violence, leaving other moments of violence and ongoing harms unaddressed. Indeed, the ICC only has jurisdiction over crimes committed after 1 July 2002, which prevents recognition of harms which occurred prior to this date, particularly since the situations before the Court concern violence and conflict which has lasted for decades.[648] Such temporal jurisdiction obviously obscures the impact of histories of violence, particularly colonial interventions, on contemporary causes and contexts of violence.[649] While these issues impact upon the ability of international criminal tribunals to address subsistence harms, they are essentially generic problems. However, there are also particular issues which affect the ability and willingness of such tribunals to address subsistence harms as such.

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[647] United Nations Transitional Administration in East Timor, Regulation 2001/25 on the Amendment of UNTAET No.2000/11 on the Organization of Courts in East Timor; United Nations Transitional Administration in East Timor, Regulation No.2000/30 on the Transitional Rules of Criminal Procedure, 14 September 2001; Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Crimes Committed during the Period of Democratic Kampuchea.

[648] Rome Statute, n 646 above. Article 11 (1) states that 'The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute'.

[649] Adam Branch, 'What the ICC Review Conference Can't Fix' Oxford Transitional Justice Research (OTJR) Working Paper Series, 10 March 2010
<http://www.csls.ox.ac.uk/documents/AdamBranchICC_Final.pdf> accessed 9 June 2010.

The partial and fragmented nature of the recognition of subsistence harms within international criminal law is obviously manifested in the treatment of these harms within international criminal tribunals. For example, the offence of starvation as a war crime is excluded from the jurisdiction of the Cambodia and Sierra Leone tribunals and the ICC cannot, as yet, prosecute this offence in any of the situations that it is currently investigating as they all concern non-international armed conflicts.[650] The widespread perpetration of subsistence harms in both Cambodia and East Timor would suggest that these tribunals may be highly relevant to the treatment of these harms.[651] It is significant that Kaing Guek Eav *alias* Duch has recently been convicted in the Extraordinary Chambers of Cambodia for inhumane acts as crimes against humanity, which included the deprivation of adequate food within the S-21 detention centre (the security centre widely known as Tuol Sleng), as will be discussed below.[652] Nevertheless, it remains to be seen whether the Tribunal will fully recognise the perpetration of subsistence harms in Cambodia or will continue to focus on physical integrity harms.[653]

The East Timor Special Panels for Serious Crimes have been particularly limited in regard to the prosecution of offenders in general, let alone regarding subsistence harms.[654] While the Special Panels worked quickly to bring indictments against a large number of perpetrators, the lack of cooperation from Indonesia and lack of international will to fully pursue criminal justice measures has meant that many of the cases have been abandoned due to the absence of defendants.[655] Although there were some prosecutions involving offences of forcible transfer

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[650] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, n 647 above; Statute of the Special Court for Sierra Leone, n 647 above. See Rome Statute, n 646 above. As highlighted previously, while 'intentionally using starvation of civilians as a method of warfare' is included as a war crime in the Rome Statute under Article 8(2)(b)(xxv) when perpetrated during international armed conflict, the Statute does not articulate a similar offence with regard to non-international armed conflict.

[651] Ben Kiernan, *Genocide and Resistance in Southeast Asia: Documentation, Denial & Justice in Cambodia and East Timor* (New Brunswick, NJ.: Transaction Publishers, 2008).

[652] *Co-Prosecutors* v. *Kaing Guek Eav "Duch"*, Trial Chamber Judgement, 26 July 2010, Case File/Dossier No. 001/18-07-2007/ECCC/TC.

[653] There has yet to be much literature arguing for the prosecution of harms related to deprivations of subsistence needs perpetrated in Cambodia. For an exception to this lack of attention regarding these harms see Solomon Bashi, 'Prosecuting Starvation at the Extraordinary Chambers in the Courts of Cambodia' (2010) (Unpublished paper http://works.bepress.com/solomon_bashi/1/> accessed 10 August 2010.

[654] Caitlin Reiger and Marieke Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', International Center for Transitional Justice Report (2006) <http://ictj.org/static/Prosecutions/Timor.study.pdf> accessed 1 June 2010.

[655] *ibid*, 3; David Cohen, 'Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor' East-West Center Special Reports, 9 June 2006 <http://scholarspace.manoa.hawaii.edu/bitstream/10125/3528/1/sr009.pdf> accessed 9 June 2010.

and destruction of property, the Special Panels essentially did not develop the case law in this area and thus did not fully recognise the subsistence harms perpetrated in East Timor.[656] While there were mass perpetrations of subsistence harms during this period of jurisdiction (1 January to 25 October 1999), the fact that the Special Panels did not have jurisdiction over all the violence perpetrated by Indonesian or Fretlin forces during the long occupation, means that experience of subsistence harms such as widespread starvation, destruction of homes, livelihoods and deprivations of resources during the occupation have not been subject to international criminal justice.[657] Essentially, due to the limitations of international criminal justice in East Timor, such harms have instead been left to the truth commission, CAVR, as will be discussed in the following chapter.[658]

This is not to say that existing international criminal tribunals have not recognised deprivations of subsistence needs at all, but that the norms and goals of international criminal tribunals often prevent them from performing comprehensive recognition of these harms. The narrow focus of international criminal law, which still predominantly emphasises physical integrity harms, is manifested within the work of international tribunals, with clear gendered results.[659] Consequently, this narrow focus obscures the relationship between different forms of violence and the way that socio-economic grievances relate to subsistence harms.[660] Moreover, the goal of instituting individual criminal responsibility inevitably leads to a narrow and de-contextualised reflection and hides the complicity of beneficiaries of violence.[661] As Pureza critiques, the 'Nuremberg paradigm canonizes a model of retributive justice aimed at establishing a microscopic truth, decontextualised from the dominant genocidal culture of complex political emergencies'.[662] This does not mean that subsistence

[656] For discussion of the failures of the Special Panels more generally, see Sylvia de Bertodano, 'Current Developments in Internationalized Courts: East Timor - Justice Denied' (2004) 2 *Journal of International Criminal Justice* 910.
[657] For discussion of the use of scorched-earth policies and famine in East Timor see Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (London: Cornell University Press, 2005) 29-30.
[658] Commission for Reception, Truth and Reconciliation in East Timor (CAVR), 'Chega!' (2005) <http://www.cavr-timorleste.org/en/chegaReport.htm> accessed 20 May 2008.
[659] Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queen's Law Journal* 219, 234.
[660] Mats Berdal and David M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (London: Lynne Rienner, 2000); Frances Stewart, 'Crisis Prevention: Tackling Horizontal Inequalities' (2000) 28(3) *Oxford Development Studies* 245.
[661] Gerry Simpson, *Law, War and Crime* (Cambridge: Polity, 2007) 157.
[662] Jose Manuel Pureza, 'Defensive and Oppositional Counter-Hegemonic Uses of International Law: From the International Criminal Court to the Common Heritage of Mankind' in Boaventura de Sousa Santos and César A.

harms cannot be prosecuted within these mechanisms, but rather that it is often easier for prosecutors to focus on physical integrity harms, for which individual responsibility can more clearly be assigned and proved.

This focus could be justified in terms of the goals of international criminal tribunals to prosecute only the most serious crimes.[663] However, the recent case law illustrates that international criminal tribunals do not necessarily always focus on the most serious offences or on high level perpetrators.[664] For example, while there were many forms of serious harm perpetrated in the DRC, including the widespread use of subsistence harms, the ICC Prosecutor has focused the *Lubanga* trial exclusively on offences concerning the use of child soldiers as war crimes.[665] This case has raised questions over prosecutorial strategy and whether the gravity threshold is being adhered to.[666] The Office of the Prosecutor (OTP) has stated that its aim in selecting cases and harms is 'to provide a sample that is reflective of the gravest incidents and the main types of victimization'.[667]

Clearly, the use of child soldiers is a serious and widespread harm, which should be addressed by the Court. However, the focus on one particular type of harm in this case has left many other forms of harm in the DRC, such as widespread subsistence harms, unaddressed and has led to criticisms regarding the limited scope of the case by some survivors and NGO groups.[668] The case against Germain Katanga and Mathieu Ngudjolo

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Rodríguez-Garavito (eds), *Law and Globalisation from Below* (Cambridge: Cambridge University Press, 2005) 267.

[663] See Rome Statute, n 646 above. The Preamble to the Rome Statute which states 'that the most serious crimes of concern to the international community as a whole must not go unpunished'.

[664] *The Prosecutor* v. *Thomas Lubanga Dyilo,* Warrant of Arrest, 10 February 2006, ICC-01/04-01/06. See Mohamed M. El Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' (2008) 19(1) *Criminal Law Forum* 35.

[665] *Prosecutor* v. *Thomas Lubanga Dyilo, ibid.* See also the Situation in the Democratic Republic of the Congo in the Case of the *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui,* Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07. International Federation for Human Rights (FIDH), *DRC/ICC: Fourth ICC arrest warrant in the DRC situation,* 30 April 2008 <http://www.fidh.org/Fourth-ICC-arrest-warrant-in-the-DRC> accessed 20 June 2010.

[666] El Zeidy, n 664 above.

[667] Office of the Prosecutor, *Report on Prosecutorial Strategy,* 14 September 2006 <http://www.iccnow.org/documents/ProsecutorialStrategy_06Sep14.pdf> accessed 9 July 2010.

[668] See in particular the Beni Declaration signed by various grassroots women's organisations which criticises the limited focus of the *Lubanga* case and highlights other harms perpetrated in the DRC, particularly gender-based crimes. Women's Initative for Gender Justice, 'Making a Statement: A Review of Charges and Prosecutions for Gender-Based Crimes before the International Criminal Court' (Report) (June 2008) <http://www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf> accessed 14 July

Chui, regarding the situation in the DRC, does reflect a wider range of harms than the *Lubanga* case, but still does not address the widespread perpetration of subsistence harms.[669]

Subsistence harms have been widely perpetrated with devastating consequences in all the situations before the Court, in Darfur, the DRC, Uganda and the Central African Republic[670], but have been ignored or sidelined within many of its first cases.[671] Indeed, the methods and decisions used by the OTP at the investigation stage have been arguably problematic, with investigations being limited to predetermined offences and evidence of other types of offences being ignored.[672] Therefore, despite the rhetoric, the selectivity employed within international criminal tribunals does not necessarily represent the various forms of serious violence and harms perpetrated and experienced, which limits the extent to which international criminal tribunals can be seen to provide an historical record of events and promote accountability.[673]

2010. For other criticisms of the OTP's approach, such as its failure to bring charges of sexual slavery and kidnapping of girls see Joint Letter from Avocats Sans Frontières et al. to the Chief Prosecutor of the International Criminal Court, D.R. Congo: ICC Charges Raise Concern (July 31, 2006) <http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm> accessed 15 July 2010.

[669] *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, n 665 above.

[670] International Crisis Group, 'Ending Starvation as a Weapon of War in Sudan' (Report No. 54) (14 November 2002) <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/054-ending-starvation-as-a-weapon-of-war-in-sudan.aspx> accessed 15 October 2008; International Crisis Group, 'The Congo's Transition is Failing: Crisis in the Kivus' (Report No. 91) (30 March 2005) <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/091-the-congos-transition-is-failing-crisis-in-the-kivus.aspx> accessed 8 October 2008; Human Rights Watch, 'Abducted and Abused: Renewed War in Northern Congo' (Report) 15 July 2003 <http://www.hrw.org/en/reports/2003/07/14/abducted-and-abused-0> accessed 8 May 2009; Internal Displacement Monitoring Centre, 'State of Neglect: Displaced Children in the Central African Republic' (2008) <http://www.internal-displacement.org/countries/centralafricanrepublic> accessed 12 May 2009.

[671] *The Prosecutor* v. *Ahmad Muhammad Harun* and *Ali Muhammad Al Abd-Al-Rahman*, Warrant of Arrest, 27 April 2007, ICC-02/05-02/07; *The Prosecutor* v. *Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Warrant of Arrest, 8 July 2005, ICC-02/04-01/05; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of Arrest, 23 May 2008, ICC-01/05 -01/08.

[672] Katy Glassborow, 'DRC: ICC Investigative Strategy Under Fire', Institute for War and Peace Reporting (2008) <http://www.ictj.org/en/news/coverage/article/2075.html> accessed 11 June 2010. There has been considerable criticism of the approach of the current prosecutor. For a particularly caustic critique see Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor without Borders' (2009) *World Affairs*.

[673] See Emilios Christodoulidis and Scott Veitch, 'Reflections on Law and Memory' in Susanne Karstedt (ed), *Legal Institutions and Collective Memories* (Oxford: Hart Publishing, 2009) 76.

ii) International criminal tribunals and perceptions of legitimacy

The concept of legitimacy obviously can relate to many different issues and be defined in various ways.[674] International criminal justice mechanisms may have legitimacy in the sense that their existence and authority is justified through their establishment by state or UN procedures.[675] Legitimacy may also be understood in a legal sense in terms of respect for principles of legality such as the rights of defendants and fair trial.[676] While acknowledging the significance of these concepts of legitimacy, the understanding of legitimacy used here relates predominantly to perceptions of legitimacy within the society concerned. Such perceptions of legitimacy may depend on issues of fairness and transparency, on the treatment of harms within these mechanisms and on the level and success of engagement with survivors.[677] As Fletcher and Weinstein observe, 'perceptions of international courts are critical. These tribunals must be seen as legitimate by those on whose behalf they operate in order for their work to be accepted within affected societies'.[678] The fact that subsistence harms remain silenced or sidelined within these tribunals may provide survivors with a sense that some of their experiences of harm are not taken seriously, which may in turn damage perceptions of the legitimacy of the Court.

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[674] For discussion of the concept of legitimacy in international law more generally see David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *American Journal of International Law* 552; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596; Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (New York: United Nations University Press, 2001).

[675] Coicaud and Heiskanen, *ibid.*

[676] For analysis of legitimacy in terms of issues of legality see David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' (2008) Georgetown Law Faculty Working Papers <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers> accessed 14 June 2010; Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence' (2006) 4 *Journal of International Criminal Justice* 765; Sara Anoushirvani, 'The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo' (2010) 22(1) *Pace International Law Review* 213.

[677] For discussion of the importance of the treatment of harms and reflections of their gravity to issues of legitimacy see Margaret M. de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 *Fordham International Law Journal* 1400, 1446. On the issue of engagement with survivors see Donna E. Arzt, 'Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone' (2006) 603 *Annals of the American Academy of Political and Social Science* 226; Mariana Goetz, 'The International Criminal Court and its Relevance to Affected Communities' in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008).

[678] Laurel E. Fletcher and Harvey M. Weinstein, 'A World unto Itself? The Application of International Justice in the Former Yugoslavia' in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004) 30.

In particular, the one-sided nature of some prosecutions and the focus upon particular countries or regions within international criminal justice has traditionally damaged perceptions of such tribunals amongst relevant audiences. The focus of the ICC's current prosecutions on situations and cases in Africa has brought into doubt the impartiality of the Court and affected perceptions of legitimacy, allowing views of the Court as being partial to Western concerns to go unchallenged.[679] As Waddell and Clark highlight, the focus on Africa 'prompts questions about why the gaze of international criminal justice falls in some places and on some people and not on others'.[680] While undoubtedly many subsistence harms have been perpetrated in recent African conflicts, as chapter 1 illustrated, these harms are far from unique to this Continent and it is important that international criminal tribunals recognise and reflect the universality of these harms.

Moreover, since the Nuremberg and Tokyo Tribunals there have been concerns that international tribunals dispense one-sided, victor's justice. The ICTY and the ICTR can be criticised for focusing on crimes committed by a particular side and the ICC prosecutions seem to be following a similar trajectory.[681] In the DRC and Uganda situations the Prosecutor has focused on the crimes committed by armed rebel groups rather than the crimes committed by government actors, which has led to questions over the legitimacy of the Court.[682] The ICC Prosecutor's decision not to investigate the Ugandan Government's responsibility for the perpetration of massive forced displacement is particularly problematic regarding both the recognition of subsistence harms and perceptions, particularly amongst survivors, of the legitimacy of the Court.[683] The Ugandan Government not only forcibly displaced hundreds of thousands of civilians but has restricted their movement and failed to provide security for them, which has essentially compounded the original deprivation of

[679] *ibid*, 496. As TWAIL literature highlights, this is problematic in allowing western perpetrations of international crimes to go unpunished and thus be seen to be condoned by law. Antony Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) *Chinese Journal of International Law* 77, 92.

[680] Waddell and Clark, n 677 above.

[681] While the ICTR sought to remedy this one-sided nature of its prosecutions in later cases, the Tribunal has only ever prosecuted one side in the genocide, leaving the war crimes perpetrated by the Rwandan Patriotic Front unaddressed. See Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4(2) *Journal of Human Rights* 213; de Guzman, n 677 above.

[682] See Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics & International Affairs* 179.

[683] On the issue of the impact of the failure to prosecute forced displacement on local perceptions of the Court, see Glasius, n 644 above, 502.

subsistence needs.[684] While there may certainly be a political and pragmatic element to such decisions, given that the Ugandan situation was originally referred to the ICC by the Ugandan Government and that the ICC is relying on government cooperation in order to carry out its investigations and prosecution, the Prosecutor has justified these decisions in terms of the gravity of the harm.

The Prosecutor has argued that decisions on which cases to prosecute are based on 'the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes' and therefore that 'Crimes committed by the LRA were much more numerous and of much higher gravity' than offences committed by state actors.[685] The fact that the decision is presented on the basis of gravity illustrates that the Prosecutor has not taken forced displacement to be a serious international harm. Indeed, the Prosecutor has even acknowledged that the situation in Northern Uganda has been called 'the biggest forgotten, neglected humanitarian emergency in the world today' and that 'almost fifty percent of the civilian population of Northern Uganda have lost their freedom and now live in camps for internally displaced persons'.[686]

Essentially, this statement perpetuates understandings of subsistence harms as unfortunate consequences of violence and as humanitarian concerns, rather than as constituting international crimes. The lack of prosecutorial attention given to subsistence harms in the Ugandan situation gives the impression to survivors that such harms are not taken particularly seriously by the Court. As Glasius highlights, 'Northern Ugandans and others have drawn the inference that the Prosecutor rates the forced displacement of hundreds of thousands as

[684] Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' (Report) (September 2005)
<http://www.hrw.org/en/reports/2005/09/19/uprooted-and-forgotten-0> accessed 7 October 2008
[685] ICC-OTP, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants', 14 October 2005
<http://www.icc-cpi.int/NR/rdonlyres/3255817D-FDO-4072-9F58
FDB869F9B7CF/143834/LMO_20051014_English 1.pdf.> accessed 12 June 2009; Office of the Prosecutor, 'Report on the activities performed during the first three years, June 2003 - June 2006', 12 September 2006
<http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-
725747378AB2/143680/OTP_3yearreport20060914_English.pdf> accessed 2 March 2010.
[686] Office of the Prosecutor, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants' 14 October 2005
<http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-
FDB869F9B7CF/143834/LMO_20051014_English1.pdf> accessed 2 March 2010.

less grave than the killing, maltreatment, and abduction of thousands'.[687] The failure to address subsistence harms may impact on public perceptions of the ICC in terms of the degree of transparency and fairness applied to decisions over which crimes and perpetrators to investigate and prosecute.[688] Indeed, perceptions of lack of transparency by the OTP have already become an issue amongst survivors in Northern Uganda.[689]

The distance of international criminal tribunals from survivors, both in terms of geography and accessibility is also problematic regarding perceptions of legitimacy, as well as in limiting truth-telling opportunities. This is obviously more of an issue for international as opposed to internationalised tribunals, which operate within the country concerned.[690] Nevertheless, even given such proximity to survivors, tribunals may not necessarily be accessible in terms of engagement with survivors and civil society groups and may have limited outreach programmes. Indeed, East Timor's Special Panels did not have an outreach programme or even engage with basic dissemination of information regarding its investigations and cases.[691]

Perceptions of legitimacy rest to a large degree on tribunals successfully engaging with civil society groups and survivors and thus outreach has become increasingly recognised as an important function of international criminal tribunals.[692] In situations where local populations are unfamiliar with a tribunal and with international legal systems, outreach is particularly important in publicising the historical record and accountability provided.[693] Moreover, outreach may allow survivors to voice harms experienced and thus influence the type of harms prosecuted by tribunals. In this way the lack of outreach may perpetuate a

[687] Glasius, n 644 above, 502.
[688] On the issue of the application of the gravity threshold by the Court see Susana Sacouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2008) 23 *American University International Law Review* 807.
[689] See Branch, n 682 above, 188.
[690] Janine Natalya Clark, 'From Negative to Positive Peace: The Case of Bosnia and Herzegovina' (2009) 8(4) *Journal of Human Rights* 360, 374.
[691] Reiger and Wierda, n 654 above.
[692] Janine Natalya Clark, 'International War Crimes Tribunals and the Challenge of Outreach' (2009) 9 *International Criminal Law Review* 99; Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' (2005) 3 *Journal of International Criminal Justice* 950; Patrick Vinck and Phuong N. Pham, 'Outreach Evaluation: The International Criminal Court in the Central African Republic' (2010) 4 *International Journal of Transitional Justice* 421.
[693] Glasius, n 644 above, 511.

"top-down" assertion of the harms to be recognised, which may re-enforce the silencing of subsistence harms and limit the truth-telling functions of these mechanisms.

The ICTY has been particularly criticised regarding the limitations of its outreach programmes, which have impacted on local perceptions of legitimacy and willingness of survivors to acknowledge the judgments of the Tribunal.[694] While the ICTR was also late to initiate outreach programmes, there have been some efforts to promote outreach, such as the establishment of an information centre in Kigali.[695] Nevertheless, there remains debate over the effectiveness of its outreach programme and the impact on perceptions of the Court amongst Rwandans.[696] Outreach has been far more of a priority within the ICC and its outreach programme aims to promote awareness of the Court's activities and proceedings in order to 'engender greater local community participation by addressing their concerns and countering misperceptions'.[697]

However, the Court's record on outreach so far has been chequered.[698] In Uganda, the ICC's initial lack of outreach programmes was particularly damaging as it led to significant civil society opposition to the investigations.[699] Although, since then, the Court has more successfully engaged with civil society and survivor groups in Uganda, its outreach programmes have not been as successful in other situations.[700] While there have been outreach programmes for Sudanese refugees in eastern Chad, the Sudanese Government has refused to allow the Court's outreach staff to visit Darfur.[701] This highlights the limitations of international criminal tribunals in terms of their continued reliance on state cooperation,

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[694] Clark, n 690 above, 375.
[695] Peskin, n 692 above.
[696] See *ibid*; Kingsley C. Moghalu, 'Image and Reality of War Crimes Justice: External Perception of the International Criminal Tribunal for Rwanda' (2002) 26 *Fletcher Forum of World Affairs* 21; Clark, n 692 above.
[697] ICC Outreach Report 2009
<http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64
D5AB32D33247/281271/OR_2009_ENG_web.pdf> accessed 29 May 2010.
[698] Clark, n 692 above, 99.
[699] Glasius n 644 above, 510.
[700] *ibid.*
[701] Clark, n 692 above.

which often serves to restrict grassroots engagement and may circumscribe the scope of investigations and the types of harms prosecuted.[702]

Perceptions of the legitimacy of international criminal tribunals are also affected by the limited ability and willingness of such mechanisms to perform recognition through measures of redress. Until relatively recently, redress was largely outside the purview of international criminal tribunals.[703] The Nuremberg Tribunal included victims to a very limited degree and did not provide for reparations. Neither the ICTY nor ICTR have the jurisdiction to deal with the issue of compensation to victims, but can provide for the restitution of property.[704] While the Cambodian Extraordinary Chambers can provide reparations, other hybrid courts, such as the Lebanon Tribunal, specify that victims should seek reparations within other national court systems and thus are not directly involved in the issue of redress.[705]

The ICC's reparations regime offers a much more comprehensive approach, allowing the Court to offer tangible recognition of harms through some measure of redress to certain victims.[706] The Rome Statute established a Trust Fund which administers reparations ordered by the Court and can provide other material support to victims.[707] The work of the Trust Fund remains relatively limited at present, but it has shown signs that it may seek to focus on providing material support to victims through development projects. For example, the Trust Fund has been working with the Northeast Chilli Producers Association in Uganda to support victims' farming cooperatives and has stated that it seeks to bridge the divide between

[702] Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31 *Human Rights Quarterly* 655.
[703] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts' (2010) 8(1) *Journal of International Criminal Justice* 79.
[704] Article 24(3) of the ICTY Statute states that 'In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'. Article 24(3) of the ICTR has a similar provision regarding restitution of property.
[705] Zegveld, n 703 above, 84. The Special Tribunal for Lebanon, established pursuant to Security Council resolution 1664 (2006) entered into force on 10 June 2007. The Tribunal was established on the request of the Government of Lebanon that the United Nations establish a tribunal of an international character to try all those who are alleged responsible for the attack of 14 February 2005 in Beirut.
[706] Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *Leiden Journal of International Law* 667.
[707] Rome Statute, n 646 above, Article 79(1). '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.'

development and transitional justice.[708] Such aims are welcome in illustrating some awareness by the Court of the need to begin to address long-term issues of survivors' subsistence needs.

However, the issue will be the extent to which such projects are available to survivors and whether the Court will show a serious and long-term commitment to them. Moreover, there is also a need for caution in regard to proclaiming a relationship between development programmes and transitional justice.[709] Much will depend on the type of development programmes pursued and whether they sufficiently recognise and address underlying socio-economic inequalities or merely perpetuate existing grievances. As already argued, reparations and material support are considered by many survivors to be essential to recognition of harms and impact on the willingness of survivors to reconcile with former combatants.[710] How the ICC responds to this, and the kinds of harms for which it recommends reparations, will therefore present a key factor in future perceptions of the Court within the societies concerned. If international tribunals do not recognise subsistence harms in a comprehensive way, there is the danger that this may affect public perceptions of their value and legitimacy.

The next section will examine the case law of some of the tribunals in order to analyse the issue of the recognition of subsistence harms in more detail. It will focus on the case law regarding property offences, as war crimes or even crimes against humanity, and how far subsistence harms may be recognised through these offences. While some commentators have acknowledged developments of the law, particularly the *Kupreskić* case, there has yet to be a comprehensive review of the case law regarding deprivations of subsistence needs.[711]

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[708] International Criminal Court, Trust Fund for Victims, Lira and Amuria Districts, TFV/UG/2007/R2/038.

[709] For literature which promotes a stronger relationship between development and transitional justice, but fails to acknowledge the potential problems of mainstream development approaches, regarding socio-economic inequality see Roger Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2(3) *International Journal of Transitional Justice* 292.

[710] Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *International Journal of Transitional Justice* 28; Ellen A. Waldman, Restorative Justice and the Pre-Conditions for Grace: Taking Victim's Needs Seriously' (2007) 9 *Cardozo Journal of Conflict Resolution* 91.

[711] *The Prosecutor of the Tribunal* v. *Zoran Kupreskic et al.*, Trial Chamber Judgement, 14 January 2000, IT-95-16-T. For literature which highlights the *Kupreskić* case, for example, see Louise Arbour, 'Economic and Social Justice for Societies in Transition' 2007) 40(1) *International Law and Politics* 1; Guénaël Mettreux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former

This section of the chapter therefore seeks to contribute to the literature by providing a review of the case law and a critique of the current treatment of subsistence harms within international and internationalised criminal tribunals.

2) Concepts of 'property offences': misrepresenting subsistence harms

Building on the discussion in previous chapters, this section will argue that the case law shows that despite some significant developments, the traditional dichotomy between property and physical offences continues to prevent the comprehensive recognition of subsistence harms. Understanding deprivations of subsistence needs, such as food, water, homes and livelihoods, as deprivations of property automatically obscures the harms involved. Whilst there have been some developments within the ICTY case law, particularly in the *Kupreskić* case, the current legal framework still presents a significant obstacle to the recognition of subsistence harms when perpetrated through the destruction or deprivation of basic resources necessary for human subsistence.[712] Essentially, while property offences may seem to encompass subsistence harms, understanding the nature of these harms as physical, mental and social harms centred on the deprivation of subsistence needs, and as being fundamentally gendered, illustrates this not to be the case.

i) Destruction of property as persecution and offences involving economic exploitation

Although the case law on property offences that relates to subsistence harms mostly involves property in an individual or communal sense, there is some jurisprudence from the Nuremberg Tribunal which relates to economic exploitation of a country as a whole. Large-scale economic exploitation has featured in many conflicts and it is frequently the civilian population who suffer the consequent physical, mental and social harms. The *Frank* case in the Nuremberg Tribunal was one of the few cases dealt with in this forum to refer to and recognise unwarranted economic exploitation, within the situation of military occupation, as

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Yugoslavia and Rwanda' (2002) 43(1) *Harvard International Law Journal* 237; Mark A. Drumbl, 'Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development' (2009) International Center for Transitional Justice
< http://www.ictj.org/static/Publications/Devt_PropertyCrimes_Full.pdf> accessed 20 January 2010.
While Drumbl discusses the case in some detail, he does not analyse developments within other international or hybrid tribunals. Moreover, Drumbl continues to focus on the issue of property rather than emphasising the subsistence harms involved.

[712] *The Prosecutor of the Tribunal* v. *Zoran Kupreskić*, ibid.

a crime against humanity or war crime when it leads to mass starvation and the creation of inhumane living conditions.[713] In this Judgment, the Trial Chamber stated that 'the food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level and epidemics were widespread'.[714] The Judgment went on to state that although some of the suffering was due to wartime economic conditions, 'the suffering was increased by a planned policy of economic exploitation ...Frank was a willing and knowing participant in the use of terrorism in Poland, in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people'.[715]

Similar issues of economic exploitation were referred to within the *Goering* and *Seyss-Inquart* Judgments, although these cases were not as explicit in terms of the impact on the local population.[716] The *Goering* Judgment states that he 'was the active authority in the spoliation of conquered territory. He made plans for the spoliation of Soviet territory long before the war on the Soviet Union'.[717] The Judgment then cites a directive issued by Goering regarding Soviet territory which 'contemplated plundering and abandonment of all industry in the food deficit regions and from the food surplus regions, a diversion of food to German needs'.[718]

Again it is welcome that the Tribunal cited this material in the Judgment and recognised these actions, particularly in relation to diversion of food, as potential war crimes or crimes against humanity.[719] However, the Tribunal did not sufficiently discuss the impacts of this on the local population. Moreover, it is not clear which offences such acts would come under, due to the unsystematic nature of the judgments and of the discussion of crimes at Nuremberg.

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[713] *Prosecutor* v. *Frank*, Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946.
[714] *ibid.*
[715] *ibid.*
[716] *Prosecutor* v. *Goering* Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946: *Prosecutor* v. *Seyss-Inquart*, Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946.
[717] *Prosecutor* v. *Goering*, *ibid.*
[718] *ibid.*
[719] *ibid;* n 716 above. In the *Seyss-Inquart* case, the Judgement stated that 'a policy was adopted for the maximum utilisation of economic potential of the Netherlands, and executed with small regard for its effect on the inhabitants. There was widespread pillage of public and private property'.

While these precedents are significant, the language of economic exploitation is problematic in emphasising the economic and material aspects rather than the deprivation of basic resources and subsistence needs. Despite the massive exploitation of natural resources in recent conflicts such as in Sierra Leone and Darfur, which have had significant impacts on the subsistence needs of local populations, these precedents have not been built on in subsequent cases, perhaps due to lack of concern regarding subsistence harms and also the limitations of the current legal framework.[720]

The Nuremberg and Post-World War II trials also provide some important precedents in regard to the treatment of property offences more generally, which have allowed the ICTY to treat certain property offences as acts that form elements of the crime against humanity of persecution.[721] In treating property offences as persecution, the ICTY, building on the Nuremberg precedents, has allowed these offences to go beyond property to emphasise some of the human aspects behind the perpetration and experience of these offences. This is significant since it begins to break down the traditional legal demarcation between property offences and physical harms. In *Tadic* the ICTY Trial Chamber cited the Nuremberg case-law, particularly *Flick*, as well as the *Eichmann* Israeli Supreme Court Judgment in its discussion of whether property offences can amount to crimes against humanity.[722] The *Flick* Judgment was particularly relevant since the Court expressed the opinion that the plunder of Jewish industrial property could not be considered a crime against humanity but crucially went on to add that 'a distinction could be made between industrial property and the dwellings, household supplies and food supplies of a persecuted people'.[723]

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[720] On the significance of exploitation of natural resources in these conflicts see Human Rights Watch, 'Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan' (May 2004) <http://www.hrw.org/en/reports/2004/05/06/darfur-destroyed-0> accessed 16 July 2008; David Keen, *Conflict and Collusion in Sierra Leone* (Oxford: James Currey, 2005). For discussion both of the impact of exploitation of natural resources and the problems of addressing such violence within the current legal framework, see Michael A. Lundberg, 'The Plunder of Natural Resources During War: A War Crime (?)' (2008) 39 *Georgetown Journal of International Law* 495. Regarding the lack of attention given to the exploitation of natural resources in transitional justice mechanisms, see Zinaida Miller, 'Effect of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 (3) *International Journal of Transitional Justice* 266;

[721] *The Prosecutor of the Tribunal* v. *Zoran Kupreskić*, n 711 above.

[722] *Prosecutor v. Flick*, Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946; *State of Israel* v. *Adolf Eichmann*, Judgement, 11 December 1961.

[723] *Prosecutor* v. *Flick*, *ibid.*

This distinction left the possibility that plunder of private civilian property could constitute underlying acts of crimes against humanity. The *Eichmann* case consequently held that, 'the plunder of property may be considered an inhuman act within the meaning of the definition of "crime against humanity" only if it is committed under the pressure of mass terror against any civilian population, or if it is linked to any of the other acts of violence defined by the Law as a crime against humanity, or as a result of any of those acts'.[724] The Chamber went on to say that 'the plunder is only part of a general process, by way of "Hast thou killed (or expelled) and also taken possession?"'.[725] This again reinforces the demarcation between physical integrity harms and property offences. It is therefore doubtful that the *Eichmann* Judgment allows for plunder of property as a crime against humanity when it works the other way around, i.e. plunder of property leads to subsistence deprivation, to starvation and displacement.

While the Trial Chamber in *Tadic* agreed with these earlier judgments that plunder of certain civilian property could possibly constitute persecution, it did not definitively express its own opinion on this point.[726] The *Kupreskić* case in the ICTY therefore is particularly significant in doing so, and is a landmark case in the recognition of the gravity of some property offences.[727] It explicitly recognised that destruction of property can amount to persecution due to the impact on the livelihood of a population.[728] The Trial Chamber found that 'the case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation'.[729]

The language of destruction of homes and the livelihood of a certain population is a welcome development, illustrating that the Chamber recognised that it is potentially people's livelihoods, and thus their ability to meet their subsistence needs, rather than just property that is destroyed. Moreover, acknowledgement that such attacks on property could have the

[724] *State of Israel* v. *Adolf Eichmann*, n 722 above, para. 204.
[725] *ibid.*
[726] *The Prosecutor of the Tribunal* v. *Duško Tadic*, Trial Chamber Judgment, 7 May 1997, IT-94-1-T, para. 707.
[727] Arbour, n 711 above, 15; Mettreux, n 711 above.
[728] *The Prosecutor of the Tribunal* v. *Zoran Kupreskić*, n 711 above, paras 619 and 631. Interestingly, although the Trial Chamber drew upon the *Flick* case, it did not draw upon the *Eichmann* case law in this regard.
[729] *ibid*, para. 631.

same inhumane consequences as forced displacement, marks an important step towards recognition of the interrelationship between these offences, which is crucial if subsistence harms are truly to be understood and recognised within the law. This approach has been followed by the ICTY Prosecution in subsequent cases, notably in the *Milosevic* Indictment and *Martic* Amended Indictment, where appropriation and plunder of property belonging to Muslim, Croat and other non-Serb civilians were included under the crime against humanity of persecution.[730] Similarly, in the *Karadžić* Indictment the appropriation or plunder of property and the wanton destruction of private property are included under the crime of persecution.[731]

However, this still constitutes a limited degree of recognition, which, while beginning to blur the demarcation between property and physical harm, does not in itself amount to recognition of subsistence harms. Indeed, the language used in the *Blaškić* Judgment, illustrates the limited nature of this development.[732] In following the approach of the Trial Chamber in *Kupreskić*, the *Blaškić* Judgment found that persecution 'encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property'.[733] In emphasising that attacks upon property 'appear less serious' than other forms of violence, the Chamber again presents a demarcation betwen bodily and mental harm and attacks on property. Moreover, in discussing the *mens rea* requirement, the Chamber emphasised that the essence of the offence of persecution is discrimination against certain groups rather than the particular acts constituting it.[734] The attacks on property are only rendered serious because they serve to discriminate against a particular group, not because such attacks are recognised as serious in themselves. This

[730] *The Prosecutor of the Tribunal* v. *Slobodan Milošević*, Second Amended Indictment "Croatia", 28 July 2004, IT-02-54-T, p.12; *The Prosecutor of the Tribunal* v. *Slobodan Milošević*, Amended Indictment "Bosnia and Herzegovina", 22 November 2002, IT-02-54-T, at 14. *The Prosecutor of the Tribunal* v. *Milan Martić*, Amended Indictment, 9 September 2003, IT-95-11, at 8.

[731] *The Prosecutor of the Tribunal* v. *Radovan Karadžić*, Third Amended Indictment, 27 February 2009, IT-95-5/18-PT.

[732] *The Prosecutor of the Tribunal* v. *Tihomir Blaškić* Trial Chamber Judgement, 3 March 2000, IT-95-14, para. 233.

[733] *ibid.*

[734] *ibid*, para 235. The Chamber stated that 'it is the specific intent to cause injury to a human being, because he belongs to a particular community or group rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example, attacks on property'.

approach essentially serves to maintain rather than disrupt the traditional legal dichotomy between attacks on "the person" and attacks on "property".

Thus, whilst the ICTY has shown some, if still rather limited, willingness to recognise the seriousness of certain perpetrations of property offences, the framework of the law remains problematic. Although the recognition of these acts within the crime against humanity of persecution is welcome, the essence of subsistence harms as deprivations of subsistence needs is again not fully recognised. While the gravity of the harm is acknowledged to some extent by transcending the level of "property offences", to the level of acts contributing to the perpetration of a crime against humanity, the nature of the harm is not fully reflected. Indeed, the approach in *Kupreskić*, whilst appearing progressive actually illustrates indebtedness to traditional concepts of conflict based on ethnicity and identity, rather than reflecting the economic, political and social causes and effects of violence.[735] Persecution of certain groups may constitute a means of hiding other reasons for such attacks, such as underlying socio-economic grievances or military and political purposes. In emphasising the crime of persecution there is the significant danger of buying into the language of persecution and ethnic division, which may be unhelpful in the promotion of reconciliation following the cessation of hostilities. In terms of law's normative role, prosecution of harms involving destruction of basic resources, homes or livelihoods under the crime of persecution does not reflect the reality of the deprivations of subsistence needs involved.

The approach of including attacks on property within the crime against humanity of persecution has been followed by other international criminal tribunals. The East Timor Special Panels included property within persecution in many of their indictments.[736] The early evidence coming from the ICC in the *Harun* and *Kushayb* case, regarding the situation in Darfur, also suggests that the Court will follow the approach of the ICTY in including destruction of property under the crime against humanity of persecution.[737] There is also recognition within this case that people fled certain areas as a result of the destruction of

[735] On the issue of economic and political causes of violence see David Keen, *The Economic Functions of Violence in Civil Wars* (Oxford: OUP, 1998); Berdal and Malone, n 660 above; Stewart, n 660 above.
[736] See for example, *Deputy General Prosecutor for Serious Crimes* v. *Wiranto and others*, Indictment, District Court of Dili before the Special Panels for Serious Crimes, Case No. 05/2003.
[737] *Prosecutor* v. *Harun* and *Al Abd-Al-Rahman*, n 671 above. The evidence and facts of persecution include the attack upon the Kodoom villages, on Bindisi town, Mukjar town and Arawala town and surrounding villages.

homes and other crimes, and this evidence has been included in the warrant of arrests regarding the crime against humanity of forcible transfer.[738] This may be a significant development in terms of recognition of the relationship between destruction of property and forced displacement. However, given that the framework of the law does not see these offences in an integrated way, it is unlikely that the Court will be able to truly explore this relationship.

The war crimes of pillaging and destruction of property have been included in the ICC Arrest Warrants against *Harun* and *Kushayb*.[739] The evidence for these offences cited in the document explicitly includes widespread burning of homes, destruction of crops, farms, burning of food stores and the taking of livestock and other property.[740] However, the fact that such subsistence harms, particularly in relation to the destruction of crops, food and farms, are still referred to in the Indictment within the category of "property offences" is disappointing, given the particular gravity of these harms perpetrated in Darfur and the massive impact upon victims.[741] The early evidence coming from the Office of the Prosecutor (OTP) and the Trial Chamber suggests the treatment of these acts and offences will remain within the boundaries of "property offences" or the crime against humanity of persecution. While the *Al Bashir* case has illustrated a much more progressive approach by the OTP regarding the treatment of deprivations of subsistence needs, such as food, water and livelihoods, there remain considerable issues regarding this case, which will be discussed below.[742]

ii) Property offences and the recognition of mental harms

The recent case law coming from the Special Court for Sierra Leone also contains some significant developments regarding recognition of subsistence harms related to "property offences", particularly the recognition of mental suffering. However, there also remain clear problems in dealing with property offences in terms of lack of recognition of the deprivations

[738] *ibid.* Forcible transfer has been charged within Counts 9, 20 and 51 of the charges. See also Office of the Prosecutor, Prosecutor's Application under Article 58(7).
[739] *ibid.* Counts 8, 18, 19, 36, 38, 4 and 50 of the charges.
[740] *ibid.*
[741] Samuel Hauenstein Swan and Bapu Vaitla (eds), *The Justice of Eating: The Struggle for Food and Dignity in Recent Humanitarian Crises* (London: Pluto Press, 2007) 16-28.
[742] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest, n 645 above.

of subsistence needs inherent in many attacks on property. Recognition of the mental suffering involved in deprivations of subsistence needs is clearly important, but it is only one of many aspects and elements of these harms. The *CDF* Judgment provides some interesting insights into the approach of the Court regarding subsistence harms, since "property offences" have been included under "cruel treatment" and under "collective punishments" as violations of Common Article 3 of the Geneva Conventions.[743]

Looting and destruction of civilian property were recognised within the Judgment as acts which were used to collectively punish civilians. This illustrates some acknowledgment by the Court of the destruction of civilian property as a weapon of conflict. However, the Trial Chamber's discussion of the offence of pillage is also illuminating, in illustrating the limitations of the Court's perceptions of property offences. The Chamber agreed with the ICTY in *Naletilic* and *Martinovic* that pillage 'may be a serious violation not only when one victim suffers severe economic consequences because of the appropriation, but also, for example, when property is appropriated from a large number of people'.[744] The fact that the harm is only seen in terms of economic consequences is inadequate, since the more serious the violation, the more it goes beyond economic consequences and involves deprivation of subsistence needs.

The recognition of looting and destruction of property within the offence of cruel treatment represents a more welcome development.[745] This is especially since the Statute of the Court, drawing on Common Article 3, does not directly associate cruel treatment with mental harms or harms stemming from attacks on property.[746] The *CDF* convictions under cruel treatment explicitly include acts of looting and destruction of property and the Judgment cites evidence which directly refers to the mental suffering experienced by the victims. The Judgment stated that the 'Kamajors went on a rampage and burned 25 houses. People felt helpless,

[743] *The Prosecutor* v. *Fofana and Kondewa (CDF Case)*, 2 August 2007, SCSL-04-14-T, File F para 794.
[744] *ibid.*
[745] *ibid*, para 791.
[746] Statute of the Special Court for Sierra Leone, n 647 above. Indeed, the examples given in the Statute relate to attacks on physical well-being and Article 3(a) is worded in terms of 'violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment'.

discouraged and feared for their lives'.[747] The wording of the mental suffering in this quotation comes directly from the witness testimony, which shows that the testimony of witnesses and victims regarding the mental suffering involved in such destruction was taken reasonably seriously by the Court.[748] However, the Court's recognition of mental suffering is based partly on the emotion of fear rather than on explicit recognition of the mental suffering resulting from the actual attacks upon one's home and/or livelihood. In terms of the normative role of law, it is extremely disappointing that within the Judgment there was a complete lack of recognition of these offences as attacks on the livelihoods of victims, or of the mental suffering resulting from such loss of livelihoods.

Moreover, the Court has not been consistent in recognising the mental harm involved and has frequently not given witnesses the space to voice the mental harms experienced.[749] A more consistent approach needs to be adopted by courts; in particular prosecutors may need to be trained in how to deal with these issues and encourage witnesses to discuss the mental elements involved in their testimonies, without obviously prejudicing the trial regarding the accused. This is not simply an issue regarding subsistence harms, but reflects a more general lack of awareness within international criminal justice regarding mental harms and a lack of space provided for victims to testify to harms experienced and thus engage in truth-telling.[750]

The *AFRC* Judgment provides some other important developments in terms of the inclusion of acts of terrorism as a war crime and how this relates to subsistence harms.[751] The

[747] *CDF* case, n 743 above, para 791.
[748] *ibid*, Trial Transcripts of 17 June 2004, 74 and 9 September 2004, 28.
[749] *ibid*. Indeed the burning of 27 houses in Bembey in Bonthe District was not recognised as cruel treatment as 'it was not proved beyond reasonable doubt that those people whose homes were burnt endured serious mental suffering or injury'. This begs the question of what was the difference between these two situations and why they were treated differently by the Court. In regards to the Bonthe District testimony, the witness did not use words such as 'afraid' or 'discouraged'. He did not directly witness the burning, although his house was one of those burnt. This poses the question of whether the Court is drawing a distinction based on whether the victim/witness was present at the burning to watch it in order to suffer mental harm, or on some other, unspecified basis. This is clearly an inadequate approach, as the mental harm may not simply stem from watching the destruction, but from the realisation of the possible impact of such destruction on lives and livelihoods.
[750] Marie-Benedicte Dembour and Emily Haslam, 'Silencing Hearings? Victims-Witnesses at War Crimes Trials' (2004) 15(1) *European Journal of International Law* 151.
[751] *The Prosecutor* v. *Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgement 20 June 2007, SCSL-04-16-T. The articulation of acts of terrorism in the Statute of this Court is an interesting development. The term stems from Article 33 of Fourth Geneva Convention which prohibits all measures of terrorism and

Chamber drew to some extent upon the existing case law provided by the *Galić* case in the ICTY, which was the first time that the ICTY addressed the offence. In *Galić* the Trial Chamber defined the *actus reus* of the offence to be 'acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population'.[752] While this would seem to exclude attacks on "property" from coming within the offence, in defining acts of terrorism the Trial Chamber explicitly recognised attacks on property as aspects of this offence, without the need for accompanying "physical" violence. The Chamber stated that 'it is not the property as such which forms the object of protection from acts of terrorism, the destruction of people's homes or means of livelihood and in turn their means of survival will operate to instil fear and terror ... what places acts of terrorism apart from other crimes directed against property is the specific intent to spread terror among the population'.[753]

The language used by the Chamber is particularly welcome in illustrating some recognition that property may relate to livelihoods and the basic needs of human survival.[754] In the *Charles Taylor* Indictment the widespread destruction of civilian property by burning has been presented exclusively as constituting acts of terrorism as a war crime.[755] Nevertheless, the use of the war crime of acts of terrorism to prosecute harms within the current category of "property offences" suffers from similar pitfalls to the crime against humanity of persecution, discussed above. It is the terror and fear involved which forms the essence of the offence of acts of terrorism, rather than the specific acts themselves. As such, this offence does not fully reflect the mental effects of loss of livelihoods and means of survival, since the fear associated with acts of terror is different from the mental suffering associated with loss of subsistence needs.[756] The Special Court is therefore yet to explicitly recognise the human

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Additional Protocol II, Article 4(2)(d) and Article 13 which specifically prohibit 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.

[752] *The Prosecutor of the Tribunal v. Stanislav Galić*, Trial Judgement, 5 December 2003, IT.98-29, para 133.

[753] *ibid*, para 134. As found in *Galić* and followed in the *AFRC* Judgement, the actual infliction of terror is not an element of the crime and thus 'there is no requirement to prove a causal connection between the unlawful acts of violence and the production of terror', which clearly decreases the difficulty involved in proving this offence. A similar approach has since been adopted in the RUF case. *The Prosecutor* v. *Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgement, 25 February 2009, SCSL-04-15-T.

[754] *ibid*, para. 400. Elsewhere in the Judgment the Chamber states that acts of terrorism 'may include threats of attack on or destruction of people's property or means of survival'.

[755] *The Prosecutor* v. *Charles Ghankay Taylor*, Indictment, 29 May 2007, SCSL-03-01-PT. The Defendants in the *CDF* case were also charged with "acts of terrorism", but were found not guilty on this charge. n 743 above.

[756] *ibid.*

effects of attacks on property as a key element of the harm perpetrated and experienced and the intent of perpetrators to damage livelihoods and attack victims' means of survival.

Therefore, while there have been some significant developments within the case law of some international and internationalised criminal tribunals regarding property offences, there remains substantial barriers to the recognition of subsistence harms. Even given the recognition of property offences under the crime against humanity of persecution or the recognition of the mental impacts of property offences, international criminal tribunals are still failing to reflect the nature of the subsistence harms perpetrated and experienced, due in large part to the current framing of offences within international criminal law. The next section will highlight similar problems regarding recognition of subsistence harms in terms of deprivations of basic resources. It will highlight the different treatment of such deprivations in regard to whether or not they are perpetrated in detention situations. While the law has gone some way to addressing deprivations of subsistence needs in detention situations, it fails to recognise the nature of such deprivations in other situations, such as during forced displacement and in relation to the position of internally displaced persons or refugees. Essentially, while there are offences which relate to deprivations of resources, again the restrictions and narrow framings of current law mean that the nature of these harms is not recognised.

3) Deprivations of basic resources: the limits of recognition

i) Deprivations in detention situations

There are some key provisions within the current framework of the law that serve to cover, at least to some extent, the perpetration of subsistence harms within detention situations. Indeed, it is this form of subsistence harm that has so far been the most recognised within international criminal law, since such harms are far easier to conceptualise and prosecute than other forms of subsistence harms. Essentially, the victims in such situations do not have the opportunity to provide for themselves and the perpetrator has some kind of duty within humanitarian law and human rights law to provide for minimal survival needs.[757]

[757] See Rebecca Schechter, 'International Starvation as Torture: Exploring the Gray Area between Ill-Treatment and Torture' (2003) 18 *American University International Law Review* 1233.

International humanitarian law has long provided for the protection of the rights of detainees in conflict to have their basic survival needs met, as this stems from reciprocity principles regarding prisoners of war.[758] These harms are reasonably well covered because they are conceived in the sense of prisoner of war needs, rather than as harms exclusively experienced by civilians. Moreover, deprivations of basic needs in detention situations to some degree reflect civil and political rights issues regarding fair treatment of prisoners and prohibitions on torture. Consequently, there have been some prosecutions for acts and omissions including the imposition of starvation rations and inhumane conditions in detention facilities within the Nuremberg Trials and the ICTY.[759] Nevertheless, there are some areas in which the courts could deal far more comprehensively with these types of offences and in order to recognise the physical, mental and social aspects of the harms.

While in the Nuremberg Judgment the section on war crimes and crimes against humanity made some references to starvation and inhumane treatment, there are few references to such harms in terms of the judgments against individual defendants.[760] The *Sauckel* Judgment was the only case to refer to issues of the limited provision of basic needs, such as food and shelter, in slave labour camps in terms of war crimes and crimes against humanity.[761] Considering the widespread suffering experienced within concentration camps during the Nazi occupation, it is disappointing that there was not more focus on these issues.[762] In part, this was due to the focus on "crimes against peace" within Nuremberg Trials, rather than on the war crimes and crimes against humanity.[763]

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[758] See International Committee of the Red Cross, Geneva Convention relative to the Treatment of Prisoners of War, of August 12 1949.

[759] *The Prosecutor of the Tribunal v. Momcilo Krajisnik and Biljana Plavsić*, Consolidated Indictment, 7 March 2002, IT-00-39 & 40-PT, para. 19; *The Prosecutor of the Tribunal v. Milorad Krnojelac*, Trial Chamber Judgement, 17 September 2002, No. IT-97-25-T, para 130.

[760] Nuremberg Judgement: War Crimes and Crimes Against Humanity, <http://avalon.law.yale.edu/imt/judwarcr.asp> accessed 20 May 2010.

[761] *Prosecutor v. Sauckel*, Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946. 'All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure'. The Judgement went on to state that 'The evidence shows that Sauckel was in charge of a programme which involved deportation for slave labour of more than 5,000,000 human beings, many of them under terrible conditions of cruelty and suffering'.

[762] Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).

[763] *ibid.* See also Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: OUP, 2003).

These crimes were not dealt with in a systematic manner, with the consequence that it is not clear in the *Sauckel* Judgment under which particular heading starvation and inhumane detention conditions were intended to come. In addition, there were some references in the Tokyo Judgment to starvation as a war crime in regard to prisoners of war and civilians who were interned and to the conditions suffered by prisoners of war during forced marches.[764] The Judgment also stated that 'of the civilians who had fled Nanking, over 57,000 were overtaken and interned. These were starved and tortured in captivity until a large number died'.[765] However, again, these harms were not dealt with in a detailed or systematic manner and there is a sense that they were not treated particularly seriously.

The ICTY has developed and clarified the law with regard to these offences, particularly in recognising such deprivations under the crime against humanity of persecution.[766] In the *Krajisnik* and *Plasvić* Consolidated Indictment, inhumane conditions were stated as including 'failure to provide adequate: accommodation or shelter; food or water; medical care; or hygienic sanitation facilities'.[767] More significantly, in the *Plasvić* Sentencing Judgment and the *Krajisnik* Judgment, the Trial Chamber cited evidence of inhumane conditions in the detention facilities and the effect of these conditions and the starvation rations on victims' physical and mental health.[768] Similar harms have also been treated as inhumane acts as a crime against humanity and cruel treatment as a war crime within the ICTY jurisprudence. The Trial Chamber in *Krnojelac* defined the *actus reus* of inhumane acts and cruel treatment as 'the occurrence of an act or omission of similar seriousness to the other enumerated crimes under the Article concerned; the act or omission causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity'.[769] Drawing upon the Judgment in

[764] 'Less than one-third of the prisoners of war who began these marches at Sandakan ever reached Ranau. Those who did reach Ranau were starved and tortured to death, or died of disease, or were murdered.' International Military Tribunal for the Far East, Judgement, Chapter VIII Conventional War Crimes, 1048.
[765] *ibid.*
[766] *The Prosecutor of the Tribunal* v. *Milan Martić*, n 723 above, 7; *The Prosecutor of the Tribunal* v. *Momcilo Krajisnik and Biljana Plavsić*, n 759 above, para. 19.
[767] *The Prosecutor of the Tribunal* v. *Momcilo Krajisnik and Biljana Plavsić, ibid*, 19.
[768] *The Prosecutor of the Tribunal* v. *Biljana Plavšić*, Sentencing Judgement 27 February 2003, IT-00-39 & 40/1 at 16. *The Prosecutor of the Tribunal* v. *Krajisnik* Judgement Case No. IT-00-39-T, 27 September 2006, at para. 803.
[769] *The Prosecutor of the Tribunal* v. *Milorad Krnojelac*, n 759, para. 130.

Kunarac, the Chamber confirmed that 'the suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious'.[770]

Following the cases of *Kayishema and Ruzindana* in the ICTR and *Aleksovski* in the ICTY, the Trial Chamber in *Krnojelac* also confirmed that advertant recklessness could be sufficient *mens rea* for these offences.[771] Amongst other acts and omissions contributing to the brutal and inhumane conditions in the detention facility, the Trial Chamber in *Krnojelac* explicitly stated that 'there was a deliberate policy to feed the non-Serb detainees barely enough for their survival'.[772] Although stating that there was no legal requirement for the suffering of victims to be lasting, the Trial Chamber did acknowledge that 'many of the non-Serb detainees continue to suffer lasting physical and psychological effects of their period of detention at the KP Dom'.[773] The recognition of these harms as inhumane acts within the ICTY jurisprudence is significant, particularly in regards to the explicit acknowledgement of the physical and mental harms caused by the use of starvation and inhumane conditions and their long-term nature.[774] However, the relationship between physical and mental harms and the issue of the social harms involved in detention situations was not fully reflected or explored.

It is difficult to ascertain whether starvation and inhumane living conditions in detention situations have also been recognised as torture, as either a war crime or crime against humanity, since the relevant ICTY judgments have tended to discuss these acts all together under the counts of imprisonment, inhumane acts and torture. In *Krnojelac* the Trial

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[770] *ibid.*

[771] *ibid.* The Trial Chamber confirmed that requisite elements for the *mens rea* of these offences were the 'intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission'. See also *Prosecutor* v. *Clément Kayishema and Obed Ruzindana* Trial Chamber Judgment, 21 May 1999, ICTR-95-1, ICTR-96-10, para. 153; *The Prosecutor of the Tribunal* v. *Zlatko Aleksovski*, Trial Chamber Judgment, 25 June 1999, IT-95-14/1, para. 56.

[772] *The Prosecutor of the Tribunal* v. *Milorad Krnojelac ibid,* para 13.

[773] *ibid,* para. 130. Drawing upon the Judgement in *Kunarac*, the Chamber confirmed that 'the suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious'.

[774] *ibid,* para.149. For example the Judgement cited evidence that Witness 'FWS-66 lost 31 kilograms while detained at the KP Dom. He could no longer stand on his feet, and he fainted several times. After he had fainted three times, he received an infusion from the nurse Gojko Jovanovic. He was a healthy man before he was detained at the KP Dom, but he now suffers from diabetes and has to consult doctors and hospitals often. He suffers from frequent nightmares and often awakes screaming'.

Chamber seemed to suggest, in its discussion of solitary confinement, that deprivation of food did not necessarily constitute torture per se. However, the Chamber did go on to state that 'To the extent that the confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture. The same is true of the deliberate deprivation of sufficient food'.[775]

Nevertheless, deprivation of food rations was cited as evidence of torture in *Krnojelac* only in conjunction with physical attacks and very much as an afterthought.[776] It is doubtful that, at present, there is general recognition in international criminal law of starvation and other deprivations of subsistence needs as acts which constitute forms of torture on their own.[777] There does remain some kind of ideological barrier to the perception of severe attacks on what are largely perceived within law as economic and social rights as constituting torture, even in situations of detention. In this respect international criminal law can be seen to be mirroring the stance of human rights law in tending not to recognise starvation as a form of torture per se, but rather to perceive starvation and deprivations of subsistence needs as instances of inhumane treatment, and thus as a less serious form of harm.[778]

It is also significant that the crime against humanity of extermination has not been used in relation to starvation or inhumane living conditions in detention facilities in the ICTY case law, but rather has been exclusively charged in relation to "direct" mass murders. This is

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[775] *ibid.* In support of this they cited Article 55 of Geneva Convention IV and Article 26 of Geneva Convention III. See also Article 20 of the *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955; *Setelich v Uruguay*, (28/1978) Report of the Human Rights Committee, GAOR, 14th Session, para 16.2; the 1986 Report of the Special Rapporteur on torture which lists "prolonged denial of food" as one specific form of torture (E/CN.4/1986/15); and the *Greek* case, where the European Commission of Human Rights considered Greece's breaches of Article 3 of the Eurpoean Convention on Human Rights in light of its failure to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners (Report of 5 Nov 1969 (1969) 12 Yearbook, Vol II).

[776] *The Prosecutor of the Tribunal* v. *Milorad Krnojelac*, *ibid*, para. 235, 236 and 300. 'In view of the seriousness of the treatment inflicted upon FWS-73, the Trial Chamber is satisfied that this treatment amounted to torture within the meaning of the definition given above. The Trial Chamber has also taken into account the fact that, following those beatings, FWS-73 was not given any medical treatment but was instead returned to the isolation cells where he was left lying on the floor with just one blanket to be shared between two detainees. Food rations, which were already largely insufficient, were halved'.

[777] On the issue of the current difficulties of including deprivations of food as torture see Schechter, n 757 above, 1233.

[778] *ibid.* This is despite the fact that international humanitarian law generally has a more expansive definition of torture, in comparison with human rights law, particularly in including perpetration by non-state actors.

despite the fact that one example of inhumane conditions leading directly to death was treated as the crime against humanity of murder in the *Krajisnik* case. In this Judgment the death of twenty detainees from heat stroke and lack of water was treated, alongside many other killings, as murder.[779] The jurisprudence of the ICTY has defined the *actus reus* of murder to include omissions as well as acts, which is crucial in allowing inhumane conditions and starvation leading to death to be charged as murder.[780] Nevertheless, there is yet to be an example of death by starvation in detention facilities in the case law of the ICTY that has been charged as murder as a crime against humanity, which reflects a generally narrow understanding of both murder and extermination by the Tribunal.

The definition of extermination provided by the ICTY in *Vasiljević* did not explicitly include the "slow death" element of the imposition of conditions of life and deprivation of food and medicine, in contrast to the illustrative definition enumerated in the Rome Statute.[781] On the other hand, the ICTR has explicitly adopted the "slow death" element in its definition of extermination.[782] The *mens rea* requirement for extermination has been explored within the ICTY and ICTR. While in *Kayishema et al.* the ICTR Trial Chamber held that extermination may encompass intentional, reckless, or grossly negligent acts or omissions, the later *Stakic* Trial Judgment has held that proof of recklessness or gross negligence was not sufficient to hold an accused criminally responsible for extermination and thus that intent remains the necessary requirement.[783] This definition is crucial, given the ease with which responsibility

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[779] *The Prosecutor of the Tribunal v. Momcilo Krajisnik and Biljana Plavsić*, n 759 above, para. 795.

[780] See *The Prosecutor of the Tribunal* v. *Miroslav Kvočka et al.*, Appeal Judgement, 25 February 2005, IT-98-30/1, para. 260. Moreover, the Trial Chamber in *Orić* stated that the Tribunal recognised that culpable omission is open to all forms of participation, not just perpetration, which may provide further scope for prosecutors to indict defendants for these types of offences. *The Prosecutor of the Tribunal* v. *Naser Orić*, Trial Chamber Judgement, 30 June 2006, IT-03-68, para. 303.

[781] *The Prosecutor of the Tribunal* v. *Mitar Vasiljević*, Trial Chamber Judgement, 29 November 2002, IT-99-32-T, para. 229. The Trial Chamber sought to find a precise definition of extermination and stated that the elements were 'any one act or combination of acts which contributes to the killing of a large number of individuals and that the offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury in the reasonable knowledge that such an act or omission is likely to cause death'. See also Article 7(2)(b) of the Rome Statute, n 646 above.

[782] *The Prosecutor* v. *Ignace Bagilishema*, Trial Chamber Judgement, 7 June 2001, ICTR-95-1A-T, para. 88; *The Prosecutor* v. *Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Appeals Chamber Judgement, 13 December 2004, *ICTR-96-10-A* and *ICTR-96-17-A para. 522.* The Appeals Chamber in *Ntakirutimana* and *Ntakirutimana,* stated that 'the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result'.

[783] *Kayishema and Ruzindana,* n 771 above, para. 146; *The Prosecutor of the Tribunal* v. *Milomir Stakić*, Trial Chamber Judgement, 31 July 2003, IT-97-24-T, para. 642.

and intent regarding subsistence harms can be hidden, particularly in non-detention situations.

Significantly, the Indictment against Kaing Guek Eav "Duch" before the Extraordinary Chambers in the Courts of Cambodai has charged extermination in relation to "slow death" in detention situations within S-21.[784] The Indictment charges that the 'living conditions imposed at S-21 were calculated to bring about the deaths of detainees. These conditions included but were not limited to the deprival of access to adequate food and medical care'.[785] The recent Judgment found that 'detainees died as the result of unlawful omissions known to be likely to lead to their death and as a consequence of the conditions of detention imposed upon them' and thus included "slow death" as evidence of murder and extermination as crimes against humanity.[786] While the focus within this case remained on physical integrity harms, it is significant that there was acknowledgement of deprivation of food and basic resources as possibly constituting crimes against humanity in detention situations.

It is also significant that, despite continued failure within the ICTY to prosecute subsistence harms under the crime against humanity of extermination, there has been recognition within some cases before the ICTY of starvation and inhumane conditions within detention situations as the *actus reus* of genocide under Article 4(c) of the ICTY Statute.[787] However, this may well be explained in terms of the difficulty of proving actual deaths, which seems to create a higher *actus reus* threshold for the crime of extermination compared to the requirement of genocide under Article 4(c). Several indictments have charged genocide or complicity in genocide alleging the imposition of inhumane conditions and starvation rations on detainees.[788] However, these indictments have not led to conviction for these offences, due largely to the problems of the group element or special intent requirements of

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[784] Office of the Co-Investigating Judges, Closing Order Indicting *Guek Eav Kaing "Duch" Case* File N° 002/14-08-2006, para. 139.
[785] *ibid.*
[786] *Co-Prosecutors* v. *Kaing Guek Eav "Duch"*, n 652 above, para. 339.
[787] *The Prosecutor of the Tribunal* v. *Milomir Stakić*, n 783 above. Article 4(c) of the ICTY Statute, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. See Updated Statute of the International Criminal Court for the former Yugoslavia, September 2009.
[788] *ibid.* The *Drljaca* and *Kovacevic* Indictment charged the defendants with genocide or complicity to commit genocide, stating that 'Daily food rations provided to detainees amounted to starvation rations ... The little water they received was often foul'. However, the proceedings against Kovacevic were terminated in 1998 due to his death and the case against Drljaca seems at present to have stalled.

genocide.[789] While in the *Krajisnik* and *Plasvić* cases, the Trial Chamber found that some of the crimes charged met the *actus reus* of genocide, including the imposition of inhumane conditions, it did not find that the acts were committed with the intent to destroy the Bosnian-Muslim or Bosnian-Croat ethnic group as such.[790] Although it is significant that inhumane conditions and starvation rations have been acknowledged to some degree as forming part of the *actus reus* elements of genocide, the lack of convictions means that the Trial Chambers have not been able to clearly outline their approaches regarding these offences.

While the material analysed above constitutes some significant developments regarding subsistence harms, at least in terms of the approaches of the prosecution, this does not go far enough. There needs to be similar recognition of severe deprivation of subsistence rights under Article 4(b) of the ICTY Statute, and within other tribunals, in order for the physical and mental suffering involved to be acknowledged.[791] It is possible that this failure to recognise deprivations of subsistence harms in terms of physical and mental suffering regarding genocide has so far resulted from attempts by the prosecution and trial chambers to prevent overlap of offences. On the other hand, this may also stem from a more fundamental failure to recognise that these kinds of attacks constitute bodily and mental harms, since they are essentially less overt and direct than other forms of physical and mental violence. The separate articulation of 'imposing physical and mental suffering' and 'imposing conditions of life' within the framework of the crime of genocide is therefore problematic in inhibiting this recognition.

In effect, prosecuting subsistence harms under either the crime against humanity of extermination or as genocide remains difficult due to the *actus reus* and *mens rea* elements. Essentially, this means that many situations of deprivations of subsistence needs in detention situations could continue to fall through the gaps in the framework, particularly situations where the group element or special intention requirement of genocide would be difficult to

[789] Due to a plea agreement most of the counts against Plavsić were dropped by the Prosecution when she pleaded guilty to Count 3, persecutions as a crime against humanity. Moreover, Krajisnik was found not guilty of genocide or complicity in genocide. *The Prosecutor of the Tribunal v. Momcilo Krajisnik and Biljana Plavsić*, 759 above, 305.
[790] *ibid.*
[791] See Article 4(b) of the ICTY Statute, causing serious bodily or mental harm to members of the group, n 787 above.

prove. While the ICC has adopted a more expansive definition of extermination, the requirement of intent and the need for such acts to be calculated to bring about this result may prevent many situations involving these harms from being prosecuted as extermination. The problems of the current framework become even starker regarding non-detention situations. Historically, the perpetration of subsistence harms outside of detention facilities has been marginalised both by the legal framework and the application of the law by international tribunals. This is a result of the traditional emphasis on direct physical atrocities and the issues of agency regarding subsistence harms. The next section will analyse the treatment of subsistence harms in non-detention situations and argue that even despite developments regarding the interpretation of some offences, there remain significant problems in addressing subsistence harms within the current framework of international criminal law.

ii) Forced displacement and the deprivation of subsistence needs

As a consequence of the problems of the current framework and the unwillingness of existing courts to recognise the nature of subsistence harms, the case law on deprivations of subsistence needs in non-detention situations is much less developed. The offences of forcible transfer or deportation, as either war crimes or crimes against humanity, while seeming to encompass subsistence harms, in fact obscure the physical, mental and social impacts of these harms. Thus, the deprivations of subsistence needs inherent in forced displacement and the resulting experience of refugees and internally displaced persons is not fully recognised within existing justice mechanisms. While there is some interesting discussion of the offences of forcible transfer or deportation within the ICTY case law this has largely not led to greater recognition of subsistence harms.

The developments in the case law regarding forcible transfer or deportation largely centre on whether these offences constitute the *actus reus* of genocide.[792] The *Blagojević* Judgment related to the events after the fall of Srebrenica when 7,000 Bosnian Muslim men were killed and the women, children and elderly were forcibly transferred from the enclave.[793] The Trial Chamber considered forcible transfer under the underlying act of 'causing serious bodily or

[792] *The Prosecutor of the Tribunal* v. *Vidoje Blagojević and Dragan Jokić* Trial Chamber Judgement, 17 January 2005, IT-02-60-T.
[793] *ibid.*

mental harm to members of the group' and found that within the existing case law on genocide, deportation was one of the acts that could constitute serious bodily and mental harm, as stated in the *Kristić* and the *Stakić* Trial Judgments.[794] The Chamber therefore found that 'the suffering of the women, children and elderly people who were cruelly separated from their loved ones and forcibly transferred, and the terrible consequences that this had on their life, reaches the threshold of serious mental harm under Article 4(2)(b)' of the ICTY Statute.[795]

However, the Chamber did not hold that forcible transfer in general is an act of genocide, but rather that forcible transfer constituted an underlying act of genocide in the circumstances of the case, in conjunction with other elements, such as the terror inflicted on the population and the separation of families. The burning down of their properties and houses was also mentioned in the Judgment, since this was cited as having led to the realisation by the group that it was not a temporary displacement for reasons of their immediate safety.[796] The Chamber concluded that in addition to the cruel separation from their loved ones and the consequences this has had on their lives, 'the level of the mental anguish suffered by the people who were forcibly displaced from their homes – in such a manner as to traumatise them and prevent them from ever returning – obliged to abandon their property and their belongings as well as their traditions and more in general their relationship with the territory they were living on, does constitute serious mental harm'.[797]

The use of the language *homes* and *territory* is significant in suggesting more than removal from place by emphasising some of the human impacts of such removal.[798] However, the language of property remains problematic, illustrating that the Chamber did not fully understand the impact of displacement on subsistence needs and thus did not capture the essence of subsistence harms in terms of the interrelationship of the physical, mental and social aspects or their gendered nature. Moreover, it was largely an emphasis on the separation of families that dominated the Chamber's recognition of mental suffering. Thus,

[794] *ibid*, para. 646; see also *The Prosecutor of the Tribunal* v. *Radislav Krstić*, Trial Chamber Judgement, 2 August 2001, IT-98-33, para. 513 and *The Prosecutor of the Tribunal* v. *Milomir Stakić*, n 783 above, para. 516.
[795] *The Prosecutor of the Tribunal* v. *Vidoje Blagojević*, *ibid*, para. 652.
[796] *ibid*, para. 650.
[797] *ibid*, para. 652.
[798] *ibid*.

whilst there was also some recognition of the effects of this displacement on the lives of victims, such recognition was very much secondary to the perception of mental harm in terms of separation of families.[799] The emphasis on separation of men and boys from their families is also reflected in the *Karadžić* Indictment under the *actus reus* of genocide of causing serious bodily or mental harm.[800] While it is significant that the Prosecutor has again attempted to position forcible transfer or deportation as an underlying act of genocide, there remains a failure to reflect the subsistence harms that are often inherent within the perpetration and experience of displacement.

The Chamber's discussion of the *mens rea* requirement of genocide, of intent to destroy the group, also provides some interesting insights. Whilst acknowledging that the term "destroy" encompassed only physical or biological destruction of a group, rather than cultural genocide, the Chamber did find, following the approach of the ICTR in *Akayesu* and *Musema*, that the physical or biological destruction of a group does not necessarily require the death of group members, but may encompass 'acts which may fall short of causing death'.[801] The Chamber stated that 'a group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land', and therefore found that forcible transfer could lead to the material destruction of the group.[802] While the recognition of the relationship of the group to the land is significant, this still emphasises group "homeland" as opposed to an emphasis on land in terms of the livelihoods of the group and the individuals and thus the physical, mental and social, rather than material, aspects of displacement.[803]

Related to the issue of forced displacement is the ICTY's treatment of restrictions on humanitarian aid, which is the closest the Court comes to recognising the responsibility of perpetrators for imposing conditions which result in deprivations of subsistence needs in such

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[799] *ibid*, para. 651, citing the testimony of Witness 76, KT. 5756.
[800] *The Prosecutor of the Tribunal* v. *Radovan Karadžić*, n 731 above, para. 47.
[801] *The Prosecutor of the Tribunal* v. *Vidoje Blagojević*, n 792 above, para. 662. See also *The Prosecutor* v. *Jean-Paul Akayesu*, Trial Chamber Judgement, 2 September 1998, ICTR-96-4-T, para. 731-32 and *Prosecutor* v. *Alfred Musema*, Trial Chamber Judgement, 27 January 2000, ICTR-96-13, para. 933.
[802] *The Prosecutor of the Tribunal* v. *Vidoje Blagojević*, *ibid*, para. 666.
[803] For literature which emphasises the significance of "homeland" regarding forced displacement, see Alfred de Zayas, 'The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia' (1995) 6 *Criminal Law Forum* 257.

situations. The *Milošević* Indictment included under persecutions as a crime against humanity, 'The obstruction of humanitarian aid, in particular medical and food supplies into the besieged enclaves Bihac, Gorazde, Srebrenica and Zepa, and the deprivation of water from the civilians trapped in the enclaves designed to create unbearable living conditions'.[804] Similarly, in the *Krstić* Judgment the humanitarian crisis in *Potočari* was one of the elements said to constitute persecutory acts.[805] Indeed, the Judgment states that the catastrophic humanitarian situation 'was born out of the policy of systematically hampering humanitarian convoys'.[806] The Judgment even went on to state that 'several persons died from starvation on 7 and 8 July 1995 and a report from the command of the 28th Division, dated 8 July 1995, warned that the civilian population would very soon be forced to flee the enclave if it wished to survive'.[807]

However, although there are many other references to the humanitarian crisis and some references to the deliberate blocking of humanitarian aid elsewhere in the *Krstić* Judgment, these harms were not included as elements of any of the other counts for which he was indicted or convicted.[808] The treatment of these acts and omissions by the Prosecution and Trial Chamber shows the limitations of the current approach of the ICTY and the problems of the Statute itself. It is unfortunate that the drafters of the ICTY Statute did not explicitly include the war crime of starvation of civilians, given that such use of starvation was already prohibited in Additional Protocols I and II to the Geneva Conventions.[809] This war crime, now worded in the Rome Statute to include wilfully impeding relief supplies, would have been particularly relevant to the acts and omissions charged in this case and may have served to recognise at least some elements of the subsistence harms perpetrated.

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[804] *The Prosecutor of the Tribunal* v. *Slobodan Milošević*, Amended Indictment "Bosnia and Herzegovina", n 730 above.

[805] *The Prosecutor of the Tribunal* v. *Radislav Krstić*, n 794 above, para. 615. The Trial Chamber stated that 'General Krstić subscribed to the creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians'.

[806] *ibid*, para. 566.

[807] *ibid.*

[808] *ibid.*

[809] Neither the original nor the amended Statute of the Court includes offences related to deprivations of humanitarian aid. See Updated Statute of the International Criminal Court for the former Yugoslavia, September 2009, n 787 above.

In the *Miletić* Consolidated Indictment, obstruction of humanitarian aid was referred to as part of the aspects of inhumane acts as a crime against humanity, but only in relation to the forced displacement involved.[810] The Indictment states that 'the VRS deliberately restricted humanitarian aid and relief supplies to the Muslim inhabitants of Srebrenica and Zepa as part of the organised effort to make life impossible for the Muslims and remove them'.[811] Miletić has recently been found guilty of these offences.[812] Whilst it is important to recognise that one of the reasons for the obstruction of humanitarian aid was to forcibly transfer or deport the local population, this is clearly only one aspect of these acts and omissions. Although the Judgment recognised that restrictions on aid directly caused 'a very dire humanitarian situation in the Srebrenica and Zepa enclaves', it did not capture the purpose and impact of these harms other than in terms of forcible transfer.[813] The obstruction of aid constituted much wider harms involving deprivations of subsistence needs and resultant suffering, which the case simply did not reflect. A similar approach is evident in the *Karadžić* Indictment, in which the restriction of humanitarian aid to Srebrenica has been included under the crimes against humanity of deportation, inhumane acts and also persecution, which again fails to fully reflect the nature of the subsistence harms involved.[814]

In the *Blagojević* case, despite the recognised involvement of the Bratunac Brigade in the blocking of humanitarian aid, the attack on the enclave was not charged, since the Indictment chose to deal only with events after the fall of Srebrenica.[815] However, the Trial Chamber did acknowledge the involvement of the Bratunac Brigade in this obstruction and took the events into account as "background issues". Indeed Nikolic, one of the other accused, provided testimony in the case regarding restriction of convoys of humanitarian aid supplies to Srebrenica, part of the aim of which was to 'make life within the enclave impossible for the civilian population'.[816] It is therefore disappointing that these atrocities were not prosecuted in this case.

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[810] *The Prosecutor of the Tribunal* v. *Miletić et al.*, Consolidated Indictment, June 2006, IT-05-88-PT.
[811] *ibid.*
[812] The case against *Miletić* has now been incorporated into the consolidated *Popović case. The Prosecutor of the Tribunal v. Vujadin Popović et al.*, Trial Chamber Judgement, 10 June 2010, IT-05-88-T.
[813] *ibid*, para. 767.
[814] *The Prosecutor of the Tribunal* v. *Radovan Karadžić*, n 731 above.
[815] *The Prosecutor of the Tribunal* v. *Vidoje Blagojević* n 792 above.
[816] *ibid*, para 111, footnote 340.

There clearly does remain a conceptual barrier to the prosecution of subsistence harms, particularly relating to starvation and deprivation of other basic needs in terms of inhumane acts, of forms of physical and mental violence and ultimately murder. If, as in Potočari, one or more people died as a result of the imposition of inhumane conditions and deprivation of food and medical care due to obstruction of humanitarian aid, then surely this should have been prosecuted under the crime against humanity of murder. The issue of causation does provide a hurdle for prosecutors, since it may appear more difficult to prove legal causation in relation to deaths from subsistence harms outside of detention facilities. Nevertheless, there is a causal link in subsistence harms which could be proved, given the legal will to do so. The next section will focus on the work of the ICC and which will again highlight the general unwillingness of prosecutors and judges to address subsistence harms but also the fundamental limitations of the current legal framework.

iii) Deprivations of subsistence needs and the ICC's approach regarding Darfur

Turning to the ICC jurisprudence, it seems that the Court will build on some of the foundations provided by the ICTY in relation to its treatment of subsistence harms, but that such treatment will be similarly limited and problematic. While all the cases and situations before the ICC involve subsistence harms to varying degrees, this section focuses on the situation in Darfur, as there are signs that some aspects of harms related to deprivations of subsistence needs may begin to be acknowledged in the *Al Bashir* case. This case is of particular relevance in providing some significant material on issues related to subsistence harms coming from both the OTP and the Pre-Trial Chamber.[817]

Darfur is essentially a paradigm case for subsistence harms, since it shows up in a particularly stark manner the inadequacy of the three core crimes to deal with subsistence harms. If the law cannot deal with these harms committed in Sudan, which is such a publicised example of the perpetration of deprivations of basic needs, then there is little likelihood that the law can deal with these harms committed elsewhere. The lack of attention given so far to the issue of subsistence harms in the other cases before the Court, suggests that these harms are unlikely

[817] *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest, n 645 above; *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09.

to be taken particularly seriously. Despite the massive perpetrations of subsistence harms in Uganda, the DRC and the Central African Republic (CAR), there is little indication that the Prosecutor, at present, intends to address these harms. The Pre-Trial Chamber has confirmed the charges against two militia leaders, Germain Katanga and Mathieu Ngudjolo Chui, regarding the situation in the DRC, for war crimes and crimes against humanity.[818] However, while the charges include offences related to property, deprivations of subsistence needs remain ignored within this case.[819] Indeed, although the attack on Bogoro, which involved mass civilian displacement, is included in the charges under other offences, the crime against humanity of forcible transfer is not being charged.[820]

The Prosecutor's Application to bring charges against Harun and Kushayb (Former Minister of State for the Interior of the Government of Sudan and the alleged leader of the Militia/Janjaweed respectively) largely ignored the perpetration of subsistence harms in the form of starvation and obstruction of humanitarian relief.[821] This marginalisation of the offences related to subsistence harms follows similar sidelining in the Commission of Inquiry Report which led to the referral of the Sudan situation to the ICC. [822] In the Prosecutor's Application "starvation" was only mentioned alongside disease as a consequence of conflict, which serves to promote the perception that starvation is a humanitarian concern rather than an international crime.[823] In discussing the humanitarian consequences of war and the numbers of deaths, the document makes the distinction between deaths caused by 'direct violence' and those resulting from 'disease, starvation and conditions of life imposed by the attacks'.[824] The Prosecutor has therefore followed traditional legal thinking in not perceiving such "indirect" deaths as constituting violence or harms.[825] Consequently, the Pre-Trial

[818] *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chiu*, n 665 above.
[819] *ibid.*
[820] *ibid.*
[821] Office of the Prosecutor, 'Situation in Darfur, the Sudan: Prosecutor's Application under Article 58(7)', February 2007.
[822] Report of the International Commission of Inquiry on Darfur to the UN Secretary-General (Geneva, 2005). In this Report the term "starvation" appeared only once, in relation to the prohibition of such destruction as provided by Article 14 of AP II.
[823] *ibid.*
[824] *ibid.*
[825] *ibid*, 30.

Chamber's Decision on the Prosecutor's Application and the Warrants of Arrest issued by the Court fails to mention starvation or deprivations of subsistence needs.[826]

The ICC Prosecutor has more recently recognised some harms related to subsistence in the case against the Sudanese President, Al Bashir, and has included offences relating to deprivations of subsistence needs under crimes against humanity and genocide.[827] Such recognition may stem more from the Prosecutor's attempt to charge the crime of genocide, rather than a commitment to prosecute subsistence harms themselves, since deprivations of subsistence needs provide a key basis for the genocide charges within the Arrest Warrant.[828] The scale of the subsistence harms employed in Darfur, in terms of deprivations of homes, land, livelihoods and basic resources means that such acts could be seen by the Prosecutor as central to attempts to indict President Al Bashir for genocide, under Article 6 (c) of the Rome Statute.[829] Considering the lack of international consensus on whether the situation in Darfur amounted to genocide, and the Commission of Inquiry's conclusion that 'the Government of the Sudan has not pursued a policy of genocide', the inclusion of genocide charges in the Arrest Warrant has been highly controversial.[830]

In this Application for Warrant of Arrest, the ICC Prosecution presented harms related to deprivations of subsistence needs in terms of the crime against humanity of extermination and as constituting the *actus reus* of genocide, in terms of the 'deliberate infliction on members of the group of conditions of life calculated to bring about the physical destruction of the group in whole or in part'.[831] The Application documented the destruction of 'food,

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[826] *ibid.*

[827] *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest, n 645 above.

[828] See Office of the Prosecutor, 'Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 Against *Omar Hassan Ahmad Al Bashir*', 14 July 2008.

[829] Rome Statute, n 646 above, Article 6(c) 'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.

[830] Andrew T. Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 829; Antonio Cassese, 'Flawed International Justice for Sudan' *Project Syndicate*, July 2008 <http://www.project-syndicate.org/commentary/cassese4> accessed 2 September 2009; Christopher Gosnell, 'The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan?' (2008) *Journal of International Criminal Justice* 841; Lutz Oette, 'Peace and Justice, or Neither? The Repercussions of the *Al-Bashir* Case for International Criminal Justice in Africa and Beyond' (2010) 8(2) *Journal of International Criminal Justice* 345; Manisuli Ssenyonjo, 'The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) *International and Comparative Law Quarterly* 205.

[831] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest, n 645 above, 6.

wells and water pumping machines, shelter, crops and livestock as well as any physical structures capable of sustaining life or commerce' as constituting the *actus reus* of genocide.[832] This differs from the Commission of Inquiry's approach which saw such attacks as constituting destruction of property or possibly as coming within the crime against humanity of persecution, as in *Kupreskić*.[833] Moreover, forcible transfer as a crime against humanity was presented in the Application in terms of deprivation of the means of survival, rather than primarily as removal from certain areas. The Application stated that the 'survivors were not only forced out of their homes, they were also pursued into inhospitable terrain'.[834] This therefore reflects the use of tactics in Darfur which are centred not only on direct killing but also on preventing access to subsistence needs. The restriction on and manipulation of aid was presented in the Application as related to such strategies, in terms of ensuring the destitution of survivors.[835]

The Prosecution did not provide direct evidence in support of the *mens rea* of genocide, but rather argued that genocidal intent could be inferred from the pattern of atrocities committed.[836] As evidence for this, the Prosecution argued that the 'attacks on villages across Darfur from March 2003 to the present were designed not only to kill members of the target groups and force them from their lands, but also to destroy the very means of survival of the groups as such'.[837] The Prosecution recognised the destruction of food, grain stores, water sources, crops, and shelter as a strategy 'to ensure that those inhabitants not killed outright would not be able to survive without assistance'.[838] Furthermore the OTP highlighted the obstruction of humanitarian aid as another feature of this strategy, which it argued had led to massive numbers of civilians enduring "slow death".[839] The Prosecutor has also used the language of 'destruction of means of livelihood' in relation to genocide.[840]

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[832] *ibid.*
[833] Commission of Inquiry, n 822 above, para.320.
[834] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest, n 645 above, 6.
[835] *ibid.*
[836] *ibid.*
[837] *ibid.*
[838] *ibid*, 6.
[839] *ibid* 7.
[840] *ibid.*

The Prosecutor's Application therefore represents important recognition of the impact of subsistence harms on physical survival and their use as a deliberate strategy and weapon of conflict, which legal mechanisms have previously ignored. While this approach has been criticised by some commentators, such criticisms in part stem from lack of understanding of the integrated nature of deprivations of subsistence needs.[841] For example, de Waal has criticised the OTP's attempt to perceive the deprivations of subsistence needs in Darfur as genocide, arguing that the situation in Darfur was not as serious as the ICC Prosecutor has claimed, due, in part, to the "success" of the humanitarian effort.[842] Since humanitarian aid is rarely sufficient to ensure adequate conditions in IDP camps and prevent the physical, mental and social harms of deprivations of subsistence needs, such arguments reflect a misunderstanding of the nature of subsistence harms.

This is not to say that subsistence harms are comprehensively reflected in the Application, but it does undoubtedly represent a different approach to such violence. There is some recognition of the mental suffering caused by displacement in the document. The Application states that 'Victims suffer the trauma of being forced to witness their own homes and possessions destroyed and/or looted ... The victims thereafter endure the anguish of learning that in many cases, prior homelands have been occupied and resettled by members of other communities – and thus, there is no prospect of ever returning'.[843] Nevertheless, the language of possessions and homeland rather than of livelihoods, survival needs and survival networks fails to reflect the full social and mental impact of these deprivations. The Application also does not sufficiently acknowledge the attacks on traditional coping strategies, such as attacks on IDPs who venture out of camps to forage for food or fuel, or the use of forced displacement to prevent physical survival and social survival networks.[844] Moreover, the Application does not recognise the gendered nature of these harms and their disproportionate impact on women, which is a significant failing and reflects the limitations of the current framework regarding the recognition of different forms of gendered harms.

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[841] Alex de Waal, 'The Art of Medicine: On Famine Crimes and Tragedies' 372 (2008) *The Lancet* 1538.
[842] *ibid.*
[843] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest, n 645 above, 5-6.
[844] For the significance of attacks on coping strategies in Darfur, see Hauenstein Swan and Vaitla, n 741 above.

While the Prosecution has recognised some aspects of subsistence harms, the Pre-Trial Chamber's initial Decision on the Arrest Warrant failed to recognise the severity of the attacks on subsistence needs and, most crucially, to see these attacks in an integrated way.[845] The Chamber's analysis of the Prosecutor's evidence starkly illustrates the problems of traditional legal thinking regarding deprivations of subsistence needs and raises questions as to whether the current legal framework is able to reflect the nature of harms committed in contemporary conflict situations. The majority have consistently downplayed the existence of strategies centred on deprivations of subsistence needs, despite considerable evidence of such strategies within the Prosecutor's Application.[846] While the Judges recognised the widespread nature of forcible transfer and the practice of allowing other tribes to occupy this land, they again ignored the deprivations of subsistence needs inherent in such practices, despite the Prosecutor's attempt to reflect the purpose and impact of such violence.[847] Moreover, the Judges largely have not accepted the Prosecution's attempt to include these harms within the crime against humanity of extermination. In discussing extermination, the majority focused on the direct killings of civilians and did not even mention the possibility of "slow death" within the Rome Statute's definition of extermination.[848]

In this regard, the majority have misunderstood the nature of subsistence harms. Firstly, they only discussed the destruction or pollution of water sources, rather than seeing the other attacks on basic needs and thus addressing the harms committed in a comprehensive manner as a particular type of violence and strategy within the conflict.[849] Destruction of water sources was one of many ways in which the survival needs of these groups were attacked by the Government of Sudan (GoS) forces and Janjaweed militias.[850] In contrast, Judge Anita Usacka's Partly Dissenting Opinion showed a greater awareness of the integrated nature of

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[845] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application, n 817 above.
[846] Human Rights Watch, 'Darfur in Flames: Atrocities in Western Sudan' (Report) (2 April 2004) <http://www.hrw.org/en/reports/2004/04/01/darfur-flames-0> accessed 16 July 2008. Hauenstein Swan and Vaitla, n 741 above, 21; International Crisis Group, n 663 above.
[847] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application, majority opinion, n 817 above, para. 100-01.
[848] *ibid*, para 94-97. In summing up evidence for the crime of extermination, the majority stated that 'the Chamber is of the view that there are reasonable grounds to believe that acts of extermination, such as the alleged killing of over a thousand civilians in connection with the attack on the town of Kailek on or around 9 March 2004 were committed by GoS forces'.
[849] *ibid.*
[850] International Crisis Group, n 670 above.

the attacks on basic needs.[851] She noted that 'the Prosecution's allegations refer not only to the destruction of water sources, but more generally to the destruction of "means of survival", which includes food supplies, food sources, and shelter, in addition to water supplies and sources'.[852]

The majority have adopted a similar approach in regard to crime of genocide and in many ways have followed the findings of the Commission of Inquiry.[853] While the Pre-Trial Chamber may well have good grounds for doubting the existence of genocidal intent as well as the requisite group element, they also failed to see that deprivations of subsistence needs could meet the *actus reus* requirement and could show some evidence of *mens rea.*[854] In regard to the Prosecution's allegation of insufficient resources allocated by the GoS to ensure adequate conditions in IDP camps in Darfur, the majority responded by emphasising the existence of an ongoing armed conflict and the high numbers of IDPs. Rather than emphasising displacement as a strategy used by the Government to attack people's means of subsistence and their physical, mental and social health and wellbeing, they instead made significant allowances for the GoS.[855] The high number of IDPs should be seen as evidence of the gravity of the harms perpetrated rather than as a factor that necessarily negates *mens rea.*

In addition, the majority found that 'poor living conditions in the Camps were not systematically, but only "at times" exacerbated by measures introduced by the GoS on security grounds'.[856] Again, by not seeing attacks on subsistence needs as an overall and interlinked course of conduct, the majority failed to perceive that it may not be relevant whether such measures only at times exacerbated conditions, since the conditions in the first place were caused by attacks on people's means of survival. Indeed, the majority seem to unquestioningly accept that these measures were introduced 'on security grounds', rather than

[851] Decision on the Prosecution's Application, Separate and Partly Dissenting Opinion of Judge Anita Usacka, n 817 above.
[852] *ibid*, para. 98.
[853] Commission of Inquiry, n 822 above.
[854] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application, majority opinion, n 817 above.
[855] *ibid*, para. 181.
[856] *ibid*, para. 180.

to further deprive IDPs of the means of subsistence.[857] Judge Usacka, however, recognised that 'even if the level of obstruction differed over time, as suggested by the Majority, the periods during which the obstruction was high would have significant consequences on the ability of the population to survive'.[858] She also highlighted that the Prosecution's allegations regarding the hindering of assistance 'must be analysed in the context of Darfur's harsh terrain, in which water and food sources are naturally scarce and shelter is of utmost importance'. [859]

Some of the other findings of the majority also seem to misunderstand the nature of subsistence harms and their centrality to the violence perpetrated in Darfur. This is shown in regard to the majority's failure to understand the significance of destruction of villages and the resultant forced displacement.[860] They argued that 'in relation to the attacks conducted by the GoS forces on towns and villages primarily inhabited by members of the Fur, Masalit and Saghawa groups, the Majority finds that there are reasonable grounds to believe that in most such attacks, the large majority of their inhabitants were neither killed nor injured', despite the strength of the militia forces and aerial attacks.[861] By attacking their means of survival, the GoS forces did not need to directly kill or injure all or even a large majority of the inhabitants. Furthermore, the majority highlighted that 'GoS forces did not attempt to prevent civilians belonging to the Fur, Masalit and Saghawa groups from crossing the border to go to refugee camps in Chad and that the great majority of those who left their villages after the attacks by GoS forces reached IDP camps in Darfur or refugee camps in Chad'.[862] Again the majority's use of such reasoning was flawed, since such acts condemned victims to terrible living conditions which would inevitably result in a high death toll and thus does not necessarily constitute lack of specific intent.

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[857] *ibid,* para. 181. 'The Majority considers that hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods, can be carried out for a variety of reasons other than intending to destroy in whole or in part the targeted group. As a result, the Prosecution's claim must be assessed in the light of the extent and systematicity, duration and consequences of the alleged GoS obstruction.'
[858] *ibid.* dissenting opinion para. 100.
[859] *ibid,* para. 98.
[860] *ibid,* majority opinion, para. 196.
[861] *ibid,* para. 196.
[862] *ibid,* para. 198.

The Prosecutor's appeal against the Decision of the Pre-Trial Chamber to reject the inclusion of the crime of genocide within the Arrest Warrant has recently been successful.[863] The appeal was based on the Pre-Trial Chamber's interpretation of the threshold required for inclusion of genocide charges under Article 58 (1) of the Statute.[864] The Appeal Chamber decided that this interpretation was erroneous and has remanded the matter back to the Pre-Trial Chamber.[865] Given the Appeal Chamber's finding, the Pre-Trial Chamber's Second Decision now reflects a lower level of proof regarding genocide, which has allowed charges of genocide to be included in the new Arrest Warrant.[866] Where the Chamber had previously held that genocidal intent could not be found when this was only one of the possible conclusions, the lower threshold applied no longer negates genocidal intent in such circumstances.[867]

Thus, while it is significant that genocide charges, including those related to subsistence harms, are now in the Arrest Warrant, the threshold for proving such charges at trial obviously will be much higher and will require positive proof of specific intent. It is therefore unlikely, even given the inclusion of genocide charges in the amended Arrest Warrant, that such charges could be successfully proven, if the case were to be brought to trial.[868] Indeed, the Pre-Trial Chamber's Second Decision highlighted that the infliction of conditions of life under genocide within Article 6(c) of the ICC Statute requires not simply proof that the relevant acts were committed, but additionally requires that they were '*calculated* to bring about the physical destruction of the targeted group, in whole or in part'.[869]

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[863] *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Judgement on the Appeal of the Prosecutor on the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir" 3 February 2010 ICC-02/05/09-OA.

[864] *ibid.*

[865] *ibid.* For a critique of the Pre-Trial Chamber's approach towards the issue of genocide and discussion of the threshold required under Article 58 (1) see Robert Cryer, 'The Definitions of International Crimes in the *Al Bashir* Arrest Warrant Decision' (2009) 7(1) *Journal of International Criminal Justice* 283.

[866] *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010 ICC-02/05-01/09-94; *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95.

[867] *ibid.*

[868] de Waal, n 841 above.

[869] *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application, n 866 above, emphasis added.

If charges of genocide cannot be substantiated, then there are few other offences which could be used to reflect the use of subsistence harms. Indeed, since the situation in Darfur is defined by the Court as a non-international armed conflict, offences such as the starvation of civilians or violence involving attacks on the environment, which could constitute war crimes within international armed conflict, are not available.[870] Moreover, the crime against humanity of persecution was not included in the Prosecutor's Application, meaning that the "property" offences perpetrated can only be reflected within the war crime of pillage.[871] The crimes against humanity of extermination and forcible transfer are therefore the only offences which could be used to address some aspects of subsistence harms, but which, as argued above, would not constitute a full recognition of these harms.

Conclusion

Therefore, there remain considerable problems with the treatment of subsistence harms within international criminal tribunals. While there have been some developments in the interpretation of the law, particularly regarding property offences, this has not led to greater recognition of subsistence harms as such. The analysis of the case law regarding deprivations of subsistence needs has revealed a demarcation between the treatment of harms when committed within and outside of detention situations. Although the law has gone some way towards recognising the gravity of deprivations of subsistence needs within detention situations, its recognition of similar harms committed outside of such situations remains rudimentary and highly problematic. Indeed, despite the fact that IDP camps often operate in a situation where the movement of inhabitants, and thus their ability to meet their own subsistence needs, is severely restricted, there has been limited recognition of subsistence harms within such situations. The cases before the ICC provide the opportunity to develop the law in this area, if there is the will amongst prosecutors and judges to do so.

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[870] See the Rome Statute which, as already highlighted, includes the offences of 'intentionally using starvation of civilians as a method of warfare' under Articles 8(2)(b)(xxv) and 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' under Article 8(2)(b)(iv). However both offences only exist in relation to international armed conflict. n 646 above.

[871] *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Prosecutor's Application, n 645 above; Situation in Darfur, Sudan in the Case of *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir* ("Omar Al Bashir"), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009.

The situation in Darfur presents international criminal justice with a key opportunity to address subsistence harms. The ICC Prosecutor's attempt to charge genocide in the *Al Bashir* case has revolved around a strategy which requires the recognition of subsistence harms. Nevertheless, even here, there remains a lack of awareness of some aspects of the essence of subsistence harms, in particular the essence of the mental and social harms involved and the gendered nature of the harms. The Pre-Trial Chamber's analysis of the Prosecutor's evidence has starkly illustrated the problems of traditional legal thinking regarding subsistence harms and the failure to recognise such harms in an integrated way, as constituting a certain type of violence. Moreover, the Chamber's decisions have further illustrated the problems of including subsistence harms within the framework of genocide, due to the specific intent requirement.

Essentially, the treatment of subsistence harms within existing international criminal tribunals remains disappointing. Clearly, given the limited goals of such tribunals and their inherent selectivity, there is a need to be realistic about what they could achieve. Nevertheless, while there have been important developments in the recognition of physical integrity harms and sexual offences, subsistence harms have largely continued to be sidelined or ignored. The failure or unwillingness of international criminal tribunals to get to grips with the widespread and devastating use of subsistence harms means that there continues to be a lack of recognition of the perpetration and experience of harms. The chapter has argued that the silencing of these harms, and responsibility for them, may impact on public perceptions regarding the work and legitimacy of such institutions, as seen in attitudes in Uganda regarding the Prosecutor's decision not to bring charges against the Government for the widespread perpetration of forced displacement.[872] Ultimately, this promotes impunity for perpetrators of these harms and leaves survivors with a sense of injustice. Moreover, given the nature of subsistence harms, such injustice is also inherently gendered. The next chapter will analyse the treatment of subsistence harms within truth commissions, in comparison with international criminal tribunals. However, while truth commissions may promise a broader recognition of harms and responsibility for them, the chapter will argue that, in general, truth commissions have similarly failed to provide recognition of subsistence harms and thus that these harms continue to be silenced or sidelined within transitional justice mechanisms.

[872] Glasius, n 644 above, 502.

Chapter 4

Subsistence harms and the "truth" of truth commissions

While the South African TRC proclaimed that 'revealing is healing' the Sierra Leone Tribunal adopted a similar message of 'mek wi tok tru fo joyn an' [Let's tell the truth and join hands].[873] As these slogans illustrate, truth commissions promise to heal survivors and promote societal reconciliation through the telling of "truth". But what is the nature of this truth? If it is a partial and distorted truth, then surely this undermines the very nature of these claims. This chapter will argue that the "truth" of truth commissions needs to be questioned, in regard to their proclamations of a single truth which largely silences subsistence harms. If promoting individual healing and societal reconciliation through acknowledging violence is one of the main rationales for truth commissions, then silencing subsistence harms and underlying socio-economic grievances could be counterproductive and serve to foster further grievances.[874] Whilst some of the existing literature has sought to dissect and critique the "truth" of truth commissions and the value of truth-telling, this chapter is concerned with placing such critiques within the context of subsistence harms in order to analyse truth commissions' treatment of such harms.[875] It therefore seeks to contribute to the literature by analysing truth commissions' treatment of subsistence harms and the impact such treatment has on their role within transitional justice.

This chapter develops the discussion in chapter 2 by examining, in more detail, the goals and the value of truth commissions as a means of recognising and addressing harms. The first section will discuss the goals of truth commissions and perceptions of the legitimacy of such mechanisms as well as providing an overview of the treatment of subsistence harms within

[873] A message from leaflets distributed at the Sierra Leone TRC, quoted in Rosalind Shaw, 'Rethinking Truth and Reconciliation Commissions Lessons from Sierra Leone' United States Institute of Peace Special Report <http://www.usip.org/files/resources/sr130.pdf> accessed 3 February 2009.

[874] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) *International Law and Politics* 1, 8.

[875] See Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (London: Routledge, 2001) 163; Christine Bell, Colm Campbell, Fionnuala Ní Aoláin, 'Justice Discourse in Transition' (2004) 13(3) *Social & Legal Studies* 305.

these mechanisms. It will highlight the possibilities of truth commissions to address subsistence harms, but also argue that existing commissions tend to reflect the current concerns of transitional justice in privileging civil and political rights issues and emphasising short-term goals of transition. The second part of the chapter compares the approaches of two truth commissions: the South African TRC and East Timor's CAVR. These commissions have been chosen because they both address situations concerning widespread perpetrations of subsistence harms, but reflect very different treatment of these harms. The comparison will illustrate the limitations of the South African TRC and the more progressive approach of CAVR, but argue that even the latter presents problems in terms of truly addressing and redressing subsistence harms.

I) Truth commissions, the performance of recognition and the silencing of subsistence harms

i) The norms and goals of truth commissions: proclaiming a partial truth

Truth commissions have proliferated in recent years as a key transitional justice mechanism.[876] While some truth commissions, such as the Sierra Leone Commission, have worked alongside criminal tribunals, most have been used as an alternative transitional strategy to international criminal trials.[877] The recognition provided by truth commissions is quite different from that provided by international criminal tribunals, but still provides an important form of recognition and, crucially, some means of redress.[878] Their legitimacy stems not from strict legalistic approaches, although some commissions have attempted to adopt these, but rather from the space these official institutions provide for articulating and recording harms and the way that they treat such harms.[879] While some truth commissions have been internationalised, most have been developed within a particular country and thus there is the potential for truth commissions to be more tailored to the needs of the society

[876] Pricilla Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16(4) *Human Rights Quarterly* 597.
[877] William A Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *U C Davis Journal of International Law & Policy* 145.
[878] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).
[879] James L. Gibson, 'On Legitimacy Theory and the Effectiveness of Truth Commissions' (2009) 72 *Law and Contemporary Problems* 123.

concerned than international criminal tribunals.[880] The structure and mandates of truth commissions therefore vary considerably, as will be seen in regard to the differences between the South African TRC and East Timor's CAVR.[881] Nevertheless, there are clear features in common which can be analysed, notably the focus on truth-telling and more recently on reconciliation and measures for redress.[882]

The legitimacy of truth commissions resides in their ability to provide space for testimony and to prevent the silencing of violence by compiling a record of past violence. Perceptions of legitimacy on the part of survivors are crucial to truth commissions being able to fulfil their goals of fostering truth-telling and promoting societal reconciliation.[883] In comparison with international criminal trials, truth commissions arguably aim to focus far more strongly on the narrative told and are not restricted to tailoring testimony to the particular prosecution. As Moon highlights, the 'power of testimonial truth turns on the spectacle of victim suffering, communicating not just the forensic details of a violation but the personal pain emanating from the act'.[884] Since they lack the powers and procedures of international criminal tribunals, truth commissions may feel more accessible to some survivors and avoid some of the negative associations of law and the taint of law's complicity in past abuses. This potentially allows space for the recognition of diverse forms of harm and therefore for the acknowledgement of a more comprehensive record of past violence than within international criminal tribunals.[885]

However, the treatment of subsistence harms within existing truth commissions raises significant questions regarding some of these goals and the very legitimacy of such mechanisms. The claims of truth commissions to facilitate and provide truth have been

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[880] Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2002) 12 *International Legal Perspectives* 73.
[881] The South African TRC was based on the Promotion of National Unity and Reconciliation Act 34 of 1995 Assented to 19 July 1995, Date of Commencement: 1 December 1995; Commission for Reception, Truth and Reconciliation in East Timor (CAVR), 'Chega!' (2005) <http://www.cavr-timorleste.org/en/chegaReport.htm> accessed 20 May 2008.
[882] Jeremy Sarkin, 'Achieving Reconciliation in Divided Societies: Comparing the Approaches in Timor-Leste, South Africa and Rwanda' (2008) *Yale Journal of International Affairs* 11.
[883] Gibson, n 879 above, 125.
[884] Claire Moon, 'Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation' (2009) 8(1) *Journal of Human Rights* 71, 83.
[885] Minow, n 878 above.

contested within the existing literature.[886] As Hayner points out, 'There is never just one truth: we each carry our own distinct memories, and they sometimes contradict each other'.[887] There is a danger that in compiling an historical record and proclaiming a truth about the past, truth commissions can overlook the multiplicity of truths involved and the different perspectives of survivors.[888] Nevertheless, provided truth commissions recognise these issues, they potentially can play an important role in preventing the silencing of violence and countering perpetrators' dominant version of history.[889] The power of truth commissions is their ability to publicise truths concerning a violent past and thus widely disperse such understandings amongst survivors.[890] Nevertheless, this does not mean that all forms of violence are proclaimed by truth commissions. The lack of attention paid to different forms of harm within truth commissions, and particularly to subsistence harms, illustrates that claims as to truth by such commissions need to be examined and unpacked.[891]

Truth commissions have largely failed to allow the truths of subsistence harms to be told and have remained indebted to, and bound by, some of the conceptual restrictions of international law. Despite perceptions of truth commissions as being less restricted than international criminal tribunals in the types of harms they recognise, the nature of the "truth" told is often circumscribed by the mandate of the commission and the political and legal restrictions of transitional justice discourse.[892] The mandates and concerns of truth commissions dictate and predetermine the kinds of testimony which is permitted and acknowledged within these mechanisms.[893] These mandates have often been restricted to examining physical integrity harms, presenting a barrier to other forms of truth, particularly those involving the perpetration of subsistence harms and other socio-economic grievances, becoming known.[894] Claims that truth commissions provide a "democratising" truth and a more inclusive and

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[886] Erin Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2(1) *International Journal of Transitional Justice* 23.
[887] Hayner, n 875 above, 163.
[888] Vasuki Nesiah, 'Gender and Truth Commission Mandates' International Center for Transitional Justice <http://www.ictj.org/static/Gender/0602.GenderTRC.eng.pdf > accessed 12 November 2009.
[889] Daly, n 886 above, 33.
[890] Brandon Hamber and Richard A. Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-conflict Societies' (2002) 1(1) *Journal of Human* Rights 35.
[891] Bell, Campbell and Ní Aoláin, n 875 above.
[892] Fionnuala Ní Aoláin, and Catherine Turner, 'Gender, Truth and Transition' (2007) 16 *UCLA Women's Law Journal* 229, 274.
[893] On the neglect of economic harms see Zinaida Miller, 'Effect of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 (3) *International Journal of Transitional Justice* 266, 268.
[894] *ibid.*

engaging space for survivors therefore are questionable.[895] While the degree of civil society involvement obviously varies between the different truth commissions, with some commissions allowing greater engagement than others, the boundaries of what it is considered as important to be told still may be dictated to a large degree on a "top-down" basis.[896] As Lundy and McGovern argue, the scope of a commission's work and findings is often decided within the initial negotiations surrounding the establishment and mandate of a particular commission, rather than necessarily reflecting the range of survivors' concerns.[897]

The restricted nature of many truth commission mandates is seen most starkly with regard to the Argentinean Truth Commission, which was established by the Argentinean Government in 1983 and was tasked with focusing purely on forced disappearance. Similarly the Chilean Truth Commission, established by the Chilean Government in 1990, was mandated to investigate human rights abuses resulting in death through torture, disappearance or execution.[898] Although the mandate of Peru's truth commission, which was established by the Peruvian Government in 2001, may seem less restricted than these previous commissions, it continued to focus on the physical integrity harms of 'murders and abductions; forced disappearances; torture and other serious injuries'.[899] Although it is significant that the mandate included 'violations of collective and individual rights', the lack of definition of such violations meant that the Commission continued to focus on physical integrity harms and civil/political rights violations.[900]

While the more recent truth commissions have tended to have less restricted mandates, which allowed them to develop slightly wider approaches to harm, there has still been a predominant emphasis on physical integrity harms and a sidelining of subsistence harms and

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[895] For an emphasis on the "democratising" truth of truth commissions see Michael Humphrey, 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing' (2003) 14(2) *Australian Journal of Anthropology* 171.

[896] Patricia Lundy and Mark McGovern, 'Community-based Approaches to Post-Conflict "Truth-telling": Strengths and Limitations' (2006) *Shared Space: A Research Journal on Peace, Conflict and Community Relations in Northern Ireland.*

[897] *ibid.*

[898] Hayner, n 875 above; National Commission for Truth and Reconciliation, Supreme Decree No. 355, Santiago, April 25, 1990.

[899] The President of the Republic, Supreme Decree No. 65-2001-PCM, 4 June 2001.

[900] *ibid*, Article 3, 'Violations of the collective rights of the country's Andean and native communities; Other crimes and serious violations of the rights of individuals'.

socio-economic concerns. The Liberian Truth and Reconcilation Commission, established in 2005 by the National Transitional Legislative Assembly, was tasked with focusing on 'gross human rights violations and violations of international humanitarian law as well as abuses that occurred, including massacres, sexual violations, murder, extra-judicial killings and economic crimes'.[901] With the exception of economic crimes, defined in terms of corruption and misuse of natural resources, the violations within the mandate only relate to physical integrity harms. Indeed, in defining gross violations of human rights, the Commission stated that 'the TRC Act is almost exclusively concerned with gross violations of civil and political rights as opposed to economic, social and cultural rights, except for its explicit reference to economic crimes'.[902]

Interestingly, the Liberian Commission acknowledged deportation or forcible transfer as a gross violation, and thus equated this harm, both in its definition and analysis, with civil and political rights rather than perceiving the range of rights violations involved.[903] This follows the general approach of international legal discourse and practice, which, despite a current lack of clarity on the definition of gross violations of human rights, tends to perceive gross violations purely in terms of civil and political rights.[904] Indeed, although the UN Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights acknowledged the indivisibility and interdependence of all human rights he stopped short of explicitly recognising that certain socio-economic harms can constitute gross violations of human rights.[905]

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[901] The National Transitional Legislative Assembly, 'An Act To Establish The Truth And Reconciliation Commission', 12 May 2005.

[902] Republic of Liberia, Truth and Reconciliation Commission: Final Report Vol. II, Consolidated Report <http://www.trcofliberia.org/> accessed 19 July 2009, 33.

[903] *ibid*, 214.

[904] An exception to this is the work of Louise Arbour who has argued that gross violations can and should relate to all forms of human rights including socio-economic rights. Arbour, n 874 above, 16.

[905] The Special Rapporteur largely sees gross violations of human rights as including 'genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender'. He acknowledges that 'given also the indivisibility and interdependence of all human rights, gross and systemic violations of the type cited above [i.e. civil and political rights violations] frequently affect other human rights as well, including economic, social and cultural rights'. However, this is very different from recognising subsistence harms as constituting gross violations themselves. UN Sub-Commission on the Promotion and Protection of Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Cictims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report, submitted by Theo van Boven, Special Rapporteur, 2 July 1993, E/CN.4/Sub.2/1993/8.

The Sierra Leone Truth and Reconciliation Commission, which was established in 2000 by the Sierra Leone Government following the peace agreement between the government and the rebel Revolutionary United Front, avoided the issue of defining gross violations.[906] Instead, the Commission was mandated to focus on 'violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone'.[907] The broader mandate did allow the Commission to acknowledge the widespread perpetration of forced displacement and destruction of property which occurred during the conflict and to recognise that 'More forced displacements were reported than any other violation'.[908] However, the failure to understand these harms as centred on the deprivation of subsistence needs reflects similar approaches within international criminal tribunals. The harms of destruction and looting of property were dealt with by the Sierra Leone Commission as 'economic violations', with the emphasis being on 'property' rather than the human impacts of these harms.[909] The Commission did acknowledge the obvious link between destruction of homes and forced displacement, but did not discuss the nature of displacement in terms of deprivations of subsistence needs and their physical, mental and social elements or acknowledge the often gendered nature of these harms.[910]

While, in many ways, the Guatemala Commission adhered to traditional approaches in privileging physical integrity harms within its analysis, its broad mandate did allow more diverse harms to be told and recorded.[911] The Commission, which was established in 1994 during the Peace Accords, was tasked with investigating the 'human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict', which allowed a wider scope for the work of the Commission.[912] It recognised the scale of forced displacement and its impacts in terms of death, malnutrition and severe emotional traumas which is significant in terms of recognition of physical and mental

[906] The Truth and Reconciliation Commission Act 2000, 10 February 2000.
[907] *ibid.*
[908] Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth', Final Report vol. 2 (2004) Chapter 2, 'Findings'
<http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20TWO/VOLUME%202.pdf> accessed 8 May 2009.
[909] *ibid.*
[910] *ibid.* Vol. 3A, Chapter 4 'Nature of Conflict' 491-92.
[911] Charter of the Commission for Historical Clarification, 'Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer', 23 June 1994.
[912] Joanna Crandall, 'Truth Commissions in Guatemala and Peru: Perpetual Impunity And Transitional Justice Compared' (2004) 4 *Peace, Conflict and Development* 1.

harms.[913] Significantly, the Commission recognised the use of a scorched-earth policy in Guatemala against the civilian population and, importantly, analysed the burning of villages and displacement within the framework of genocide.[914]

Although its discussion of these harms was brief, it did acknowledge that 'whole villages were burnt, properties were destroyed and the collectively worked fields and harvests were also burnt, leaving the communities without food' and that 'people were also persecuted during their displacement', which shows some acknowledgement of the social impact of harms.[915] While relatively tentative and unclear in its approach, the Commission significantly perceived some of these acts as possibly constituting genocide in terms of '"deliberate infliction on the group of conditions of life" that could bring about, and in several cases did bring about, "its physical destruction in whole or in part"'.[916] Nevertheless, the lack of clarity with which the Commission discussed the issues of displacement, destruction of food and villages, is indicative of the problems of analysing and fully including subsistence harms within international criminal legal framework.

The narrow mandates and interpretations of truth commissions have crucially meant that the truths proclaimed are often profoundly gendered.[917] Despite the potential of truth commissions to allow greater flexibility to acknowledge gendered harms, such mechanisms have largely continued to silence women's experiences.[918] The need for gender-sensitive approaches and the inclusion of women has recently been recognised within some truth

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[913] Commission for Historical Clarification, 'Memory of Silence: The Tragedy of Armed Conflict' <http://shr.aaas.org/guatemala/ceh/report/english/toc.html > accessed 28 June 2009, para. 67.
It stated that 'living exposed to the elements, malnutrition and the severe emotional traumas that resulted from having witnessed numerous atrocities, left people vulnerable, especially children and the elderly, a great number of whom died during the flight and displacement'.
[914] *ibid.* See also Nahla Valji, 'Race, Citizenship and Violence in Transitioning Societies: A Guatemalan Case Study', Centre for the Study of Violence and Reconciliation (2004) 39 <http://www.csvr.org.za/docs/racism/racecitizenship.pdf> accessed 25 July 2008.
[915] Commission for Historical Clarification, n 913, para. 116-17.
[916] *ibid.*
[917] See Nesiah, n 888 above.
[918] Ní Aoláin and Turner, n 892 above, 232.

commissions, such as the Liberian and Sierra Leone TRCs, but there remains some tendancy to treat gender and women's concerns as a side issue, rather than as central to the process.[919]

Truth commissions have tended to reproduce transitional justice concepts of "breaking with the past" and "never again", which emphasise the exceptional nature of human rights violations rather than ongoing violence and situations of socio-economic and gender inequality.[920] Moreover, the emphasis on political violence and physical integrity harms within many existing truth commissions has sidelined and obscured the kinds of subsistence harms and socio-economic violations which are often central to many women's experiences of violence and harm. This failure de-contextualises violence by ignoring the linkages between ongoing socio-economic violence and inequalities and the experience of subsistence harms.[921] Since truth commission reports have the ability to shape the post-transition society, their neglect of subsistence harms and their gendered nature enforces the long-term silencing of these issues.[922]

Moreover, as with international criminal tribunals, gendered harms are largely equated with sexual violence within truth commission narratives.[923] Women's experiences are predominantly defined through the prism of sexual violence, with other forms of harm, such as subsistence harms, being marginalised or ignored. While the Sierra Leone TRC sought to contextualise gender harms by looking at how gender inequality renders women vulnerable to sexual violence, this approach was not applied to women's experience of forced displacement

[919] For attempts to include gender issues with the Liberian Commission, but also the limitation of these processes see Anu Pillay, 'Views from the Field: Truth-seeking and Gender, the Liberian Experience' (2009) 9(2) African Journal on Conflict Resolution 91.

[920] Anne Orford, 'Commissioning the Truth' (2006) 15 *Columbia Journal of Gender and Law* 852, 861; Janet Cherry, 'Historical Truth: Something to Fight For' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000) 134, 143.

[921] For some discussion of the failure of truth commissions to address a range of gendered harms see Ní Aoláin and Turner, n 892 above, 262. On the issue of the silencing of socio-economic rights issues within the initial Report of the Liberian TRC see Evelyne Schmid, 'Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice' (2009) 24 *PRAXIS The Fletcher Journal of Human Security* 5, 16.

[922] Ní Aoláin and Turner, *ibid*, 279.

[923] For literature which acknowledges the current focus on sexual violence within truth commissions see Fiona C. Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (London: Pluto Press, 2002) 86-88; Kelli Muddell, 'Capturing Women's Experiences of Conflict: Transitional Justice in Sierra Leone' (2007) 15 *Michigan State Journal of International Law* 85, 88; Nesiah, n 888 above.

and destruction of "property".[924] This failure is perhaps, in part, due to the limitations of the Commission's mandate which did not explicitly refer to gender issues but merely spoke of 'giving special attention to the subject of sexual abuses'.[925] On the other hand, the Liberian TRC did briefly allude to the impact of forced displacement on women and acknowledged the link between displacement and sexual exploitation.[926] Nevertheless, as the Commission did not acknowledge forced displacement as constituting deprivations of subsistence needs, its understanding of the impact on women remained particularly limited, again focusing predominantly on issues of vulnerability to sexual violence.[927]

The lack of sufficient attention given to recognising and contextualising gendered violence is indicative of a wider unwillingness within many truth commissions to truly uncover the underlying causes, contexts and consequences of violence.[928] Truth commissions generally have less rigid, legalistic structures than international criminal trials, which potentially allows them to investigate and recognise the context and underlying causes of violence.[929] However, the mandates of commissions, and commissioners' interpretations of their roles, have often prevented systematic examination of the broader contexts of violence, which is crucial to addressing underlying socio-economic violations and potentially promoting societal reconciliation.[930]

More recent commissions, notably Peru's Truth and Reconciliation Commission (CVR), Guatemala's Historical Clarification Commission (CEH) and Sierra Leone's Truth and Reconciliation Commission, have tended to adopt more contextualised approaches which look at some of the socio-economic causes of conflict.[931] However, due to the lack of attention to subsistence harms, such contextualised approaches still fail to perceive the

[924] Sierra Leone TRC, n 908 above. For an account which highlights the greater sensitivity of the Sierra Leone Commission to gender issues, see K. M. Franke, 'Gendered Subjects of Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 813, 826-28.
[925] Muddell n 923 above, 91-92. See Sierra Leone TRC Final Report Chapter 3B 'Women and the Armed Conflict in Sierra Leone', n 908 above. Sierra Leone TRC Act, n 906 above, Article 6(2)(b).
[926] Sierra Leone TRC Final Report Vol II, *ibid*, 273.
[927] *ibid.*
[928] Ní Aoláin and Turner, n 892 above; Arbour, n 874 above, 14.
[929] Minow, n 878 above.
[930] See Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) Vol. 2(3) *International Journal of Transitional Justice* 331, 333.
[931] Commission for Historical Clarification, n 913 above; Sierra Leone TRC, n 908 above, 29-33

linkages between deprivations of subsistence needs and underlying socio-economic grievances.[932] The mandate of Guatemala's Commission promoted the analysis of the root causes of the conflict and, while its research in this area was not extensive due to the limited resources of the Commission, it did highlight the linkages between underlying socio-economic grievances and structural violence and the outbreak of armed conflict.[933] The Commission recognised that 'a vicious circle was created in which social injustice led to protest and subsequently political instability' and consequently that 'political violence was thus a direct expression of structural violence'. [934]

The findings and approach of the Commission in regard to the recognition of contexts of violence were indebted to a large degree to the unofficial Recovery of Historical Memory Report (REHMI), commissioned by the Catholic Church in Guatemala, which had been published by the time the CEH had really got underway.[935] This illustrates the importance of unofficial, non-governmental fora, in the process of truth-telling and the role that civil society can play in promoting the recognition of harms.[936] REHMI was a crucial precursor to the official CEH, not only in promoting the need for truth-telling processes but also in providing a space for survivor testimony, documenting a wide range of harms and fostering a sense of the importance of truth-telling processes amongst indigenous populations.[937] The work of the unofficial REMHI Report, in recording the testimony of many survivors and in detailing the contexts of violence, therefore laid a key foundation for the CEH process and Report.[938] In following the publication of the REMHI Report, the CEH could not realistically ignore contexts of violence and the issue of the relationship between socio-economic inequalities and violence.

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[932] On the issue of the significance of socio-economic grievances in conflict situations, see E. Wayne Nafziger and Juha Auvinen, 'War, Hunger and Displacement: An Econometric Investigation into the Sources of Humanitarian Emergencies' Working Paper No. 142 (Helsinki: World Institute for Development Economics Research, 1997); Christopher Cramer, 'Does Inequality Cause Conflict?' (2003) 15 *Journal of International Development* 397.

[933] Elizabeth Oglesby and Amy Ross, 'Guatemala's Genocide Determination and the Spatial Politics of Justice' (2009) 13(1) *Space and Polity*, 21.

[934] Commission for Historical Clarification, n 913 above, para. 8.

[935] Recovery of Historical Memory Project, *Guatemala: Never Again!* (Maryknoll, NY: Orbis Books, 1999).

[936] Louis Bickford, 'Unofficial Truth Projects' (2007) 29(4) *Human Rights Quarterly* 994; Melissa Ballengee, 'The Critical Role of Non-Governmental Organizations in Transitional Justice: A Case Study of Guatemala' (1999) 4 *UCLA Journal of International Law and Foreign Affairs* 477.

[937] Bickford, *ibid.*

[938] *ibid*, 1012.

The Sierra Leone Commission also acknowledged some of the contexts of violence. The mandate of the Commission tasked it with 'undertaking investigation and research into key events, causes, patterns of abuse or violation' which allowed it to highlight, although rather too briefly, some of the socio-economic inequalities and grievances that contributed to the causes of conflict.[939] It found that 'Selfish leadership bred resentment, poverty and a deplorable lack of access to key services. Notwithstanding the riches endowed to Sierra Leone in the form of diamonds and other mineral resources, the bulk of the population remained impoverished. Indeed, many of the poor were becoming poorer'.[940] However, the Commission did not fully acknowledge the linkages between such underlying socio-economic grievances and the perpetration of violence based on deprivations of subsistence needs.

While the Liberia TRC found that 'the root causes of the conflict are attributable to poverty; greed; corruption; limited access to education; economic, social, civil, and political inequalities; identity conflict; and land tenure and distribution', it did not address perpetrations of subsistence harms or advocate ways of promoting socio-economic rights.[941] Interestingly, some truth commissions, such as the Peruvian Commission, have recognised aspects of the socio-economic consequences of conflict, including impoverishment caused by forced displacement.[942] In many ways, this highlights the inconsistency of truth commissions' approaches regarding subsistence harms and socio-economic inequalities, in the sense that there is some acknowledgement of the serious nature of such harms, but there is also insufficient attention given to them. The Peruvian Commission highlighted that the most marginalised and socio-economically disadvantaged parts of the population were those who suffered most from the violence.[943] However, all this was largely framed in terms of the consequences of violations of civil and political rights and physical integrity harms rather than systematic recognition of subsistence harms themselves.[944]

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[939] The Truth and Reconciliation Commission Act, n 906 above, Article 7(1)(a).
[940] Sierra Leone TRC, n 908 above, vol 2, chapter 2, 30.
[941] On the failure of truth commission to address socio-economic issues, see Schmid, n 921 above.
[942] Truth and Reconciliation Commission of Peru, Final Report (2003) <http://www.cverdad.org.pe/ingles/pagina01.php> accessed 28 June 2009, para. 156.
[943] *ibid.*
[944] For analysis of the treatment of socio-economic rights issues see Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development' (2007) 10 *Yale Human Rights and Development Law Journal* 141, 155.

Truth commissions' determinations regarding responsibility for harms also raises questions regarding the truth proclaimed. Due to the political needs of transition, truth commissions have often been restricted in their ability and willingness to address issues of responsibility. Indeed, the fact that truth commissions have frequently been linked to amnesty processes means that their ability to articulate responsibility has been severely restricted.[945] On the other hand, truth commissions have also been profoundly influenced by the traditional legal dichotomy between victims and perpetrators and focused on individuals, rather than a more collective understanding of responsibility.[946] Such a strategy presents a distorted truth by failing to focus on wider complicity in terms of international responsibility and the role of beneficiaries.[947] Moreover, it presents a clear demarcation between victims and perpetrators, rather than reflecting the fact that this line can in fact be blurred.[948] As Nwogu argues, it is important that truth commissions begin to contextualise rather than essentialise victim/perpetrator status and see this as a 'temporary state that any person could enter and from which such a person can exit - a state that a certain mix of circumstances could generate and a different set of circumstances can eradicate'.[949]

Some truth commissions, such as the Sierra Leone TRC have avoided looking at individual perpetrators, again due to the restrictions of their mandates and the needs of transition, and thus focused on particular armed groups instead.[950] Nevertheless, this fails to acknowledge the responsibility or complicity of wider society and third party states or international non-state actors. On the other hand, the example of the Guatemalan CEH's approach illustrates that where there is political will by commissions, having a limited mandate can allow a broader understanding of responsibility to develop. While the CEH mandate did not permit the naming of individual perpetrators, the Commission instead adopted a broader and more

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[945] Peter A. Schey, Dinah L. Shelton and Naomi Roht-Arriaza, 'Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty' (1997) 19 (2) *Whittier Law Review* 325.
[946] Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) 25 *Human Rights Quarterly* 1088.
[947] Mahmood Mamdani, 'The Truth According to the TRC' in Ifi Amadiume and Abdullahi An-Na'im (eds), *The Politics of Memory: Truth, Healing and Social Justice* (London: Zed Books, 2000) 176, 180; Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (London: Cornell University Press, 2005); Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 275.
[948] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ.: Princeton University Press, 2001).
[949] Nneoma V. Nwogu, 'When and Why It Started: Deconstructing Victim-Centered Truth Commissions in the Context of Ethnicity-Based Conflict' (2010) *International Journal of Transitional Justice* 1.
[950] Sierra Leone TRC Report, n 908 above, vol. 2, chapter 2, para. 107-12.

contextualised approach, which critiqued the entire political system and the structural conditions in Guatemala.[951]

Therefore, while the approaches of the various truth commissions have differed, they can all be critiqued to some degree in terms of the partial nature of the truths they proclaim, particularly the silencing or sidelining of subsistence harms. The narrow aims of transitional justice play a key role in promoting such a partial truth. Transitional justice has been focused on physical integrity harms and the goals of political transition which inevitably sideline or silence subsistence harms and underlying structural violence and grievances. The mandates of truth commissions and current understandings of gross violations of human rights also circumscribe the nature and extent of the truths told. The next section will discuss the impact of such narrow and partial truths on the forms of recognition provided by truth commissions and the dangers of failing to address subsistence harms. While the claims of truth commissions to heal survivors and promote reconciliation in general should be viewed with some scepticism, the silencing and sidelining of subsistence harms places an even greater question mark over such claims and thus over the role and value of truth commissions.[952]

ii) Healing and reconciliation: the problems of sidelining subsistence harms

The goals of investigating past atrocities allows truth commissions to place greater emphasis on victim/witness testimony and arguably provide a more inclusive and engaging space for survivors than international criminal tribunals.[953] The silencing of subsistence harms within existing truth commissions raises questions regarding whose stories are permitted to be told and how these stories are reproduced. The mandates of truth commissions, and the fact that they are often interpreted narrowly, means that only certain survivors are provided with the opportunity to testify.[954] The fact that the determination as to what harms are recognised is

[951] Crandall, n 912 above, 7-8.
[952] For literature which questions the ability of truth commissions to promote healing see Derek Summerfield, 'Effects of War: Moral Knowledge, Revenge, Reconciliation, and Medicalised Concepts of "Recovery"' (2002) 325 *British Medical Journal* 1105; Eric Brahm, 'Judging Truth: The Contribution of Truth Commissions in Post-conflict Environments' in Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Farnham: Ashgate, 2009); David Mendeloff, 'Truth-seeking, Truth-telling and Post-conflict Peacebuilding: Curb the Enthusiasm?' (2004) 6 *International Studies Review* 355.
[953] Minow, n 878 above, 72; Hayner, n 875 above.
[954] Humphrey, n 895 above, 175.

often politically circumscribed, therefore brings into doubt the legitimacy of truth commissions as forums which objectively represent past violence and address the needs of survivors as a whole. Indeed, the lack of attention given to subsistence harms and socio-economic harms experienced by women allowed the Liberian Commission to conclude that 'as a group, men comprise a larger victim category than women'.[955]

Survivors may be strictly restrained in relation to the types of harms which a commission considers relevant to its truth-telling process and thus their experiences may be de-contextualised and distorted.[956] As such, the ability of survivors to freely testify to their experiences may be far more limited than is usually imagined and there are clear gendered elements to such framing of testimony.[957] For example, while women's testimony gathered during focus groups held by the Peruvian TRC related to a broad range of harms including subsistence harms such as deprivations of crops and livestock, the TRC Report exclusively focused on sexual violence.[958] As highlighted above, women are predominantly positioned as victims of sexual violence, whereas the broader nature of their experiences as both victims and actors, and their responses to harm is obscured and ignored.

The general emphasis upon victimisation, often evident within truth commissions, is problematic in denying survivor agency and emphasising passivity and marginalisation. Understanding subsistence harms requires both recognition of the physical, mental and social experience of harms but also of how survivors, particularly women, cope with and resist these harms. Interestingly, the Guatemalan Commission did highlight both the severe victimisation of the local population and also the resistance of survivors towards the atrocities, but this largely represents the exception rather than the norm. The Commission stated that the 'testimonies of the internally displaced received by the CEH reveal an attitude both of

[955] Republic of Liberia, Truth and Reconciliation Commission, n 902 above, 63. For a critique of this narrow approach towards gender issues see Schmid, n 921 above, 16.
[956] Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001) 34.
[957] Barbara Russell, 'A Self-Defining Universe? Case Studies from the "Special Hearings: Women" of South Africa's Truth and Reconciliation Commission' (2008) 67(1) *African Studies* 49, 86-88; Ní Aoláin and Turner, n 892 above.
[958] For analysis of women's experiences of harm in Peru and the restricted nature of the truths heard by the TRC see Kimberly Theidon, 'Gender in Transition: Common Sense, Women, and War' (2007) 6(4) *Journal of Human Rights* 453.

resistance to military control and in defence of life, not only in its physical sense, but also with regard to cultural and political identity'.[959]

The process of truth-telling, while not necessarily producing healing on its own, may be a first step towards recognition of harms and consequent feelings of validation by survivors.[960] It is therefore crucial that the truth of subsistence harms can be told through and recognised by these mechanisms. As Daly reminds, 'Silencing is a particularly painful aspect of oppression because it forces the internalization of pain'.[961] The processes of truth-telling and the voicing of harms may be craved by survivors as a way of making their stories known, demanding official acknowledgement of harms and thus escaping the oppression that silencing of harms enforces.[962] As Godwin Phelps highlights, 'making stories of our lives is what we humans do. It is the fundamental means by which we assert and describe our humanity ... Storytelling is an essential human act that enables all of us to make sense of our lives and to feel integrated as members of a community'.[963]

In acknowledging and validating survivors' experiences of harms, truth commissions can potentially play a role in symbolically reversing the marginalisation and victimisation of survivors.[964] In not permitting the truth of subsistence harms and underlying socio-economic grievances to be fully told, truth commissions therefore deny this process of truth-telling to survivors and prevent wider measures to redress these harms and underlying grievances. As argued previously, in relation to theories of recognition, the concern in the thesis is not with acknowledgement and validation of victim identity, but of recognition of subsistence harms

[959] Commission for Historical Clarification, n 913 above para. 71.
[960] Hamber and Wilson, n 890 above, 7.
[961] Daly, n 880 above, 87.
[962] Research by the International Center for Transitional Justice suggests that victims/survivors often do express the importance of truth-telling and understanding the past. Piers Pigou, 'Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations', International Center for Transitional Justice Occasional Paper (August 2003) <http://www.ictj.org/images/content/0/9/096.pdf > accessed 5 December 2008; Phuong N Pham, Patrick Vinck, et al., 'Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda' (2005) International Center for Transitional Justice <http://www.ictj.org/images/content/1/2/127.pdf> accessed 4 July 2009; Patrick Vinck, Phuong Pham et al., 'Leaving with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Eastern Democratic Republic of Congo' (2008) Berkeley-Tulane Initiative on Vulnerable Populations <http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf> accessed 21 June 2009.
[963] Teresa Godwin Phelps, *Shattered Voices: Language, Violence, and the Work of Truth Commissions* (Philadelphia: University of Pennsylvania Press, 2004) 55.
[964] *ibid*, 55; Humphrey, n 895 above, 174.

and their impact on survivors. In providing a space for truth-telling, truth commissions have the potential to promote recognition of harms and of how these harms relate to wider marginalisation and grievances. However, as will be seen, truth commissions rarely promote understanding of wider contexts of violence and victimisation and therefore tend to promote a narrow understanding of victims as well as of perpetrators, which may be detrimental to societal reconciliation.[965]

Some existing literature already acknowledges the limitations of truth commissions regarding individual healing and societal reconciliation, particularly since there is little evidence, as yet, to suggest that truth commissions really do foster individual or social healing.[966] Indeed, while this may be claimed as a goal of truth commissions, in reality, recording harms rather than providing therapy for survivors remains the key aim of such mechanisms.[967] It should not be assumed that everyone reacts to truth-telling in the same way. Rather, there can be diverse reactions to truth-telling and its value can vary between different communities and individuals.[968] Indeed, there is evidence that truth-telling can be negative, particularly if survivors are not treated with care and consideration and if testimony is substantially framed.[969] It must be acknowledged that truth-telling can produce a risk of re-traumatising survivors, through the process of reliving harms experienced.[970] In this way, the needs of

[965] For literature which critiques the failure of truth commissions to acknowledge wider contexts of violence and their focus on individual and specific harms, see Miller, n 893 above; Joseph Nevins, 'Restitution Over Coffee: Truth, Reconciliation and Environmental Violence in East Timor' (2003) 22 *Political Geography* 677; Nagy, n 947 above.

[966] Hayner, n 875 above, 135 and 139; Laurel E. Fletcher and Harvey M. Weinstein, 'A World unto Itself? The Application of International Justice in the Former Yugoslavia' in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge: Cambridge University Press, 2004) 593–94; David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 *Human Rights Quarterly* 592; Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities' (2006) 5 *Journal of Human Rights* 107, 111-15.

[967] Derrick Silove, Anthony B. Zwi and Dominique le Touze, 'Do Truth Commissions Heal? The East Timor Experience' (2006) 367 *The Lancet* 1222.

[968] Ní Aoláin and Turner, n 892 above, 275. They argue that 'It is also important to understand the highly Westernized notions of agency represented by the act of speaking, which may not map onto the dominant modes of expression in non-Western societies'. Indeed in Mozambique, a truth commission process was not introduced and there has been a preference, amongst at least some of the people, for silence and forgetting rather than truth-telling. See Lyn Graybill, 'Pardon, Punishment and Amnesia: Three African Post-conflict Methods' (2004) 25(6) *Third World Quarterly* 1117. While it is important to understand that truth-telling is not always a paramount concern in all societies, Ní Aoláin highlights that there may be gender differences regarding the value of truth-telling, which is an issue that has largely been ignored. See Fionnuala Ní Aoláin, 'Political Violence and Gender During times of Transition' (2006) 15 *Columbia Journal of Gender and Law* 829, 845-46.

[969] See Brigittine M. French, 'Technologies of Telling: Discourse, Transparency, and Erasure in Guatemalan Truth Commission Testimony' (2009) 8 *Journal of Human Rights* 92.

[970] Mendelhoff, n 966 above, 599.

individuals who testify may be sacrificed for truth commissions' need to gather testimony on particular harms, while silencing other experiences.

One of the main problems regarding claims to the cathartic impact of truth-telling fundamentally lies in the limited and overly simplistic understanding of health and healing promoted by truth commissions.[971] Such commissions do not sufficiently acknowledge that measures of truth-telling may not be psychologically healing where victims/survivors continue to suffer the physical, mental and social suffering resulting from harms perpetrated.[972] For truth commissions to play any real therapeutic role, healing must be imagined in a broader way which moves beyond an individualised, psychological model and understands the way in which survivors require physical, mental and social healing in response to harms experienced. As Moon argues, the therapeutic model 'sidesteps redress for the deep structural and economical inequalities within which gross violations of human rights become possible, because it concentrates instead on changing people's behavior through altering their self-perception'.[973]

Understandings of healing need to encompass the healing of physical and socio-economic harms of individuals and communities, rather than focusing on a simplistic view of psychological therapy and a narrow understanding of victims. For survivors of subsistence harms, truth may be profoundly insufficient, since 'It neither heals their physical wounds nor provides bread or the table to put it on'.[974] Truth commissions clearly cannot be expected to heal on their own, but they have the potential to recognise harms and foster a discourse which encourages societies to address the physical, mental and social subsistence needs of all survivors.[975] A model of reconciliation which emphasises truth-telling but ignores subsistence harms and wider socio-economic concerns may be seriously flawed, allowing these harms to

[971] See Ní Aoláin and Turner, n 892 above, 275.
[972] For literature which highlights the importance of basic needs to survivors see Wendy Lambourne, 'Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation' (2004) 4 *Peace, Conflict & Development* 8; Ellen A. Waldman, Restorative Justice and the Pre-Conditions for Grace: Taking Victim's Needs Seriously' (2007) 9 *Cardozo Journal of Conflict Resolution* 91.
[973] Moon, n 884 above, 82.
[974] Daly, n 886 above, 31.
[975] Arbour, n 874 above.

fester, which, considering their widespread nature, would be damaging to reconciliation efforts.[976]

Moreover, this may undermine survivors' perceptions of the legitimacy of a truth commission, which is vital if such mechanisms are to play a role in promoting long-term societal reconciliation.[977] Claims that truth-telling inevitably promotes societal reconciliation should also be questioned.[978] While truth-telling may be important in promoting societal reconciliation by encouraging all survivors to acknowledge and come to terms with the past, in many respects, telling the truth of the past can promote further discord, if not handled carefully and if other means of promoting reconciliation are not also adopted.[979] As Daly comments, a truth commission report 'can establish facts and provide information, but it cannot always change people's beliefs, affect how people interpret the information or establish the moral common ground necessary to promote reconciliation'.[980]

Processes of reconciliation need to offer people a real alternative to violence and to build a foundation of trust based on addressing these underlying grievances which contributed to violence.[981] Reconciliation is intimately tied to measures of redress, without which truth-telling may appear as an empty process, leaving survivors 'with a sense of ongoing helplessness and may feel sacrificed for the sake of state stability'.[982] Long-term reconciliation is unlikely to occur where survivors continue to experience harms related to their basic needs whereas perpetrators and beneficiaries of violence continue to live in relative comfort.[983] Indeed, perhaps even the term reconciliation is too problematic and in many ways it would be better to think in terms of societal transformation, which requires substantial changes in order to address deep seated inequalities and grievances. These issues

[976] On the importance of addressing wider harms see Nevins, n 958 above; Mendelhoff, n 966 above, 599.
[977] Gibson, n 879 above, 131.
[978] Lorna McGregor, 'Reconciliation: I Know It When I see It' (2006) 9(2) *Contemporary Justice Review* 155, 161-62.
[979] Daly, n 886 above, 36.
[980] *ibid*, 38.
[981] Willie Esterhuyse, 'Truth as a Trigger for Transformation: From Apartheid Injustice to Transformational Justice' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000) 144, 154.
[982] Fletcher and Weinstein, n 966 above, 630; Nevins, n 965 above, 686.
[983] Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *International Journal of Transitional Justice* 28, 42.

therefore illustrate the problems of lack of recognition of subsistence harms by truth commissions.

iii) Truth commissions and the failure to provide reparations for subsistence harms

While truth commissions have the potential to promote some form of redress for harms, the recommendations of truth commissions have yet to systematically include subsistence harms within reparations policies.[984] This sidelining of socio-economic issues and deprivations of subsistence needs within the recommendations of truth commissions follows the approach of the UN Guidelines on reparations and the 2008 Office of the High Commissioner for Human Rights guidelines.[985] With the exception of the Guatemala CEH, which has recommended reparations for victims of forced displacement, truth commissions have restricted individual reparations to victims of physical integrity harms.[986] Moreover, despite the efforts of the Guatemala CEH to promote a broader approach to reparation, subsistence harms have been marginalised within the implementation process and those who died while displaced from hunger and malnutrition, until recently, have been excluded from the programme.[987] Viaene's research highlights that survivors of subsistence harms 'have problems understanding and accepting that the PNR [National Reparations Program] distinguishes between victims who died from these causes and those who died from bullets or machetes, as all deaths were a result of persecution during the conflict'.[988] This therefore highlights that survivors may not make the current legal distinction between physical integrity harms and subsistence harms.

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[984] For a comprehensive analysis of the issue of reparations and recent reparations programmes see Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford: OUP, 2006).

[985] United Nations Resolution 60/147, 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' March 2006 UN Doc. A/RES/60/147.; Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (New York: United Nations, 2008) 20-23.

[986] The crimes to be redressed by the National Reparations Program include: forced disappearance; extrajudicial execution; physical and psychological torture; forced displacement; forced recruitment of minors; sexual violence and rape; violations against children; massacres and "other violations". See Claudia Paz y Paz Bailey, 'Guatemala: Gender and Reparations for Human Rights Violations' in Ruth Rubio-Marín (ed), *What Happened to the Women? : Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006) 92. For example the Sierra Leone TRC recommended 'the following groups of victims as beneficiaries of the specific measures of the reparations programme: (1) amputees; (2) other war wounded (defined under the section describing the various categories of beneficiaries); (3) children; and (4) victims of sexual violence'. See Sierra Leone TRC, n 908 above, vol. 2, chapter 4, 243.

[987] Lieselotte Viaene, 'Life Is Priceless: Mayan Q'eqchi' Voices on the Guatemalan National Reparations Program' (2010) 4(1) *International Journal of Transitional Justice* 4, 23.

[988] *ibid*, 19, citing a personal interview by Diana de Buena Fé, Cobán, Guatemala, 28 April 2009.

It is encouraging that there has been some recognition of issues of basic needs within collective reparations recommendations.[989] While the Peruvian TRC did not expressly look at socio-economic rights issues, the Peruvian reparation plan has drawn attention to healthcare issues and included displaced persons as victims for the purposes of collective, but not individual, reparations.[990] The Commission stated that 'Beneficiaries of the Collective Reparations Program include peasant communities, native communities, and other population centers affected by the armed conflict as well as organized groups of displaced people who have not returned to their affected communities'.[991] Similarly, the Liberian TRC recommended reparations in the form of community development projects such as health facilities and addressing housing needs in areas where there was massive destruction of homes.[992]

Collective reparations may be preferable in redressing situations of mass displacement or where entire villages may have been destroyed, since they may avoid the potentially divisive impacts of individual reparation in benefiting a larger proportion of a particular community and not distinguishing between different victims.[993] On the other hand, a collective approach may pose other problems by blurring the relationship between the harm caused and the measures for redress, thus essentially becoming part of wider development projects.[994]

If the division between reparations, as a way of repairing specific, albeit widespread harms and wider development programmes is blurred, certain victims/survivors groups may not actually benefit, and resources may be prioritised to those who are deemed politically significant.[995] The Peruvian Commission's refusal to specifically address socio-economic violence and subsistence harms, has led to a blurring of the distinction between reparations

[989] For discussion of the linkages between basic needs and collective reparations see International Center for Transitional Justice, 'The Rabat Report: The Concept and Challenges of Reparations' (Report) (February 2009) <http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf> accessed 26 June 2010.
[990] Lambourne, n 972 above, 159.
[991] Truth and Reconciliation Commission of Peru, n 942 above.
[992] Republic of Liberia, n 902 above, vol. 2, 379.
[993] For discussion of collective reparations see Pablo de Greiff, 'Justice and Reparations' in de Greiff, n 984 above, 468-69; Lisa Magarrell, 'Reparations in Theory and Practice' (2007) International Center for Transitional Justice Reparative Justice Series
<http://www.ictj.org/static/Reparations/0710.Reparations.pdf.> accessed 20 April 2008.
[994] Rabat Report, n 989 above, 10-11.
[995] Laplante, n 944 above, 141.

and wider development programmes, which has led to discontent amongst some survivors.[996] As Laplante critiques, the Peruvian TRC's experience 'demonstrates the difficulty of separating the overlap of damages arising out of violations of CPR [civil and political rights] and ESCR [economic, social and cultural rights]. When the same event or situation gives rise to violations of both CPR and ESCR, it is difficult to distinguish the origin of the harms to be remedied'.[997] Collective reparations for subsistence harms would therefore need to be carefully implemented to ensure that the link to the original communal harm remains clear to survivors and society as a whole.

Truth commissions have tended not to engage with survivors' views or promote community involvement, instead placing reparations programmes in the hands of the state.[998] The generic problem of implementation may show that current models of reparations are too limited. Seeing reparations as the responsibility of the state, as the representative of the society, may serve to sideline the role of other states and non-state actors in the perpetration of harms and limit the potential for survivors to be involved in the process. As Viaene argues with regard to Guatemala, since 'experiences of the conflict differed from region to region, the PNR should be rooted in communities in order better to address specific local and cultural needs. This would not only stimulate the aspirations and empowerment of the people and communities but also help the PNR and its beneficiaries deal with and go beyond the discord caused within communities by the conflict'.[999]

Collective reparations may be empowering for communities, or at least certain groups within these communities, if local engagement with reparations programmes is encouraged. As one survivor of subsistence harms argued, 'what I want now is aid and for it to come directly to our village and to let us deal with it. We will coordinate it, we will oversee it, we will divide it among our friends and we will know who is entitled to how much. But the government is only giving aid to one person at a time, so we are not at all satisfied'.[1000] However, despite this empowering potential, it should not be assumed that greater community involvement

[996] *ibid*, 141.
[997] *ibid*, 171.
[998] Viaene, n 987 above, 23.
[999] *ibid*, 24.
[1000] *ibid*, 19 citing a leader of Chicoj Raxquix, a community of IDPS.

necessarily means that traditionally marginalised groups, such as women are included.[1001] While arguing for a more "bottom up" approach, the thesis also recognises that truth commissions need to be aware of the dangers of local involvement in potentially excluding certain groups.[1002] Thus, while local involvement should be promoted to some extent, in order to counter the narrow approaches of current transitional justice, this should not be seen as a panacea for all ills.[1003]

Essentially, neither individual nor collective reparations on their own will be sufficient to redress the many subsistence harms and underlying socio-economic issues which are crucial to the wellbeing of survivors and the prevention of future violence.[1004] In terms of reconciliation, it is important to avoid the perception that individual or collective reparations are sufficient to address and redress the harm and draw a line under it, which may not satisfy survivors.[1005] Clearly, there is a need to be aware of the inherent limitations of reparations, and thus not to expect too much from truth commissions' recommendations. Even in Guatemala where there have been some moves towards reparations for harms related to deprivations of subsistence needs, survivors have still expressed dissatisfaction with the nature of the reparations, in terms of not representing the material or spiritual value of what had been lost.[1006] Moreover, truth commissions' general unwillingness to acknowledge underlying inequalities means that reparations fail to address the gendered experience of harms.[1007] Rubio-Marín and de Greiff highlight that, 'Even if the measures do not simply try to restore that status but attempt to compensate for losses, the very evaluation of the losses is affected by the unequal starting point'.[1008]

[1001] See Ruth Rubio-Marin, 'Gender and Reparations: Challenges and Opportunities' <http://www.ictj.org/static/Gender/0602GenderReparations.eng.pdf> accessed 15 April 2010. She highlights that 'Many female victims express preference for having services to meet their basic needs and those of their family members over restitution of lost property or monetary compensation in proportion to harm or for lost opportunities'.

[1002] McGregor, n 978 above.

[1003] On the dangers of local approaches, as well as their benefits, see Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008).

[1004] On the importance of socio-economic issues in transitional justice settings see Arbour, n 874 above, 20.

[1005] de Greiff, n 984 above, 451.

[1006] Viaene, n 987 above, 18.

[1007] Anee Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparation For Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Leiden: Martinus Nijhoff, 2009) 88.

[1008] Ruth Rubio-Marin and Pablo de Greiff, 'Women and Reparations' (2007) 1(2) *International Journal of Transitional Justice* 318.

The significant role that truth commissions can play is in setting an agenda within the transitional society which promotes socio-economic issues and the need to address subsistence needs. However, the fact that truth commissions have generally focused on civil/political based human rights violations within their truth-telling process means that there is little impetus for redressing subsistence harms and implementing socio-economic rights issues within the rebuilding of the society.[1009] Again this has a gendered dimension, since the exclusion of subsistence harms plays a part in perpetuating women's exclusion and marginalisation within the new political situation.[1010] In failing to acknowledge the underlying socio-economic inequalities and marginalisation of certain groups, particularly women, truth commissions essentially permit such inequalities to continue. Political transition may be achieved, partly though the mechanism of truth commissions, but this does not mean that any real form of societal transformation occurs.

The next sections will look at all these issues more specifically, in relation to the treatment of subsistence harms within the South African TRC and East Timor's CAVR. It will argue that while the South African TRC has often been upheld as a model for truth commissions, in promoting a path towards individual healing and societal reconciliation, it has largely silenced the perpetration and experience of subsistence harms. This approach both undermines the claims of the TRC to promote truth-telling and has allowed many grievances to fester within South Africa. On the other hand, East Timor's CAVR did address some aspects of deprivations of subsistence needs. Nevertheless, subsistence harms have been sidelined within the Commission's recommendations as to redress, which casts doubt over its recognition of the seriousness of these harms and has again allowed the consequences of these harms and underlying grievances to remain a significant issue within East Timor. Therefore, while the approaches of the commissions differ substantially regarding their treatment of subsistence harms, both tribunals illustrate the continued sidelining of subsistence harms within transitional justice mechanisms and the impact that such sidelining may have on the aims of long-term healing and reconciliation.

[1009] On the issue of the silencing of economic issues by truth commissions see Miller, n 893 above, 268.

[1010] For literature which acknowledges the linkage between socio-economic and gender inequalities see Ní Aoláin and Turner, n 892 above, 279. See also Niamh Reilly, 'Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach' (2007) 3(2) *International Journal of Law in Context* 155, 156.

2) The promise and the disillusionment: the South African Commission

Since the publishing of its Final Report, there have been numerous comments and analyses regarding the level of success that can be attributed to the South African TRC.[1011] The concern in this part of the chapter is to draw on such discourses in order to specifically analyse and critique the TRC regarding its treatment of subsistence harms and how such treatment impacts on the overall aims and success of the Commission. The "truth" presented by the Commission sidelined the widespread perpetration of harms, most notably those widely defined as forced removals and destruction of property, which affected a large proportion of the population.[1012] In doing so, the Commission inevitably undermined its own role in reconciliation, since it left many harms and grievances unaddressed and failed to document the full nature and complexity of responsibility for apartheid violence in South Africa.[1013]

i) The silencing of subsistence harms and underlying socio-economic inequalities

The TRC's Final Report focused on physical integrity harms, leaving subsistence harms largely ignored and marginalised. This was despite the widespread perpetration of subsistence harms, such as forced removals and the destruction of homes and livelihoods; wherein an 'estimated 3.5 million people were forcibly removed, their communities shattered, their families dispossessed and their livelihoods destroyed' during the Apartheid regime.[1014] The Commission's focus upon physical integrity harms partly stemmed from its narrow mandate, which restricted it to investigating and documenting gross violations of human rights, defined as 'the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person' committed with a political motive, during the period of

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[1011] See, for example, Wilson, n 956 above; Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South African (TRC)' (2002) 32(3-4) *Diacritics* 33; James L. Gibson, 'Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa' (2004) 38(1) *Law and Society Review* 5; Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000); Nicoli Nattrass, 'The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation' (1999) 98 *African Affairs* 373.

[1012] Mamdani, *ibid.*

[1013] *ibid.*

[1014] On the significance of forced removals and destruction of homes to apartheid violence, see *ibid.*

March 1960 to May 1994.[1015] The definition of 'gross human rights violations' therefore adhered strictly to civil and political based violations involving physical integrity harms, and immediately limited the scope for the inclusion of subsistence harms, which were not directly articulated. The time-frame of the Commission's mandate also provided problems, in not permitting the recognition of the history of abuses and harms within the country.[1016]

Despite the narrow framing of the mandate, the Commission could have adopted a broader reading of it.[1017] The fact that it did not generally interpret the mandate in a broad way led it to create artificial distinctions between similar forms of harms and largely ignore deprivations of subsistence needs. While the Commission did not at first see arson as constituting a gross violation, after much discussion, arson was acknowledged as 'a deliberate tool used by political groupings to devastate an area and force people to move away', and the Commission eventually decided that it was sufficiently serious to constitute severe ill-treatment.[1018] However, the Commission failed to similarly recognise forced removals as constituting severe ill-treatment. The inconsistency and artificiality of this approach is illustrated by the premise upon which arson was recognised as gross violation of human rights, in terms of forcing people to move away, which essentially equates with forced removal or displacement.

The emphasis on political motivations in the mandate's definition of gross violations was also problematic for the recognition of subsistence harms. Again the element of political motive was interpreted in a narrow sense, which severely limited the numbers of perpetrators and victims acknowledged by the Commission.[1019] Essentially, the TRC only recognised active violence committed by state agents and, in turn, only political activists who suffered gross

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[1015] The Promotion of National Unity and Reconciliation Act No. 34 of 1995 '(b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date [10 May 1994] within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive'.

[1016] Kiran Lalloo, 'Citizenship and Place: Spatial Definitions of Oppression and Agency in South Africa' (1998) 45(3-4) *Africa Today* 439, 442.

[1017] Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63(1) *Modern Law Review* 1, 17.

[1018] The Commission only recognised arson as constituting severe ill-treatment if the individual act of arson resulted in the destruction of a person's dwelling to the extent that the person could no longer live there. South African Truth and Reconciliation Commission, 'Final Report' 29 October 1998, vol 2 <http://www.justice.gov.za/trc/ > accessed 12 May 2009.

[1019] Borer, n 946 above, 1100.

human rights violations, or close relatives of such activists, were recognised as victims. This left out the vast majority of people who experienced violence and harm during the Apartheid regime.[1020] This narrow definition of harms and victims therefore silenced the experience of subsistence harms and responsibility for this violence.[1021] By privileging physical integrity harms committed with a political motive 'the prosaic and sustained suffering of many under apartheid has become the "lesser" evil'.[1022] Indeed, testimony was constrained and controlled within the hearings in order to prevent victims/witnesses from telling their experiences of subsistence harms as well as the everyday context of the harms they suffered, which were not considered relevant to the TRC's agenda.[1023]

This narrow approach was adopted despite lobbying for recognition of socio-economic rights violations by civil society movements during the TRC process.[1024] In a Joint Submission to the TRC, several civil society organisations argued that the Commission was actually obligated by its mandate to include socio-economic rights issues within the truth and reconciliation process.[1025] The Submission drew on the recognition of the interrelated nature of all human rights in the newly enacted South African Constitution and various international treaties, to argue that the Commission should adopt a similar approach.[1026] Clearly, recognition of socio-economic rights issues would not have meant full recognition of subsistence harms, as these harms go beyond socio-economic rights and instead constitute physical, mental and social aspects of deprivations of subsistence needs. Nevertheless,

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[1020] *ibid.*

[1021] For criticism of the narrow approach of the TRC, see Rosemary Nagy, n 947 above, 284.

[1022] Russell, n 957 above, 50.

[1023] On the silencing of the systematic and everyday nature of violence in South Africa by the TRC, see Nahla Valji, 'Race and Reconciliation in a Post-TRC South Africa' (2004) Paper presented the *Ten Years of Democracy in Southern Africa*, organised by the Southern African Research Centre, Queens University, Canada, (May 2004)
<http://www.csvr.org.za/docs/racism/raceandreconciliation.pdf> accessed 25 July 2008; Hayner, n 868 above, 81, citing the informal survey carried out by Janis Grobbelaar, a sociologist working at the TRC. See also Annelies Verdoolaege, 'The Human Rights Violations Hearings of the South African TRC: A Bridge between Individual Narratives of Suffering and a Contextualizing Master-story of Reconciliation' (2002)
<http://www.africana.ugent.be/Publications_en> accessed 9 July 2009.

[1024] For the role of NGOs in the TRC process see Hugo van der Merwe, Polly Dewhirst and Brandon Hamber 'Non-Governmental Organisations and the Truth and Reconciliation Commission: An Impact Assessment' Centre for the Study of Violence and Reconciliation Report (1999)
<http://www.csvr.org.za/wits/papers/paphvpb.htm> accessed 15 November 2008. The Report highlights that many civil society groups were not in agreement with the TRC's narrow focus on civil/political human rights violations.

[1025] Joint NGO Submission, 'Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social and Cultural Rights to the Commission's Mandate', 18 March 1997
<http://www.doj.gov.za/trc/hrvtrans/index.htm#SUBMISSIONS> accessed 4 June 2009.

[1026] *ibid.*

acknowledgement of socio-economic rights may have led to greater willingness to address harms related to deprivations of subsistence needs, as well as underlying socio-economic grievances. The Submission argued that harms such as forced removals should be recognised by the Commission as constituting severe ill-treatment.[1027] It sought to highlight the gravity of some deprivations of subsistence needs, in terms of constituting gross violations, as well as seeking to underline the interrelated nature of all violations and the centrality of socio-economic violations to apartheid violence.[1028] The lack of success of such attempts highlights the limited space for the involvement of local NGOs and survivors' groups in the work of the Commission.

As with other truth commissions, the privileging of physical integrity harms by the TRC has clear gendered implications. The Commission's focus on physical integrity harms 'may be said to fundamentally misrepresent women's experience of apartheid and skew the truth that the commission narrated'.[1029] Women suffered particularly from subsistence harms such as forced removals and consequent destitution, as highlighted, although rather briefly, by another civil society submission to the TRC.[1030] Whilst the TRC acknowledged some women as victims of physical integrity harms or as suffering through the victimization of their male relatives, the socio-economic based suffering of many other women, both those who testified and those who did not, was silenced within the TRC process.[1031] As du Toit has argued, more generally, the TRC 'entrenched a single-sex model of politics, that is, one in which masculine agency and victimhood, as well as masculine-biased concerns and vocabularies still pose as the universal'.[1032]

[1027] *ibid.* 'Based on the interpretation of cruel, inhuman, or degrading treatment by numerous international tribunals and jurists, we argue that the deliberate impoverishment of an individual brought about through the use of force amounts to severe ill-treatment.'

[1028] *ibid.*

[1029] Nesiah, n 888 above. See also Tristan Anne Borer, 'Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons From South Africa' (2009) 15 *Violence Against Women* 1169.

[1030] Beth Goldblatt and Sheila Meintjes, 'Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission', May 1996 <http://www.doj.gov.za/trc/hrvtrans/index.htm#SUBMISSIONS> accessed 9 November 2009. The submission largely focused on emphasising the physical integrity harms which women had suffered.

[1031] Louise du Toit, *A Philosophical Investigation of Rape: the Making and Unmaking of the Feminine Self* (London: Routledge, 2009) 12.

[1032] *ibid.*

Due to the lack of involvement of women in the establishment and framing of the TRC, it was only later in the process, as a result of lobbying by NGOs and women's rights scholars, that any gender issues were inserted into the TRC framework, in the form of the Special Hearings for Women.[1033] This last minute attempt to include women served not only to set their experiences apart from the rest of the process, but also stifle their voices, since their accounts were interpreted in line with the pre-existing thinking and concerns of the Commission.[1034] Indeed, the Submission itself has been critiqued as constituting a 'liberal plea for inclusion into a supposedly sex-neutral process which was perceived to have (simplistically and innocently) excluded women from its operations'.[1035] Rather than acknowledging the deeply embedded gender assumptions that led to the TRC's stance on women's harms, the Submission instead perceived this merely in terms of 'neglect or lack of sensitivity'.[1036] Whilst the TRC even acknowledged that the lack of attention that it had given to the everyday harms of apartheid had a gender bias, it did little to actively redress this.[1037]

Essentially, the narrow interpretation of political violence not only silenced certain aspects of apartheid violence, but provided a distorted account of the very nature of apartheid and the subsistence harms integral to it.[1038] By largely failing to recognise subsistence harms and the interrelated nature of all human rights violations, the TRC obscured the essential nature of apartheid as a system of racialised violence, exclusion and destitution.[1039] Certain subsistence harms, such as forced removals and destruction of livelihoods, were undoubtedly committed in South Africa by state agents for political motives, as a key means of fulfilling the goals of the Apartheid regime.[1040] Such subsistence harms and wider socio-economic

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[1033] Goldblatt and Meintjes, n 1030 above. See the South Africa Truth and Reconciliation Commission, The Transcripts of the Special Hearings: Women's Hearings <http://www.justice.gov.za/trc/special/index.htm> accessed 18 July 2009.

[1034] Russell, n 957 above, 52-53. Women's 'principal role in the hearings, repeatedly emphasised by the Commissioners' questioning, was to give voice to the stories their male relatives could not; the focus was really the dramatic experiences of the activists, rather than the (sometimes) more pedestrian struggles of their wives'.

[1035] Du Toit, n 1031 above, 12

[1036] *ibid.*

[1037] South AfricaTRC Report, n 1018 above, vol 4, ch. 10, 288.

[1038] Kader Asmal, Louise Asmal and Ronald Suresh Roberts, 'When the Assassin Cries Foul: The Modern Just War Doctrine' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000) 86, 88; Mamdani, n 947 above.

[1039] For a critique of the way the TRC obscured socio-economic and structural violence see Nagy, n 947 above, 284.

[1040] On the issue of the use of forced removals, see Mamdani, n 947 above, 180.

based violence was profoundly political and should have been seen to come within even the Commission's narrow definition of political motive.

This violence was also political in a wider sense, since the political and socio-economic goals of apartheid were so intertwined. Physical integrity harms were a method of ensuring the continuation of apartheid, the aim of which was political, social and economic dispossession and exclusion of the black population.[1041] As Wilson explains, violence in South Africa 'emerged from a history of dispossession and extreme social inequality, and the violent protection of a racially divided structure of social and economic privilege'.[1042] The perpetration of subsistence harms and the infliction of wider socio-economic deprivation was a way of dispossessing people of political power and rights. 'Recognising that property in land is a vital source of power, the architects of apartheid strategically used dispossession and deprivation of land rights to subjugate, exploit and subordinate the black majority's citizenship status.'[1043] The limited time-frame of the Commission's mandate also served to obscure the history of such dispossession and to prevent apartheid from being contextualised in terms of colonial history and the role of law in condoning such dispossession.[1044] This meant that the truth-telling process ignored the segregation, dispossession, political exclusion and physical violence which had been crucial features of colonial rule in South Africa and thus constituted an underlying context of Apartheid rule.[1045]

The Commission's focus on identified individuals rather than the collective violence which permeated the Apartheid regime was another aspect of the exclusion of subsistence harms.[1046] These harms were often committed in South Africa against whole communities, and as a fundamental part of the group-based crime of apartheid, rather than simply against individual political activists.[1047] Displacement and relocation were centred on the exclusion of the majority of the black population from social, economic and political resources, including the

[1041] *ibid.* 179.
[1042] Richard A. Wilson, 'Justice and Legitimacy in the South African Transition' in Carmen González Enríquez, Alexandra Barahona de Brito and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: OUP, 2001) 191.
[1043] Lalloo, n 1016 above, 441.
[1044] Mamdani, n 1011 above, 42.
[1045] *ibid.*
[1046] *ibid,* 36.
[1047] *ibid,* 40

prevention of the development of social and community structures which could foster such resources and support subsistence needs. 'Under apartheid Africans were, for the most part, restricted to places that were physically designed to obstruct the formation of integrated communities.'[1048] The TRC therefore obscured the social element of apartheid, within which subsistence harms were integral, leading to a distorted understanding of apartheid violence and a silencing of subsistence harms.

ii) Understandings of responsibility and the limitations of reparations

The Commission's sidelining of subsistence harms has consequently affected understandings of responsibility for the violence of apartheid.[1049] By focusing on individual victims of narrowly defined offences and on individual perpetrators, the TRC followed the narrow approach of international criminal tribunals rather than realising its potential to tell a much wider story of responsibility for harms committed during the Apartheid regime.[1050] The TRC obfuscated wider responsibility and complicity regarding the role of bystanders and beneficiaries of the Apartheid system and failed to engage with the issue of the benefits of violence, and of subsistence harms in particular.[1051] Subsistence harms, in the form of forced removals from homes and land and the destruction or appropriation of livelihoods, allowed the white minority to gain considerable economic benefits, which were maintained through law by the forced destitution of the majority of the population.[1052]

Since the TRC process, there have been increasing demands amongst grassroots movements and certain sections of civil society for more comprehensive justice in the form of claims against beneficiaries.[1053] Indeed, the TRC's approach also obscured the role of law in apartheid violence and how many of the subsistence harms perpetrated were committed within a framework of domestic legality. The TRC tended to perceive violations only in

[1048] Lalloo, n 1016 above, 441.
[1049] Nagy, n 947 above, 284.
[1050] Mamdani, n 947 above, 180.
[1051] On the issue of the silencing of wider responsibility and the role of bystanders, see Rosemary Nagy, 'The Ambiguities of Reconciliation and Responsibility in South Africa' (2004) 52 *Political Studies* 709.
[1052] Mamdani, n 947 above, 181.
[1053] See for example the claims filed by the South African Kulumani Victim Support Group in New York in 2002 under the Alien Tort Claims Act against corporations who they allege were complicit in apartheid. <http://www.khulumani.net/> accessed 24 July 2009.

terms of acts which went beyond domestic law during apartheid, and thus shied away from analysing apartheid as a policy of exclusion sanctioned by domestic law, and how the law was ultimately complicit in these harms. The Report therefore failed to reflect the way in which laws such as 1927 Native Administration Act and the 1959 Promotion of Bantu Self-Government Act provided the legal foundation for racialised removal of entire communities during the height of the Apartheid regime.[1054]

Similarly, the TRC's narrow approach towards reparations has arguably had an impact on reconciliation, since there has been considerable discontent among survivors. Following its mandate's definition, reparations were to be given to those who had testified before the TRC and had consequently been defined as victims of gross human rights violations. This again largely excluded subsistence harms from the reparations policy and allowed little space for gendered harms to be redressed.[1055] The TRC did recommend some collective reparation measures, such as 'community-based services and activities ... aimed at promoting the healing and recovery of individuals and communities affected by human rights violations'.[1056] However, while the recommendations also included some programmes to resettle those displaced by violence, the scope of such rehabilitation measures was largely left undefined by the TRC, which has allowed the government to pay scant attention to these recommendations. The Commission did not provide specific recommendations regarding land restitution, which has remained fundamentally a political and governmental issue and has become embroiled in the broader, politically contentious land redistribution programme.

Reparations remain a controversial issue in South Africa, since even the TRC's recommendations have not been implemented fully by the government.[1057] As Colvin highlights, 'in the minds of most victims and the NGOs that support them, reparations have

[1054] While these laws were passed before the period of the TRC's mandate (1960-1994), they were used most extensively to perpetrate forced removals during the period which the TRC was mandated to investigate. See Mamdani, n 947 above, 181; Wilson, n 956 above, 51; Nagy, n 1051 above, 714.

[1055] Beth Goldblatt, 'Evaluating the Gender Content of Reparations: Lessons from South Africa' in Ruth Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006) 48.

[1056] South African TRC, n 1018 above.

[1057] Christopher J. Colvin, 'Overview of the Reparations Program in South Africa' in de Greiff, n 984 above, 176. After considerable procrastination, the government decided to implement only a limited reparations programme, consisting of one-off direct financial payments and a yet to be determined community reparations programme.

come to occupy a central, if not the central, role in their theories of suffering, justice, and responsibility'.[1058] While the government has paid out some individual reparations grants, other measures of redress such as communal and symbolic reparations have become blurred with wider development processes.[1059]

Civil society organisations have therefore been active in monitoring and campaigning on the implementation of reparations and particularly for collective reparations.[1060] As Andrews argues, 'reconciliation is elusive if those who were oppressed under apartheid have not had their economic conditions altered. The bargain - amnesty for truth telling – has resulted in perpetrators being able to walk away from the process, their economic lives largely intact. Victims are forced to go back to the appalling economic conditions that typified their lives under apartheid'.[1061] This has left many victims dissatisfied with the truth-telling process.[1062] Moreover, as Colvin highlights, the struggle for reparations in South Africa has had 'the unfortunate consequence of sidelining the responsibility of other role players besides the government. The complicity of foreign corporations and governments in supporting the apartheid regime has only recently entered the discussion'.[1063] As a result of the silencing of non-state actor responsibility, some victims' groups have sought civil law remedies against foreign corporations through the use of the Alien Tort Claims Act in the US.[1064]

[1058] *ibid*, 208.

[1059] *ibid*, 199. Colvin highlight's that the government's concern with limiting the scope of reparation implementation may have much to do with its overall political aims of fostering a neoliberal economic system in which social spending is reduced; Goldblatt, n 1055 above, 74.

[1060] See particularly the work of the Kulumani movement as discussed in Oupa Makhalemele, 'Southern Africa Reconciliation Project: Khulumani Case Study' (2004) Centre for the Study of Violence and Reconciliation <http://www.csvr.org.za/docs/reconciliation/southernafricareconcilliation.pdf> accessed 20 August 2010. See also Ali A. Mazrui, 'The Truth Between Reparations and Reconciliation: The Pretoria – Nairobi Axis' (2004) 10 *Buffalo Human Rights Law Review* 3, 4; Aletta J. Norval, 'No Reconciliation without Redress: Articulating Political Demands in Post-transitional South Africa' (2009) 6(4) *Critical Discourse Studies* 311.

[1061] Penelope E. Andrews, 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 53 *De Paul Law Review* 1155, 1164.

[1062] Ruth Picker, 'Victims' Perspectives about the Human Rights Violations Hearings' Centre for the Study of Violence and Reconciliation Report (February 2005) <http://www.csvr.org.za/docs/humanrights/victimsperspectivshearings.pdf> accessed 9 April 2010.

[1063] Colvin, n 1057 above 205.

[1064] Patrick Bond, 'Can Reparations for Apartheid Profits be Won in US Courts?' (2008) *Africa Insight* 1; Patrick Bond and Khadija Sharife, 'Apartheid Reparations and the Contestation of Corporate Power in Africa' (2009) 119 *Review of African Political Economy* 115.

By presenting its version of the truth, and ignoring truths which it did not consider relevant, the TRC essentially restricted the space for future discussion of subsistence harms and socio-economic grievances. Indeed, 'the TRC may have actually limited the agency of victims in expressing their experiences of ongoing problems and violations, and thereby have contributed to an ongoing sense of powerlessness'.[1065] This has left social movements and other civil society groups to pick up the pieces, by beginning to address harms and grievances which were silenced by the TRC process.[1066] Although the TRC was only one aspect of the transitional process in South Africa, and so could not be expected to achieve its aims of truth and reconciliation on its own, there is a clear sense, from the current state of South Africa, that it was less than successful in promoting long-term reconciliation.[1067]

This failure to address subsistence harms and systematic socio-economic rights violations has arguably resulted in 'entrenched, even increasing, inequality and poverty', leaving socio-economic elements of apartheid in many ways intact.[1068] As Nevins laments, the 'TRC's form of justice did not help to "restore" the very real socio-economic deficiencies experienced by millions of South Africans as a result of apartheid as a political–economic system'.[1069] The next part of the chapter will therefore contrast these failings with the approach of another truth Commission, East Timor's CAVR, in order to argue that subsistence harms could be dealt with by truth commission processes but also that there remains some way to go in achieving this.

[1065] Daniel Joyce, 'Some Other Truths about Reconciliation: A Response to Albie Sachs' (2005) 4 *European Human Rights Law Review* 393, 400.
[1066] Bond, n 1064 above.
[1067] Valji, n 1023 above; Hugo Van der Merwe and Audrey R. Chapman (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania Press, 2008) 259-79. See also Backer's research on attitudes towards amnesty and the TRC processes. His research suggests a decline in support for the processes of the TRC, due to lack of implementation of reparations and measures to address harms. David Backer, 'Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa' (2010) 4 *International Journal of Transitional Justice* 1.
[1068] Paul Gready, 'Reconceptualising Transitional Justice: Embedded and Distanced Justice' (2005) 5(1) *Conflict, Security and Development* 1, 5.
[1069] Nevins, n 965 above, 686.

3) East Timor's CAVR: a limited recognition of subsistence harms

i) A more progressive approach to the recognition of deprivations of subsistence needs

In contrast to the lack of recognition in the South African TRC of subsistence harms, the East Timor Commission did include some elements of these harms and recognised their serious nature. There were a variety of subsistence harms committed in East Timor from the occupation by Indonesia in 1975 to the aftermath of the popular referendum in 1999. As already seen, these harms included the widespread destruction and deprivation of homes and livelihoods, the internment of populations within camps without the provision of basic subsistence needs and the widespread use of food as a weapon.[1070] The Commission acknowledged the perpetration of these harms and recognised some of the impacts they had on the population. CAVR devoted a whole section of its chapter on human rights violations to forced displacement and famine and another section to economic and social rights.[1071]

CAVR's inclusion of certain deprivations of subsistence needs and socio-economic violations may, in part, have been due to its broad mandate which tasked the Commission with 'Inquiring into and establishing the truth regarding human rights violations which took place in the context of the political conflicts in Timor-Leste between 25 April 1974 and 25 October 1999'.[1072] Such inquiries included the 'context, causes, antecedents, motives and perspectives which led to the violations' and 'whether they were part of a systematic pattern of abuse'.[1073] The Commission was also tasked with inquiring into the 'identity of persons, authorities, institutions and organisations involved in them', 'Whether they were the result of deliberate planning, policy or authorisation on the part of the state, political groups, militia groups, liberation movements or other groups or individuals' as well as the 'role of both internal and external factors'.[1074]

[1070] Geoffrey Robinson, 'East Timor 1999 Crimes Against Humanity: A Report Commissioned by the United Nations Office of the High Commissioner for Human Rights' (2003) <http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf> accessed 1 November 2008.

[1071] CAVR Report, n 881 above, chapters 7.3 and 7.9.

[1072] *ibid*, The Mandate of the Commission.

[1073] *ibid.*

[1074] *ibid.*

This mandate allowed CAVR to inquire into human rights violations, rather than "gross" human rights violations, which allowed the Commission to examine socio-economic based harms and violations. Moreover, the fact that the mandate emphasised that the Commission should inquire into the context and causes of the violence allowed the CAVR to have a wide focus and analyse the importance of socio-economic issues, in particular the impact of harms upon the population. Examining whether harms constituted a systematic pattern of abuse, allowed CAVR to look at the use of socio-economic deprivation and starvation as a weapon, rather than focusing purely on individual violations of civil and political rights. The Commission's approach differs considerably from the East Timor Special Panels, which were supposed to work alongside the truth commission.[1075] While CAVR had a broad time-frame in terms of when harms were perpetrated, the Special Panels instead focused only on crimes against humanity perpetrated in 1999, which, even if the process had been more successful, would have severely limited the ability of the Special Panels to recognise diverse harms.[1076] Moreover, the Special Panels largely focused on murders and sidelined other forms of harm, including subsistence harms, which contrasts with the much wider approach adopted by CAVR.[1077]

There was some precedent for recognition of socio-economic rights violations within UN reports prior to the establishment of CAVR, which may have influenced the framework of the mandate and the work of the Commission.[1078] The UN Commission of Inquiry Report of 2000 did not discuss the issue of famine, but it did recognise that certain socio-economic rights such as the right to an adequate standard of living had been violated in East Timor.[1079] The Commission of Inquiry also recognised the widespread perpetration of forced displacement and relocation in 1999 as well as the restriction of humanitarian aid.[1080] It found that 'Intimidation of the internally displaced included killings in places of refuge, denial of access to humanitarian agencies and, in some instances, denial of necessities such as

[1075] On the issue of the problems of prosecutions in the Special Panels see Sylvia de Bertodano, 'Current Developments in Internationalized Courts: East Timor - Justice Denied' (2004) 2 *Journal of International Criminal Justice* 910.
[1076] International Center for Transitional Justice, 'Impunity in Timor-Leste: Can the Serious Crimes Investigation Team make a Difference?' (Report) (June 2010) <http://www.ictj.org/static/Publications/ICTJ-JSMP_TL_SCIT_pb2010_Eng.pdf> accessed 28 October 2010.
[1077] *ibid.*
[1078] Office of the High Commissioner for Human Rights, 'Report of the International Commission of Inquiry on the Question of East Timor to the Secretary General', January 31, 2000, UN Doc A/54/726,S/2000/59.
[1079] *ibid*, para. 142.
[1080] *ibid*, para. 131.

water. The intimidation was aimed at dispersing people from their places of refuge'.[1081] However, there remains a clear sense within this Report that such harms constitute only a secondary level of harm, less serious than the civil and political abuses which occurred.

CAVR was also able to draw on the findings of Geoffrey Robinson's Report, which was commissioned by OHCHR.[1082] The Report documents the widespread forced displacement and relocation that occurred in 1999 and recognised the historical pattern of displacement and famine.[1083] The Report found that 'The bombings and forced relocations led to widespread famine and disease. By 1980 church and human rights organizations estimated that as many as 200,000, of a pre-invasion population of less than 700,000, had already died. The vast majority died of starvation and disease'.[1084] It also acknowledged the widespread destruction of property and the impact this had on access to food.[1085] In addition, there was some UN acknowledgement of the occurrence and scale of displacement in 1999, as evidenced by the Report of the UN Special Representative on internally displaced persons.[1086] Although there is not any evidence within the CAVR Report that the Commission drew directly on this prior evidence of forced displacement, such acknowledgement and research by the UN may have contributed to CAVR's focus on displacement.

The Commission focused on detailing the types of harms that were perpetrated and experienced and its Final Report was divided into thematic sections relating to different harms. This meant that all the major harms considered relevant by CAVR were given space for acknowledgement, even if some of the evidence and testimony within the different sections was repeated. The Commission directly recognised the occurrence of famine and mass starvation, which was often inextricably linked to the violence of displacement in East

[1081] *ibid.*
[1082] Geoffrey Robinson, n 1070 above. This was despite the fact that the UN buried, or at least sat on, this Report for some time.
[1083] *ibid*, 16.
[1084] *ibid.*
[1085] *ibid*, 47. The Report states that the 'violations committed in 1999 also included the massive destruction of property, and in particular the targeted burning of houses and the killing of livestock ... In that brief period, roughly 70% of all buildings in the territory were deliberately burned or otherwise rendered uninhabitable ... Physical destruction on this scale had dire humanitarian consequences. It rendered hundreds of thousands of people homeless, and left a similar number without access to adequate food'.
[1086] United Nations, Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, to the Commission on Human Rights in accordance with Commission resolution 1999/S-4/1 of 27 September 1999, 'Profiles in Displacement: East Timor' 6 April 2000, E/CN.4/2000/83/Add.3.

Timor.[1087] This sets CAVR apart from other truth commissions and indeed from the approach of international criminal tribunals. By discussing famine and forced displacement in the same section, the CAVR Report began to highlight the interrelated nature of deprivations of subsistence needs, thus moving beyond the restrictive, legalistic understanding of displacement in terms of movement from "place". It recognised that forced displacement was perpetrated in East Timor as a way of controlling and punishing the population and was often achieved through the destruction of homes, livelihoods and whole communities.[1088] Importantly, the Commission recognised the communal element of displacement as a strategy of collective punishment, and as destroying the integrity and very existence of many communities.[1089] Nevertheless, the Commission did not fully explore the social elements of subsistence and thus the interrelationship with the physical and mental impacts of such destruction of communities.

Moreover, there still remain some conceptual problems regarding CAVR's use of the terms "displacement" and "famine". Notably the Commission stated that both '"displacement" and "famine" are neutral terms in the sense that they may occur without human rights being violated'.[1090] Today, famine and displacement are never purely natural, but rather are profoundly political and involve the widespread violation of human rights, as seen by the examples of Ukraine and Ethiopia.[1091] While the Commission did conclude that in the context of East Timor 'the nature of displacement and famine was almost always such that both were human rights violations in themselves and at the same time entailed a whole cluster of other violations', its understanding of these terms remains problematic.[1092] Indeed, the term "famine" remains outside of the law, and while there are provisions related to famine, the legal framework does not fully recognise this harm.[1093] The use of the term "famine" therefore presented CAVR with clear problems in regard to encompassing the harms involved within the current legal framework.

[1087] CAVR Report, n 881 above, 49-69.
[1088] *ibid*, 79-87.
[1089] *ibid*, 144.
[1090] *ibid*, 5.
[1091] Jenny Edkins, 'The Criminalisation of Mass Starvation: From Natural Disaster to Crimes against Humanity' in Stephen Devereux and Paul Howe (eds), *The New Famines: Why Famines Persist in the Era of Globalisation* (London: Routledge, 2005); David Keen, *The Benefits of Famine: A Political Economy of Famine and Relief in Southwestern Sudan, 1983-1989* (Princeton, NJ: Princeton University Press, 1994); David Marcus,'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245.
[1092] CAVR Report, n 881 above.
[1093] See Marcus, n 1091 above.

Nevertheless, CAVR's recognition of certain aspects of subsistence harms is certainly to be welcomed. The Commission explicitly recognised the use of food by the Indonesian security forces as a weapon of war to eliminate resistance to the occupation.[1094] The Commission found that from '1976 to 1978 the Indonesian armed forces systematically destroyed or removed food crops, food stores, agricultural implements, gardens and fields, and livestock belonging to East Timorese people ... it can only conclude that the aim of these Indonesian military operations was to starve the civilian population under Fretilin control into surrendering'.[1095] This approach is particularly significant, in light of the lack of attention given to the use of food and starvation as weapons within other transitional justice institutions.[1096]

The Report documented the widespread destruction and deprivation of food sources and livelihoods and placed such acts within the current international legal framework of the Geneva Conventions.[1097] It highlighted the systematic destruction of food crops, food stores and livestock during the period between 1976 and 1978 as well as the recurring destruction throughout the occupation and the scorched-earth policy instituted in 1999, following the referendum.[1098] CAVR also acknowledged the wide-ranging impacts of displacement on livelihoods and the whole economic system within East Timor. 'Flight and forced relocation separated some from their farms completely, while those still at home found their food security imperilled by severe restrictions on mobility during the June corn harvest and militia looting and destruction of crops and livestock.'[1099]

The Commission highlighted that forced displacement in East Timor was often accompanied by relocation to camps and settlements under Indonesian military control and documented the inhumane conditions and the outbreaks of famine within these camps.[1100] The Commission's Report stated that the 'camps became the sites for a fully-fledged famine in which unknown

[1094] CAVR Report, n 881 above, 147.
[1095] *ibid*, 147.
[1096] *ibid*, 144.
[1097] *ibid*. The Report refers specifically to Article 55 which protects against the requisitioning of foodstuffs by an occupying power. International Committee of the Red Cross, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
[1098] *ibid*.
[1099] *ibid*, 118.
[1100] *ibid*, 148-49.

numbers died. Already in a weakened state when they entered the camps, internees endured extended periods without access to food gardens or emergency humanitarian aid. The food that they received from the military was utterly inadequate to keep them alive'.[1101] The Report therefore found that the Indonesian authorities restricted access to humanitarian aid, particularly in the period between 1976 and 1979, despite their awareness of the desperate living conditions.[1102] This is again significant, since the Report directly discussed such restrictions in terms of the legal framework of violations of international humanitarian law and thus as war crimes.[1103] Nevertheless, the emphasis remained on physical survival rather than on an understanding of the dynamic of physical, mental and social elements of subsistence harms.

Overall, the CAVR Report found that the vast number of deaths that occurred during the period of the occupation through to the referendum of 1999 were due to hunger and illness, as a direct result of the occupation and found the Government of Indonesia and its security forces to be primarily responsible.[1104] This is highly significant in itself, since such deaths are more usually portrayed merely as the indirect and unforeseen results of violence, as seen in regard to the Ethiopian famine.[1105] The Commission found that where such deaths were the result of the intentional imposition of conditions of life, they could come within the crime against humanity of extermination, and it used the language of 'deaths by deprivation'.[1106]

ii) Subsistence harms and the limits of "truth"

The CAVR process allowed the story of the famine of 1978-79, which had been largely ignored by the outside world, to be told. The Commission, in their introduction to the Report on the Public National Hearing on famine and forced displacement, highlighted that 'Timor Leste was virtually closed off' during the period of the famine which meant that there was

[1101] *ibid*, 149.
[1102] *ibid*.
[1103] *ibid* ch. 8, 62. The Report referred to Article 147 of the Fourth Geneva Convention and interestingly positioned restrictions on humanitarian aid and deprivations of food as amounting to 'wilfully causing great suffering or serious injury to body or health' under Grave Breaches of the Conventions.
[1104] *ibid*, ch 8, 6-7.
[1105] Marcus, n 1091 above.
[1106] *ibid*, ch. 8, 6.

little outside discussion of the existence of famine.[1107] The Hearing was therefore aimed at 'providing a safe opportunity for survivors to relate their experiences and the experience of those who had perished'.[1108] It allowed the space for those who had experienced this harm to voice their suffering and for the international community to hear their stories.[1109] In fact, the number of survivors asked to participate in the Hearing, which CAVR drew on in its Final Report, was extremely small. There were only eleven survivors who told their experiences to the Public Hearing, as well as a couple of expert testimonies. However, the Hearing was a manifestation of a much wider process of truth-telling and research, which included CAVR district teams taking statements from individuals and conducting workshops in villages to understand the impact of these events on communities.[1110]

The emphasis was therefore not just on individual truth-telling but also on the analysis of experiences from a community level, in terms of the impact of harms upon whole communities, which was a potentially important approach for the recognition of subsistence harms. There was also national level research conducted through interviews with representatives of organisations and analysis of documentary evidence from East Timor, Indonesia and international organisations.[1111] The Hearing was a culmination of these wider processes of truth-telling and a way of providing a summary of the research and testimony provided at the communal level. Those who gave testimony before the Hearing were selected to do so by CAVR in order to provide a representative account of key events, strategies and places regarding the perpetration of famine and forced displacement during 1978-79 and thus the testimony was selected and framed by the concerns of CAVR.

Whilst acknowledging that mass hunger and displacement had also occurred within other periods of East Timor's recent history, particularly during the referendum of 1999, CAVR decided to focus on the period of 1978-1979 during the Public Hearing.[1112] The time frame may have constrained testimony and meant that the ongoing experience of hunger and

[1107] CAVR, 'National Public Hearing: Famine and Forced Displacement' July 2003, <http://www.cavr-timorleste.org/phbFiles/03_famine_eng-WEB.pdf> accessed 20 March 2009.
[1108] *ibid.*
[1109] *ibid.*
[1110] *ibid.*
[1111] *ibid.*
[1112] *ibid.*

starvation endured by the population was not voiced. Significantly, of the eleven survivors who testified before the Public Hearing on famine and forced displacement, four were women, but the expert witnesses were all men. The introduction to the Hearing does not mention the particular experiences of women in relation to famine and forced displacement and this does not come across within the testimony given.[1113] Undoubtedly, women did suffer disproportionately from subsistence harms, due to existing gender inequalities and roles, and thus the fact that this was not sufficiently addressed by the Commission is disappointing.[1114] Women's experiences are largely reported by CAVR in terms of vulnerability to sexual violence following forced displacement, rather than the other impacts and experiences of harms.[1115] Thus, CAVR's narrow treatment of women's experiences essentially followed the approach of other transitional justice mechanisms in equating gender issues with sexual violence.

CAVR also held a Public Hearing for women, in order to facilitate truth-telling of the particular experiences of women.[1116] Again this was based on the testimony of a few individuals who were selected through the community truth-telling processes, as well as on some submissions from women's organisations and NGOs.[1117] However, the focus was largely on sexual violence and torture, as well as an emphasis on suffering experienced as a result of attacks against or the deaths of relatives. The thirteen women who testified were selected to represent a range of geographical areas, perpetrators and harms, which again presents the danger that the women were selected on the basis of CAVR's concerns and thematic framework.[1118] Whilst it was acknowledged within the Hearing that women suffered because of their social and cultural position as women, this analysis was not applied to their experience of socio-economic violations or subsistence harms.[1119]

[1113] *ibid.*

[1114] For evidence of the way women were affected by the conflict and occupation, see United Nations Development Fund for Women, 'Gender-Profile of the Conflict in Timor-Leste' <http://www.womenwarpeace.org/docs/timo_pfv.pdf> accessed 12 May 2009.

[1115] CAVR Famine and Displacement, n 881 above, para. 495-98.

[1116] CAVR, 'Women and the Conflict', National Public Hearing 28-29 April 2003, *ibid.*

[1117] *ibid.* There were submissions from a group of Timorese women activists, from the Indonesian National Commission on Violence against Women and from the West Timor Humanitarian Team.

[1118] *ibid.*

[1119] *ibid.*

Although, in many ways, the Commission presented a broad understanding of responsibility, it also failed to truly uncover the role of structural violence and complicity in this.[1120] While CAVR did recognise the involvement of certain administrations in supporting the Indonesian occupation, it did not highlight the role of structural violence and systems of political and economic marginalisation in contributing to the harms experienced in East Timor.[1121] Thus, although acknowledging the complicity of certain Western states in not sufficiently condemning the Indonesian occupation and the violence involved, the Commission did not highlight the role of such states in maintaining the structural violence which underpinned East Timor's situation.[1122] CAVR's 'focus on individual acts of violence, and individual state involvement (that is, the who did what, when, to whom and why) pays little attention to the conditions that will perpetuate injustices and potentially create further conflict in the future'.[1123] In this way, structural violence and responsibility for its perpetuation was essentially silenced by the Commission, which meant that the linkages between deprivations of subsistence needs and underlying socio-economic inequalities were not recognised. As Stanley concludes, 'Certain "truths" – such as those that relate to how global politics and economic relations underpin violations, or those that exemplify how politics, the economy or gender continue to structure life in Timor-Leste – are yet to be fully explored'.[1124]

iii) The limitations of CAVR's approach to reconciliation and reparations

Regarding issues of reconciliation, the situation in East Timor differs from that in other countries which established truth and reconciliation policies. Whilst there were relatively large numbers of East Timorese perpetrators, these were predominantly low level offenders, with the majority of the most serious harms being committed by the Indonesian military.[1125] The task of reconciliation in East Timor is therefore different from other situations where truth and reconciliation processes have been established.[1126] The Commission has focused on a community-based reconciliation process in which deponents who wish to participate have

[1120] Nevins, n 965 above, 677.
[1121] *ibid.*
[1122] *ibid.*
[1123] Elizabeth Stanley, 'The Political Economy of Transitional Justice in Timor-Leste' in McEvoy and McGregor n 1003 above, 182.
[1124] *ibid*, 186.
[1125] Patrick Burgess, 'Justice and Reconciliation in East Timor: The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts' (2004) 15 *Criminal Law Forum* 135, 147.
[1126] Nevins, n 965 above, 686.

to tell the truth of the harms they committed and undertake acts of reconciliation. Such acts may involve traditional rituals or involve carrying out community works such as helping to repair buildings or providing compensation to their victims in the way of livestock or money.[1127] In this way the process seeks to foster reconciliation amongst the local population not simply through truth-telling processes, but also through perpetrators beginning to redress some of the harms committed. Such community work may therefore be particularly important to going some way towards repairing homes and livelihoods.

However, the community-based reconciliation process cannot begin to redress the majority of the harms perpetrated, since these were largely committed by Indonesians or East-Timorese who no longer live in the country. Surveys of community responses to the CAVR process indicate that truth-telling is not considered sufficient for reconciliation given the continuing socio-economic problems faced by people.[1128] Kent's research on survivors' perceptions of the truth and reconciliation process highlights that some 'felt that talking alone about past abuses in the context of a CRP [Community Reconciliation Process] hearing was not enough to lead to reconciliation while they continue to live in abject poverty'.[1129]

This is particularly significant given perceptions amongst some survivors of the disparity in economic situations between themselves and perpetrators of harms.[1130] 'Most victims have not enjoyed economic assistance and there is a common view, among victims, that they live poorer lives compared to perpetrators, many of whom have secured positions in the civil service or state administration. These conditions have led to feelings of injustice and resentment, and have made reconciliatory processes more difficult.'[1131] There is also evidence that victims tended to participate in the Community Reconciliation Process hearings out of a sense of duty to their communities and often deferred to the CAVR panel or village

[1127] Fausto Belo Ximenes, 'The Unique Contribution of the Community-Based Reconciliation Process in East Timor' Judicial System Monitoring Programme (2004) <www.cavr-timorleste.org/Analysis/The%20unique%20contribution%20of%20the%20CRP_Fausto%20Belo.PDF> accessed 19 November 2008.
[1128] Lia Kent, 'Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process' Judicial System Monitoring Programme 2004 <http://www.cavr-timorleste.org/otherFiles/Lia%20Kent_Report.pdf> accessed 20 November 2008.
[1129] *ibid.*
[1130] *ibid.*
[1131] Stanley, n 1123 above, 185.

head regarding the act of reconciliation.[1132] Thus, while in some ways CAVR did engage with local concerns, in practice the process has also served to entrench existing inequalities.[1133] This has meant that 'some groups – such as women, victims who experience relative deprivation and victims who hold little political sway – have not always experienced the levels of "truth", "justice" or reconciliation enjoyed by other more powerful actors'.[1134]

As in South Africa, reconciliation in East Timor remains an ongoing issue. There has been continued political instability and further perpetration of subsistence harms.[1135] Whilst such violence was primarily down to political infighting, there is a strong sense that reconciliation in East Timor cannot occur through truth-telling or community-based reconciliation processes alone. There remain significant socio-economic concerns in the wake of the mass suffering and subsistence harms committed, which need to be actively addressed, at least in part by transitional justice mechanisms. Crucially, despite CAVR's progressive approach to truth-telling, in terms of the broad range of harms recognised and the fact that the Commission viewed truth, justice and reparations as three essential, interrelated components of transitional justice, when it came to reparations it followed the traditional approach of only including physical integrity harms. [1136]

CAVR defined primary beneficiaries of reparations as 'direct survivors of human rights violations such as rape, imprisonment and torture, as well as those who suffered indirectly through the abduction, disappearance or killing of family members'.[1137] While acknowledging a broad definition of "victim" in general, for the purposes of reparations this was narrowed to only extend to victims of "gross violations of human rights".[1138] Although

[1132] Kent, n 1128 above.
[1133] Stanley, n 1123 above, 167-68.
[1134] *ibid*, 184.
[1135] United Nations Security Council, 'Report of the Secretary-General on the United Nations Integrated Mission in Timor-Leste for the Period from 8 January to 8 July 2008', 29 July 2008, S/2008/501. 'As of August 2008, the UN estimates that 100,000 civilians (10 percent of the population) remain displaced as a result of the political and military crisis in 2006 and further violence in 2007 and 2008.'
[1136] CAVR Recommendations, n 881 above, 36.
[1137] *ibid*, CAVR Acolhimento and Victim Support, 40.
[1138] According to the Commission's mandate 'a victim means a person who, individually or as part of a collective, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her rights as a result of acts or omissions over which the Commission has jurisdiction to consider and includes the relatives or dependents of persons who have individually suffered harm.' United Nations Transitional Administration for East Timor, Regulation 2001/10, Section 1.

CAVR recognised the potential for some deprivations of subsistence needs to be crimes against humanity for the purposes of reparations, it did not acknowledge them to be "gross violations of human rights", which constitutes an inherently contradictory approach.[1139] Essentially, forced displacement, which it had previously recognised as a serious harm, was considered by the Commission as too widespread to come within the reparations programme.[1140]

The Commission cited issues of practicality and limited resources for this narrow approach.[1141] However, as argued above, while issues of feasibility are clearly important, failing to promote redress for subsistence harms is highly problematic to the whole process of truth-telling and reconciliation. Although, there remain huge resourcing issues for the government, it does still seem puzzling that harms related to deprivations of subsistence needs, which CAVR acknowledged to be serious, were not emphasised within the reparations programme, particularly harms such as destruction of homes and livelihoods which are particularly suitable for material reparations.[1142] The needs based approach it adopted did emphasis that reparations should be given to the vulnerable, including widows, single-mothers and children, as well as emphasising community reparation, which is to be welcomed, but only to those who had suffered, directly or indirectly, gross human rights violations, i.e. physical integrity harms. In terms of accountability, it is significant that CAVR called for the reparations programme to be funded by foreign governments and non-state actors who were complicit in the occupation and violence, as well as Indonesia.[1143] However, such international funding for the reparations programme has, unsurprisingly, yet to be forthcoming.[1144]

[1139] CAVR Recommendations, n 881 above.
[1140] Galuh Wandita, Karen Campbell-Nelson and Manuela Leong Pereira, 'Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims' in Ruth Rubio-Marin (ed), *What Happened to the Women: Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006).
[1141] CAVR Recommendations, n 881 above, 40-41.
[1142] Arbour, n 874 above, 13.
[1143] Jeffrey Kingston, 'Balancing Justice and Reconciliation in East Timor' (2006) *Critical Asian Studies* 271, 279. Joseph Nevins, '(Mis)Representing East Timor's Past: Structural Symbolic Violence, International Law and the Institutionalization of Injustice' (2002) 1(4) *Journal of Human Rights* 523.
[1144] Joseph Nevins, 'Timor-Leste in 2006: the End of the Post-Independence Honeymoon' (2007) 47(1) *Asian Survey* 162, 167.

Despite the inconsistency of its approach regarding reparations, CAVR's acknowledgment of some aspects of subsistence harms within its truth-telling process is significant in providing a precedent for recognition of these harms within transitional justice mechanisms. Nevertheless, the CAVR Report has received little international political or academic attention, perhaps in part due to East Timor's insignificance as a small and poor country, as well as the issues of Western responsibility.[1145] Similarly, in seeking not to annoy its powerful neighbour, Indonesia, and Western powers who were complicit in the violence, the East Timor Government has sidelined CAVR's findings and recommendations.[1146] President Gusmao argued against focusing on accountability for past atrocities and maintained that 'the people are better served by the government concentrating its meagre resources on achieving economic and social justice and consolidating peace'.[1147]

The Government's attention to socio-economic and subsistence needs of its population is certainly to be welcomed. However, reparations for subsistence harms could provide a way of linking justice and subsistence needs and therefore providing a much broader form of recognition to survivors, which attended to their basic needs. The current President, Jose Ramos-Horta, has recently endorsed an illustrated edition of the CAVR Report, written in Tetum, the local language, in order to render the Report more accessible to East Timorese people.[1148] This is an important step towards further publicising the Report amongst the people, but has come some years after its original publication and, significantly, the issues of reparations for subsistence harms continue to be left unaddressed.

[1145] Joseph Nevins, 'The CAVR: Justice and Reconciliation in a time of Impoverished Political Possibilities' (2008) 80(4) *Pacific Affairs*, 593.

[1146] The subsequent Truth and Friendship Commission has developed a weak approach towards accountability, which again undermines the findings of CAVR. See Megan Hirst, 'Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste' International Center for Transitional Justice Occasional Paper Series, January 2008 <http://www.ictj.org/images/content/9/7/972.pdf> accessed 10 March 2009.

[1147] Kingston, n 1143 above, 293.

[1148] International Center for Transitional Justice, 'Timor-Leste: Illustrated Version of Truth Report Launched' (Press Release) (31 August 2010) <http://www.ictj.org/en/news/press/release/4030.html> accessed 7 September 2010.

Conclusion

The examples of South Africa's TRC and East Timor's CAVR discussed within the chapter have highlighted both the dangers of not attending to subsistence harms and the possibility that truth commissions could potentially address some aspects of these harms. The TRC's sidelining of subsistence harms not only created a distorted truth, but is problematic in terms of long-term reconciliation, since these harms have remained unaddressed. By explicitly including aspects of deprivations of subsistence needs harms, CAVR has set an example for other truth commissions to follow. Nevertheless, whilst CAVR certainly adopted a much more progressive stance, it essentially did not go beyond current transitional justice frameworks, as shown by its privileging of physical integrity harms within its reparations recommendations and its failure to fully explore the mental and social aspects of subsistence harms and their gendered nature. Therefore, not until transitional justice moves beyond the narrow confines of current international legal frameworks can the perpetration and experience of subsistence harms truly be able to be recognised by truth commissions.

Essentially, the problems of recognising and addressing subsistence harms stem from both the limited and fragmented recognition given to these harms within international criminal law and human rights law and how the law is interpreted within these mechanisms of transitional justice. The focus of truth commissions largely remains on a narrow understanding of harm and on addressing "crisis" situations, in line with the goals of transitional justice discourse.[1149] If truth commissions are to provide recognition of subsistence harms, then the priorities and purposes of transitional justice need to be rethought.[1150] Given the linkages between socio-economic grievances and violence, current emphases on civil and political human rights and physical integrity harms are not sufficient to prevent the recurrence of violence.[1151]

[1149] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377; Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' (2007) 101(3) *Northwestern University Law Review* 1257.
[1150] Arbour, n 874 above.
[1151] Frances Stewart, 'Crisis Prevention: Tackling Horizontal Inequalities' (2000) 28(3) *Oxford Development Studies* 245.

Truth commissions could play a crucial role in such transformation through the forms of recognition they institute. However, in order to do so, they must therefore move away from current approaches, which all too often silence the experiences of subsistence harms and underlying socio-economic grievances, and instead explore how the perpetration of subsistence harms and physical-integrity harms interrelates with these grievances to form a continuum of violence. Moreover, it is crucial that truth commissions, such as CAVR, not only recognise the physical aspects of deprivations of subsistence needs, but also explore the mental and social aspects of subsistence harms and their gendered nature. Truth commissions also need to expand their approaches in relation to their aims to foster reconciliation. Whilst acknowledgement of harms is crucial, this is not sufficient for reconciliation in the wake of mass violence and atrocities. Reconciliation processes must seek to begin to address underlying concerns and grievances as well as the consequences of harms and, fundamentally, need to do so in gender-sensitive way.

Essentially, similarity to international criminal tribunals, existing truth commissions have predominantly only addressed harms currently recognised by law. This allows many other forms of harm, including perpetrations of subsistence harms, to continue to be silenced and thus accepted by official mechanisms. Transitional justice and international criminal law remain unconcerned with situations of ongoing violence and harms which are not centred on violations of physical integrity. This has resulted in the emergence of unofficial, non-governmental tribunals which seek to address harms ignored by law and official, legal mechanisms. The next chapter turns to analysing these non-governmental tribunals and will argue that, despite their unofficial status, such mechanisms play a crucial role in recognising harms, such as subsistence harms, which continue to be silenced by conventional law.

Chapter 5

Non-governmental tribunals and the recognition of subsistence harms

Challenging the "crime of silence" and law's role in this "crime" provides the key motivation for and purpose of non-governmental tribunals.[1152] Although non-governmental tribunals do not have legal authority, they challenge law's silencing of certain harms by reclaiming and appropriating the power to judge harm. While law silences certain harms, it can, at the same time, provide a powerful language and authority with which to voice and frame harm. In this way, the language of law constitutes an important tool to allow non-governmental tribunals to recognise and judge the perpetration of harms, including subsistence harms, which are silenced and marginalised by conventional law.[1153]

Although none of the existing non-governmental tribunals discuss all the aspects of subsistence harms in a coherent way, they do recognise and acknowledge some of the harms that come within the typology of subsistence harms and also begin to acknowledge elements of the essence of these harms. It is therefore crucial that the thesis engages with and analyses such recognition, in order to contrast it with the sidelining of such harms within official mechanisms and to discuss the alternative space for the recognition of subsistence harms that non-governmental tribunals provide. In addition, through recognition of silenced harms, non-governmental tribunals have the potential to provide a way of rethinking these harms and influencing law "from below". However, at least in regard to subsistence harms, this potential has yet to be fully realised.

This chapter focuses on analysing the relationship between non-governmental tribunals and law in terms of recognising subsistence harms and responsibility for them. Apart from a few

[1152] Peter Limqueco and Peter Weiss (eds), *Prevent the Crime of Silence: Reports from the Sessions of the International War Crimes Tribunal Founded by Bertrand Russell* (London: Allen Lane, 1971).
[1153] Jayan Nayar, 'A People's Tribunal against the Crime of Silence? The Politics of Judgement and an Agenda for People's Law' (2001) *Law, Social Justice and Global Development Journal* <http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html> accessed 12 October 2008.

scholarly books and articles, the phenomenon of non-governmental tribunals remains largely ignored, and has yet to gain any real credibility within international legal circles or wider discourse.[1154] This chapter seeks to contribute to the literature by analysing these tribunals and examining their treatment of subsistence harms. It draws on critical discourses and literature in looking in detail at the use of non-governmental tribunals as a means to critique the deficiencies of the current legal framework and the treatment of subsistence harms within international legal mechanisms.[1155] By focusing on harms ignored by conventional law, non-governmental tribunals may be able to recognise subsistence harms more effectively than conventional legal systems and be less restricted regarding assessments of responsibility for harms.

The first part of this chapter will analyse the origin and aims of non-governmental tribunals and examine their ability to recognise harms silenced by international law. The second part will focus on the work of three specific tribunals which have addressed situations involving the perpetration of subsistence harms. It will argue that the focus of these tribunals on harms related to deprivations of subsistence needs is in itself highly significant, given the sidelining of such harms within current legal mechanisms. However, it will also highlight the way in which using the current legal framework has restricted the work of these tribunals, meaning that their recognition of subsistence harms is not necessarily as comprehensive as may be presumed. Essentially, while non-governmental tribunals present an important space for the recognition of subsistence harms there remain tensions between the aims of such tribunals to highlight silenced harms through law and the problems of employing law in order to do so.

[1154] See particularly Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizen's Tribunals: Mobilizing Public Opinion to Advance Human Rights* (New York: Palgrave, 2002); Arthur W. Blaser, 'How to Advance Human Rights Without Really Trying: An Analysis of Nongovernmental Tribunals' (1992) 14(2) *Human Rights Quarterly* 339; Christine Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 9 *American Journal of International Law* 335.

[1155] For critical legal approaches to non-governmental tribunals see Nayar, n 1153 above, Chinkin, *ibid*; Richard Falk, 'The World Speaks on Iraq' (2005) 62 *Guild Practitioner* 91.

1) The history and status of non-governmental tribunals

i) Non-governmental tribunals: challenges to law and issues of legitimacy

The contemporary phenomenon of non-governmental or "people's" tribunals stems from the pioneering Russell Tribunal, which was convened in 1966.[1156] The Tribunal was initiated by Bertrand Russell and headed by Jean-Paul Sartre, with many other high profile participants, such as Simone de Beauvoir, as a means of addressing the pervasive silence towards international crimes committed by the US during the Vietnam War.[1157] The Tribunal was essentially an attempt to highlight the lack of accountability for US actions in Vietnam, in the context of the absence of legal mechanisms to deal with crimes against humanity resulting from the political stalemate of the Cold War.[1158] Its aim was therefore to publicise the international crimes committed during the Vietnam conflict, and possibly influence US foreign policy in the process.[1159] The Russell Tribunal explicitly acknowledged that it 'is not a substitute for any institution already in existence: it is, on the contrary, formed out of a void and for a real need'.[1160]

While there has been an emergence of international legal mechanisms, such as criminal tribunals and truth commissions, in recent years to deal with international crimes, the number of non-governmental tribunals has also proliferated, particularly through the Lelio Basso Foundation.[1161] The Permanent People's Tribunal has established numerous tribunals on various issues such as violations of civil/political and socio-economic rights, environmental issues and structural violence.[1162] There have also been many independent non-governmental tribunals established addressing a wide variety of human rights and environmental concerns.[1163] These tribunals are no longer a reaction to the lack of legal mechanisms

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[1156] While there were citizens' tribunals prior to this, most notably the Commission of Inquiry into the Origins of the Reichstag Fire and Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials, the model of contemporary people's or non-governmental tribunals can be seen to stem from the work of the Russell Tribunal. For analysis of these earlier commissions see Klinghoffer and Klinghoffer, n 1154 above.

[1157] Limqueco and Weiss, n 1152 above.

[1158] *ibid*, 103-15.

[1159] *ibid*, 109-10.

[1160] Jean-Paul Sartre, Inaugural Statement, in *ibid*, 65-66.

[1161] See the website of the Lelio Basso Foundation and the Permanent People's Tribunal, based in Rome <http://www.internazionaleleliobasso.it/index.php?newsid=273> accessed 24 October 2009.

[1162] *ibid.*

[1163] Niamh Reilly and Linda Posluszny, 'Women Testify: A Planning Guide for Popular Tribunals and Hearings' Center for Women's Global Leadership (2005)

available, but to the way conventional law silences certain harms and the lack of political will to deal with particular situations of violence. Their very existence illustrates the deficiencies of international law and legal mechanisms in silencing certain harms which are of concern to survivors. As Borowiak highlights, while 'the Russell Tribunal sought to hold states to account before international law, the PPT [Permanent People's Tribunal] seeks to account for the inadequacy of law itself'.[1164]

While each tribunal is different in its composition, aims and procedures, there are also clear similarities, which allow non-governmental tribunals to be discussed as a particular phenomenon. These tribunals draw on the authority, language and power of law, but do so in a way which challenges conventional interpretations of law and law's sidelining of certain harms and situations.[1165] The tribunals use the language of law to judge harms which are ignored by conventional legal mechanism and also to assign responsibility for them. According to the Permanent People's Tribunal, its mission is 'to raise awareness of all those situations in which the massive violation of fundamental human rights receives no institutional recognition or response, whether at a national or an international level, and to qualify such situations in legal terms'.[1166] However, while non-governmental tribunals do draw on and utilise legal procedures, they are not as restricted by legal procedures and do not necessarily adhere to a particular framework or process.[1167] Indeed, the composition and processes of tribunals differs considerably, which gives such tribunals the flexibility to relate their processes to local situations. This flexibility allows non-governmental tribunals to potentially recognise a wider variety of harms than official mechanisms, as well as providing understandings of underlying grievances and wider contexts of violence.[1168]

<http://www.cwgl.rutgers.edu/globalcenter/womentestify/completetext.pdf> accessed 20 October 2009; Klinghoffer and Klinghoffer, n 1154 above, 163-85.

[1164] Craig Borowiak, 'The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability' (2008) 30(2) *New Political Science* 161, 174.

[1165] Sally Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29 *Law and Society Review* 11, 21.

[1166] Permanent People's Tribunal, 'Session on Neoliberal Policies and European Transnationals in Latin America and the Caribbean' (2008) <http://www.internazionaleleliobasso.it/dtml/tribunale_permanente/sentenze/34.2_TPP_Lima_ENG.pdf> accessed 2 October 2008.

[1167] Chinkin, n 1154 above, 211-12.

[1168] Borowiak, n 1164 above, 162.

The very convening of a non-governmental tribunal seeks to challenge states' and international institutions' sole right to apply law and judge harms. Non-governmental tribunals do not have any legal standing or authority and they cannot deliver a verdict in the sense of conventional law.[1169] Essentially they are "tribunals of conscience" which aim to highlight the perpetration of harms and responsibility for them, but do so in legal as well as moral terms.[1170] In convening a tribunal, the participants reclaim the right to judge violations in the name of civil society or "the people". The legitimacy proclaimed by non-governmental tribunals in their act of judging international crimes and human rights violations is rooted not in the state-centric view of law, but in the civil society view that law 'is an instrument of civil society and does not belong exclusively to states'.[1171]

Such a basis for authority and legitimacy draws on the wider concept of "peoples' law", which articulates the 'notion that the ordinary people of the world have the right to judge violation'.[1172] This concept stems from alternative foundations of authority and legitimacy, most notably the 1976 Universal Declaration of the Rights of Peoples (Algiers Declaration).[1173] The Algiers Declaration and other documents of "peoples' law" enshrine the rights of peoples, as a reaction and challenge to the imperialism of the global order and the widespread violations of human and peoples' rights.[1174] Indeed, the Permanent People's Tribunal bases its existence and authority on the Algiers Declaration as a document which promotes the rights of peoples to legitimately struggle against violations of rights.[1175]

[1169] Chris Cusano, 'A People's Tribunal in Practice' (2003) <http://www.foodjustice.net/modules.php?name=Content&pa=showpage&pid=7> accessed 23 September 2008.
[1170] People's Tribunal on Food Scarcity and Militarization in Burma, *Voice of the Hungry Nation* (1999) <http://www.foodjustice.net/burma/1996-2000tribunal/report/index.htm> accessed 8 September 2008.
[1171] Chinkin, n 1154 above, 217-18; Borowiak, n 1164 above, 165; Richard Falk, 'The Rights of Peoples (in Particular Indigenous Peoples)' in James Crawford (ed), *The Rights of Peoples* (New York: OUP, 1988) 29.
[1172] Jayan Nayar, 'Peoples' Law: Decolonising Legal Imagination' (2007) 1 *Law, Social Justice and Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/nayar/nayar.pdf> accessed 12 October 2008.
[1173] Universal Declaration of the Rights of Peoples, Algiers, 4 July 1976 <http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm> accessed 9 April 2010.
[1174] Nayar, n 1172 above; Richard Falk, 'The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights' in Antonio Cassese, *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn, Netherlands: Sijthoff and Noordhoff, 1979) 225, 231.
[1175] 'May all those who, throughout the world, are fighting the great battle, at times through armed struggle, for the freedom of all peoples, find in this Declaration the assurance of the legitimacy of their struggle'. Preamble to the Algiers Declaration, n 1173 above.

Non-governmental tribunals claim the legitimacy, as a part of civil society, to judge violations and harms where states or international legal mechanisms fail or refuse to act to ensure justice.[1176] 'A People's Tribunal can step in to fill the lacunae in international law and to forge new ground in the development of international law by creating a "law of peoples" arising from principles of justice and humanity'.[1177] The very name of people's tribunals seeks to associate law and judgement with "the people" or peoples. Indeed, the Russell Tribunal acknowledged that 'we have not been given a mandate by anyone; but we took the initiative to meet, and we also know that nobody could have given us a mandate'.[1178] It based its authority on a different source, stating that 'its legality comes from both its absolute powerlessness and its universality'.[1179] In doing so, the Russell Tribunal, and subsequent non-governmental tribunals, have turned their powerlessness into a strength by claiming a different authority to conventional law from which to exercise judgment.[1180] For example, the Courts of Women 'seek legitimization not by dominant standards but by its claim to the truths of the dispossessed, of the denigrated'.[1181]

Clearly, such claims to legitimacy have not been generally accepted within conventional legal circles or indeed within much of wider society.[1182] However, there are increasing doubts, both within and outside legal circles, over the centrality of the state within international law, which, in time, may allow non-state actors to play a greater role and thus for the authority of non-governmental tribunals to gain some credibility.[1183] In this way, the hope is that non-governmental tribunals will be able to begin to influence the development of law "from below", so as to encourage the recognition of harms currently ignored by law. Where such development is not possible, due to the nature of the current legal framework, the role of non-governmental tribunals lies in providing alternative mechanisms to recognise harms and some

[1176] Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, Prosecutors and Peoples of Asia Pacific Region v. Hirohito; Prosecutors and Peoples of Asia Pacific Region v. Japan, Judgement 4 December 2001 <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf> accessed 14 October 2008.
[1177] *ibid*, 15.
[1178] Jean-Paul Sartre, 'Inaugural Statement', in Limqueco and Weiss, n 1152 above, 65.
[1179] *ibid*, 65-66.
[1180] *ibid.*
[1181] Corinne Kumar, 'Our Memories are Our Histories: Conversations on the Courts of Women' in Kumar (ed), *Asking, We Walk: The South as New Political Imaginary*, Book 2 (Bangalore: Streelekha Publications, 2007) 184, 186.
[1182] Merry, n 1165 above, 80.
[1183] Fleming Terrell, 'Unofficial Accountability: A Proposal for the Permanent Women's Tribunal on Sexual Violence in Armed Conflict' (2005) 15 *Texas Journal of Women and the Law* 107, 145.

form of acknowledgement of responsibility for harms. As with official legal mechanisms, such recognition may therefore perform a normative function in condemning the perpetration of harms and also provide a degree of validation to survivors.

This is not to advocate an uncritical approach to non-governmental tribunals. Indeed, such tribunals vary greatly both in terms of their goals and the quality of their judgments. Moreover, there is also a need to be aware that the term "people's" tribunals or courts has been used by authoritarian states as a means of silencing political opposition.[1184] As Borowiak reminds, 'Merely calling itself a tribunal and declaring that it works on behalf of humanity does not make such a group's claims credible, any more than a state's actions serve justice merely because a government says so ... Credibility depends on performance'.[1185] Each tribunal has to be judged on the nature of its own merits, which is why the second part of this chapter looks in detail at the work of three separate tribunals in relation to their treatment of subsistence harms. As Falk stated, regarding the World Tribunal on Iraq, 'the credibility of the WTI depends on its capacity for effective truth-telling that engages public opinion, and withstands fair-minded critical scrutiny'.[1186]

However, criticisms of non-governmental tribunals should not be based on traditional understandings of legitimacy in terms of either a state-centric view of law or legal concepts such as due process and fair trial.[1187] Judging non-governmental tribunals on such bases essentially misses the point.[1188] As Borowiak argues, 'Rather than judging them for how well they fit the mold of official tribunals, one should judge them for how well they demonstrate the need for accountability in the context of official institutions that have failed to fulfil their legal and normative obligations to carry out justice'.[1189] While drawing on legal procedures to some degree, non-governmental tribunals do not aim to be legal in this sense or to judge in the same way as international legal mechanisms.[1190]

[1184] Borowiak, n 1164 above, 182.
[1185] *ibid.*
[1186] Richard Falk, *The Costs of War: International Law, the UN, and World Order after Iraq* (New York: Routledge, 2008) 179.
[1187] Borowiak, n 1164 above, 181.
[1188] *ibid.*
[1189] *ibid*, 162.
[1190] Falk, n 1155 above, 92.

Non-governmental tribunals have often been run by activists and designed to address a particular issue of concern and therefore cannot, and do not attempt to, attain legal standards of objectivity.[1191] However, the very idea of legal objectivity and the claims of international criminal tribunals to attain this are themselves highly questionable.[1192] While, it is undoubtedly the case that the procedures of non-governmental tribunals cannot ensure a proper defence or appeal, in part because of the absence of the accused, they often seek to adopt at least some legal procedures in order to ensure a degree of fairness. Such procedures have included inviting the accused or a representative to participate in proceedings and the use of *amicus curiae* briefs in support of the accused.[1193]

The thesis analyses non-governmental tribunals not on the basis of legitimacy as traditionally understood, but on how they perform recognition and the types of harms they recognise. Credibility in this sense requires adhering to the concerns of survivors and producing rigorous and well documented findings. Non-governmental tribunals are often focused on witness/survivor testimony and analysis of harms experienced, as well as on discussing the wider context of violence. Their focus on witness/survivor testimony therefore resembles the aims of truth commissions far more than those of international criminal tribunals. Nevertheless, as critiqued in the previous chapter, truth commissions have largely focused on producing a narrow truth and have avoided analysing wider contexts of violence.[1194] It is this willingness to discuss a wider range of harms and underlying contexts of violence, which represents the strength and significance of the non-governmental tribunal model.

Some tribunals can be critiqued in terms of their elitist nature, as was certainly the case with the Russell Tribunal.[1195] Nevertheless, other non-governmental tribunals, such as the Courts of Women, have been much more successful at ensuring a combination of retaining legal

[1191] Terrell, n 1183 above, 132.
[1192] Margaret M. de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 *Fordham International Law Journal* 1400; Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21(2) *Ethics and International Affairs* 179.
[1193] Terrell, n 1183 above, 127. See for example the procedures of the Women's International War Crimes Tribunal, n 1176 above.
[1194] Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) Vol. 2(3) *International Journal of Transitional Justice* 331, 333.
[1195] Chinkin, n 1147 above, 216.

experts on their panel and engaging with local organisations and survivors to ensure that they represent the concerns of survivors.[1196] Many tribunals have a strong relationship with other forms of civil society organising. They are often created by civil society organisations and may act in concert with other forms of activism against the injustices of conventional law, such as social movements.[1197] Indeed, La Via Campesina, which is a key organisation within the Food Sovereignty Movement, provided evidence to the Permanent People's Tribunal session on Neoliberal Policies and European Transnationals in Latin America and the Caribbean, regarding the atrocities committed against rural workers in Brazil by Syngenta, a transnational agri-business corporation.[1198] The Courts of Women also work closely with local and transnational social movements and have even fostered the growth of women's organisations and social movements within the countries where courts have been held.[1199]

The inclusion of women and gender concerns is also crucial to such claims to credibility. Traditionally, despite the involvement of some high profile women, notably Simone de Beauvior in the Russell Tribunal, non-governmental tribunals have not necessarily dealt with gender issues in a coherent or comprehensive way.[1200] However, there have been some very successful gender-focused tribunals, notably the tribunal on sexual slavery by Japan during WWII.[1201] Moreover, there have been approximately thirty Courts of Women held on various gendered harms ranging from domestic violence, trafficking, property rights, neo-liberal policies and the impact of armed conflict.[1202] Thus, the concerns of women are gradually beginning to be heard within the space provided by non-governmental tribunals, but there remains a need for tribunals, other than specific women's tribunals, to adopt a gender sensitive approach and more fully address gendered harms.

[1196] Kumar, n 1181 above, 197.
[1197] Borowiak, n 1164 above, 185.
[1198] *ibid.*
[1199] Kumar, n 1181 above, 201.
[1200] See Women's International Tribunal on Japanese Military Sexual Slavery, n 1176 above, 16-17
[1201] Chinkin, n 1154 above; Shreyas Jayasimha, 'Victor's Justice, Crime of Silence and the Burden of Listening: Judgement of the Tokyo Tribunal 1948, Women's International War Crimes Tribunal 2000 and Beyond' (2001) (1) *Law, Social Justice & Global Development Journal*
<http://elj.warwick.ac.uk/global/issue/2001-1/jayasimha.html> accessed 17 June 2009; Women's International Tribunal, n 1176 above; Charlotte Bunch and Niamh Reilly, *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights* (New Jersey: Center for Women's Global Leadership, 1993).
[1202] See the El Taller website
< http://www.eltaller.in/> accessed 2 February 2010.

ii) Breaking the silence of conventional law and performing recognition

Essentially, non-governmental tribunals are centred on voicing silenced harms and on the act of remembering.[1203] 'They often use public hearings as an occasion to gather and publicize information about alleged crimes or injustices and to draw attention to how official structures are failing their responsibilities.'[1204] Since oral testimonies and truth-telling processes are central to the procedures and aims of non-governmental tribunals of voicing harms that are silenced by law, promoting the participation of women and women's concerns within non-governmental tribunals is a key way in which gendered harms could be further recognised.[1205] As the Global Tribunal on Violations of Women's Human Rights stated, the testimonies of women at the Tribunal 'contributed enormously to the important task of documenting, defining and making visible violations of women's human rights which the prevalent conceptualization and practice of human rights have addressed inadequately'.[1206]

This is not a negotiated truth imbued with the needs of political transition, as is all too often the case regarding truth commissions, but rather a space which permits the voicing of harms silenced by conventional legal mechanisms. It is a 'process of justice and healing outside [the] boundaries' of official legal mechanisms.[1207] Although a non-governmental tribunal will be convened around a particular issue or situation, these tribunals may allow for a less fettered truth and potentially for multiple truths to emerge from the testimony provided by survivors and other participants.[1208]

Due to political exigencies, some tribunals, such as the People's Tribunal on Food Scarcity and Militarization in Burma, cannot operate within the country concerned and thus are geographically distanced from survivors. In this way, the lack of official standing and

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[1203] Asian Women's Human Rights Council and El Taller International, World Court of Women on US War Crimes, 18 January 2004 <www.globalresearch.ca/articles/WOR403A.html> accessed 9 April 2009.
[1204] Borowiak, n 1164 above, 165.
[1205] Christine Chinkin, 'People's Tribunals: Legitimate or Rough Justice' (2006) *The Windsor Yearbook of Access to Justice* 201, 212.
[1206] Niamh Reilly (ed), *Testimonies of the Global Tribunal on Violations of Women's Human Rights at the United Nations World Conference on Human Rights Vienna, June 1993* (New York: Center for Women's Global Leadership, 1994).
[1207] Kumar, n 1181 above, 212.
[1208] *ibid*, 189.

attempts to tackle harms ignored by law essentially prevents some tribunals from having the freedom to engage with survivors. However, the People's Tribunal on Food Scarcity and Militarization in Burma has shown awareness of the need to engage with survivors despite these practical difficulties, and to do so in order to tackle harms which would otherwise be ignored by conventional legal mechanisms.[1209] Resource and practical constraints may mean that only a few survivors are given the space to testify. Nevertheless, such testimony can voice previously silenced harms and therefore may still provide some sense of validation to other survivors. 'The testimonies that women would recount at The Tribunal were to be symbolic of the situation of many thousands of women who could not be there. They would define, document, and make visible violations of women which the current conceptualization and practice of human rights had not adequately addressed.'[1210]

In articulating and documenting harms, non-governmental tribunals can, therefore, form part of a process of allowing populations and individuals to reclaim their histories and voice their stories.[1211] Through allowing the space for testimony on situations and harms ignored by conventional law, participants and survivors can reclaim the truth and memory of their experiences and gain some sense of justice through the recognition of harms experienced.[1212] As Nayar highlights, a 'fundamental orientation of a peoples' law perspective, therefore, is to counter the assumption of misfortune which belies much of the "dominant" construction of deprivation through the explicit denunciation of the violence and the violation of current world orders'.[1213] In documenting the harms brought before them, non-governmental tribunals seek to prevent the "crime of silence".[1214] They defy the official silence of the legal system by highlighting suffering as constituting not simply misfortune but as constituting harm and rights violations. In recognising harms, non-governmental tribunals can fulfil an educative role ensuring that the "crime of silence" is not allowed to continue unchallenged.[1215] As Kumar highlights, the 'Courts of Women invite us to write another

[1209] Cusano, n 1169 above.
[1210] Bunch and Reilly, n 1201 above.
[1211] Nayar, n 1153 above.
[1212] *ibid.*
[1213] *ibid*, 1.
[1214] Bertrand Russell, 'Speech to the First Meeting of Members of the War Crimes Tribunal' in Limqueco and Weiss n 1152 above, 59.
[1215] Chinkin, n 1205 above, 220.

history, a counter-hegemonic history, a history of the margins; giving private individual memory its public face transforming it into political discourse'.[1216]

Essentially, the power and value of non-governmental tribunals lies in their ability to mobilise around certain silenced harms and publicise such violence.[1217] The Courts of Women, for example, have used publications and video documentation of testimony to raise awareness of the harms they address.[1218] Moreover, they have used such evidence to lobby the UN regarding certain violence, such as the US economic blockade of Cuba.[1219] While the publicity accorded to non-governmental tribunals is often limited, they can have a mobilising role such that the effect of judgments, at least at a local level, must not be underestimated. In this way they provide some survivors with a space wherein harms experienced can be acknowledged and publicised, thus potentially promote a sense of agency and validation, in contrast to their prior experience of marginalisation.[1220] The People's Tribunal on Food Scarcity and Militarization in Burma described its aims in terms of a two way process of truth and justice: not just taking from witnesses but also seeking to offer solidarity with them and to understand their experience of violence and suffering.[1221] This inclusiveness potentially allows these tribunals to document and reflect more effectively the nature and essence of abuses, such as subsistence harms, as they are actually experienced.

Moreover, the Courts of Women has deliberately sought to promote acknowledgement of the agency of women in the face of violence within its hearings. 'While the Courts of Women listens to the voices of the victims/survivors, it also listens to the voices of women who resist, who rebel, who refuse to turn against their dream ... it hears of survival in the dailiness of life; it hears of women and movements resisting violence in its myriad forms.'[1222] This

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[1216] Kumar, n 1181 above, 187.
[1217] Borowiak, n 1164 above, 167.
[1218] See the El Taller website, n 1202 above.
[1219] Georgina and Gilberto from Galfisa, the Institute of Philosophy in Havana, quoted in Kumar, n 1181 above, 202.
[1220] Cheah Wui Ling, 'Walking the Long Road in Solidarity and Hope: A Case Study of the "Comfort Women" Movement's Deployment of Human Rights Discourse' (2009) 22 *Harvard Human Rights Law Journal* 63.
[1221] Cusano, n 1169 above. The Tribunal presented itself as being interested 'not merely in what it could get from persons coming before it, as in the case of conventional human rights reporting, but also in what it could contribute in exchange'.
[1222] Corinne Kumar, 'Towards A New Political Imaginary' (2005) <http://snellings.telenet.be/womeninblackleuven/new_political_imaginary.htm> accessed 23 April 2010.

presents a stark contrast to the treatment of gendered harms within many official mechanisms, where it is women's vulnerability to harms rather than their agency and struggles to survive which are all too often emphasised.[1223] Understanding both vulnerability and agency is crucial to recognising the experience of subsistence harms.

Despite these aims of voicing silenced harms there has been divergence within different non-governmental tribunals regarding their engagement with and treatment of law and thus the framing of violence as constituting legal harms. Some tribunals have sought to apply existing law to situations which, for political and resource reasons, have not been addressed by international legal mechanisms. For example, the recent Permanent People's Tribunal on Sri Lanka acted in response to 'the substantial disregard of the [government's actions in the war] by international institutions which accompanied the "disappearance" of the massacre of the Tamils from the attention of the international media'.[1224] This Tribunal employed the existing framework of war crimes, crimes against humanity and genocide in order to judge the government's actions towards the Tamil people in the last phase of the war.[1225] Significantly, it did recognise the use of food as a weapon of war and the deprivation of other basic needs, but largely sought to include these harms within the current legal framework, rather than seeking to broaden or redefine the law.[1226]

As such, it failed to understand or reflect the essence of subsistence harms as physical, mental and social harms centred on the deprivation of subsistence needs. Moreover, in using the current legal framework the Tribunal predominantly focused on gendered harms in relation to sexual offences and failed to fully perceive the gendered nature of deprivations of subsistence needs.[1227] This illustrates the dangers of using law to address harms related to subsistence needs, which can serve to replicate and perpetuate the problems evident with the international legal framework and prevent such harms from being fully recognised. In using the same laws

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[1223] See Kimberley Theidon, 'Gender in Transition: Common Sense, Women, and War (2007) 6 *Journal of Human Rights* 453.
[1224] Permanent People's Tribunal, 'Tribunal on Sri Lanka' 14-16 January 2010 <http://www.internazionaleleliobasso.it/dtml/tribunale_permanente/sentenze/38_tpp_srilanka_ENG.pdf> accessed 4 February 2010.
[1225] *ibid*, 17-19.
[1226] *ibid*, 16.
[1227] *ibid*, 14.

that ignore or sideline subsistence harms, non-governmental tribunals could serve to reinforce rather than fundamentally challenge the current legal framework and its concepts of harm.

Nevertheless, other tribunals have attempted to reinterpret and redefine law and thus to critique not just the enforcement of law, but, more fundamentally, the unwillingness of official legal mechanisms to recognise particular harms and to name them as a form of violence.[1228] The People's Tribunal on Food Scarcity and Militarization in Burma stated that 'To convene a Tribunal is to propose how human rights should be perceived, discussed and ultimately achieved'.[1229] The aim of such tribunals is to redefine human rights and international criminal law and provide an alternative interpretation of law.[1230] There is often a strong emphasis within non-governmental tribunals on contextualising harms and situating them within an understanding of dominant power structures and economic regimes.[1231] This contrasts with the critique of official mechanisms, articulated within the previous two chapters, regarding their inability or unwillingness to recognise the context surrounding harms and the underlying causes of such violence. The Courts of Women for example, seek to 'creatively connect and deepen our collective insights and understandings of the *context* in which the *text* of our everyday realities are being written'.[1232] Non-governmental tribunals have often focused particularly on harms resulting from structural violence and violations of socio-economic rights caused by neoliberal economic policies, in which law can be seen as complicit.[1233]

The recent Permanent Peoples' Tribunal on Global Corporations and Human Wrongs was focused on the human rights violations caused by transnational corporations, for which there has not been any legal redress.[1234] This Tribunal argued that it sought 'to construct an alternative discourse of human rights around wrongs not simply as "acute" events of violence but as "chronic" conditions of systematic, structural violence resulting in the creation of

[1228] See Permanent Peoples' Tribunal on Global Corporations and Human Wrongs (2000) <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_1/ppt> accessed 1 September 2008.
[1229] People's Tribunal on Food Scarcity and Militarization in Burma, n 1170 above.
[1230] See Borowiak n 1164 above, 174; Merry, n 1165 above, 21.
[1231] Kumar, n 1181 above, 211.
[1232] *ibid.*
[1233] See the work of the Permanent People's Tribunal, n 1228 above; Nayar, n 1153 above.
[1234] Permanent People's Tribunal, *ibid.*

communities of suffering'.[1235] Other tribunals have focused on socio-economic rights violations in addition to highlighting harms associated with civil and political rights. The Permanent Peoples' Tribunal session on the Philippines dealt with socio-economic, as well as civil/political rights violations, economic plunder and the transgression of the Filipino peoples' sovereignty during the Arroyo regime.[1236]

Moreover, some non-governmental tribunals which have focused on gendered harms have begun to explore women's experiences of socio-economic rights violations in addition to physical integrity and sexual harms.[1237] This represents a clear distinction between non-governmental tribunals and conventional legal mechanisms, which, as already argued, all too often ignore the context of structural violence and the gendered nature of subsistence harms. The Vienna Tribunal on Violations of Women's Human Rights and the Courts of Women have allowed women to voice their experiences of "private" harms and socio-economic forms of violence, which are not contained within the current legal framework.[1238] These tribunals have used the language of human rights to challenge the narrow and gendered interpretation of human rights law.[1239] The Vienna Tribunal on Violations of Women's Human Rights highlighted that 'Many women suffer disproportionately under wartime economic, social, and political dislocation. Both the immediate graphic violence of war, and the longer term societal destruction which results, are experienced in gender-specific ways by women in their daily lives'.[1240] It therefore 'called for a revision of the concepts of public and private spheres, and of individual and social rights, in the formulation of national and international laws and regulations', and actively sought to influence international law during the 1993 UN World Conference in Vienna.[1241]

[1235] *ibid.*

[1236] Permanent Peoples' Tribunal, 'Second Session on the Philippines: Indicting the U.S. Backed Arroyo Regime and its accomplices for Human Rights Violations, Economic Plunder and Transgression of the Filipino Peoples' Sovereignty' (2007) <http://www.internazionaleleliobasso.it/index.php?op=6&oid=3> accessed 2 October 2008.

[1237] Bunch and Reilly, n 1201 above, ch 4.

[1238] See also Reilly and Posluszny, n 1163 above, 13; Christine Chinkin and Hilary Charlesworth, 'Building Women into Peace: the International Legal Framework' (2006) 27(5) *Third World Quarterly* 937.

[1239] Reilly and Posluszny, *ibid*, 14.

[1240] Bunch and Reilly, n 1201 above, 42.

[1241] *ibid.*

A particularly significant feature of non-governmental tribunals is their different approach to the issue of responsibility. While some truth commissions have adopted a wider understanding of responsibility than international criminal tribunals, this understanding still largely fails to reflect the many complicities and complexities of responsibility for harms.[1242] Non-governmental tribunals deliberately bypass current barriers of legal responsibility by attributing blame to non-state actors, such as transnational corporations.[1243] In addition, non-governmental tribunals have highlighted wider responsibilities such as the involvement of third party states.[1244] The Russell Tribunal acknowledged the responsibility and complicity of the governments of Australia, New Zealand, South Korea and Japan in addition to the responsibility of the United States, for atrocities committed during the Vietnam War.[1245] The Permanent Peoples' Tribunal on the Philippines also attributed direct responsibility to the US Government and the then US President for the atrocities suffered in the Philippines, in addition to finding the Philippine Government responsible.[1246] Indeed, one of the key benefits of the approach of these tribunals is their ability to focus on abuses, such as subsistence harms and other socio-economic based violations, where responsibility can fall beyond the strict boundaries of current models of legal responsibility.

On the other hand, the weakness of tribunals is their lack of power and authority to institute accountability, through the punishment of perpetrators, or to redress harms experienced by survivors, meaning that their role is largely symbolic. This is problematic, given the importance of measures of redress to survivors as a form of recognition.[1247] However, while they cannot themselves act to redress the lived experience of harms such as subsistence harms, in highlighting harms non-governmental tribunals look to promote situations which address harms. In this sense, some non-governmental tribunals do seek to focus on both the past and the future, but unlike truth commissions provide a different memory or truth

[1242] Mahmood Mamdani, 'The Truth According to the TRC' in Ifi Amadiume and Abdullahi An-Na'im (eds), *The Politics of Memory: Truth, Healing and Social Justice* (London: Zed Books, 2000) 180; Joseph Nevins, 'Restitution over Coffee: Truth, Reconciliation and Environmental Violence in East Timor' (2003) 22 *Political Geography* 677.

[1243] See Permanent People's Tribunal, n 1228 above.

[1244] Limqueco and Weiss, n 1152 above, 181.

[1245] *ibid.*

[1246] Permanent Peoples' Tribunal, n 1228 above.

[1247] Naomi Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence' in Eric Stover and Harvey M. Weinstein, *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004) 121, 122; Lisa J. Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 *Human Rights Quarterly* 228.

regarding the past and a different vision of what is needed in the future, which often involves wide-ranging economic, political and social change.[1248]

In highlighting harms and their impact on survivors, non-governmental tribunals can foster and support grassroots protests and put pressure on political leaders to act to redress harms suffered. Such tribunals can therefore play a role in mobilising public opinion in order to make demands based upon their recommendations. Moreover, the judgments of non-governmental tribunals can act to limit absolute impunity through placing some pressure on political leaders and legal institutions to address harms.[1249] As Terrell concludes, 'Properly constructed and implemented, a people's tribunal can serve as an unofficial but powerful legal tool, surpassing the Russell Tribunal's goal of consciousness-raising by providing a real sense of justice to victims and influencing societies, international law, and official legal institutions'.[1250] Nevertheless, given law's narrow understanding of responsibility and the lack of political will to deal with certain harms, this influence may, at least in the foreseeable future, be limited.

The next section will examine three different non-governmental tribunals which address issues related to subsistence harms, in order to analyse and assess their treatment of these harms. It will look at the extent to which harms involving deprivations of subsistence needs have been recognised in each of these tribunals and how they have used and redefined law in order to address such harms. In doing so, it will highlight both the promise and the limitations of non-governmental tribunals in regard to the recognition of subsistence harms and how such tribunals may potentially be used to foster a greater legal recognition of these harms in the future.

[1248] See Permanent People's Tribunal, n 1228 above, 15-17.
[1249] Terrell, n 1183 above, 133.
[1250] *ibid*, 138.

*2) **The extent of recognition of subsistence harms within existing tribunals***

i) The Russell Tribunal and the recognition of subsistence harms perpetrated in Vietnam

As already highlighted, the Vietnam conflict involved the widespread destruction of homes, crops and livelihoods.[1251] It is therefore significant to analyse the degree to which the Russell Tribunal recognised elements of the subsistence harms perpetrated in Vietnam and attributed responsibility for them. While the Tribunal focused on a range of different harms and international crimes, including crimes of aggression, war crimes, crimes against humanity and genocide, it did recognise both the extent and the gravity of some of the harms involving deprivations of subsistence needs inflicted on the Vietnamese people.[1252] Indeed, it acknowledged harms related to deprivations of subsistence needs not simply as destruction of property, but in terms of the impacts on the lives and livelihoods of the population.[1253] Thus, while the Russell Tribunal sought to follow the foundations laid by the Nuremberg Tribunal, its approach in regard to subsistence harms differed considerably from the Nuremberg trials which, as seen above, accorded little attention to these harms.

The Russell Tribunal condemned the widespread destruction of villages by bombing and land-based attacks, which resulted in the destruction of homes, crops and livestock.[1254] It concluded that 'villages are entirely levelled, fields are devastated, livestock destroyed'.[1255] The Tribunal also recognised the impact of destruction of dams upon the local population, in terms of the importance of water sources to the population and the consequent danger of famine caused by such destruction.[1256] Nevertheless, the Tribunal did not fully understand the nature of these harms in terms of the mental and social impacts of such deprivations of subsistence needs and tended to focus purely on the physical harms involved.

The Tribunal analysed and documented the practice of defoliation by the spraying of herbicidal products over entire regions of Vietnam, which was one of the most significant and

[1251] Arthur H. Westing, 'The Environmental Aftermath of Warfare in Vietnam' (1983) 23 *Natural Resources Journal* 365.
[1252] Russell Tribunal, Summary and Verdict of the Stockholm Session, n 1152 above, 183.
[1253] *ibid*, Summary of the Second Session, 348.
[1254] *ibid.*
[1255] *ibid*.
[1256] *ibid*, Summary and Verdict of the Stockholm Session, 183.

devastating forms of subsistence harms committed during the conflict.[1257] It recognised that the practice of defoliation, and the consequent destruction of crops, land and livelihoods, was widespread and that the effects were of a long-term nature.[1258] Drawing on international law, as set out in the Hague Conventions and the Martens Clause (though without referring to specific provisions) the Tribunal argued that the use of defoliation chemicals, and other chemical weapons such as napalm, was prohibited by the laws of war.[1259] This contrasts with later civil law decisions regarding the legality of the use of defoliation methods at the time, as seen in the dismissal of the 2005 lawsuit brought by "Agent Orange" victims using Alien Tort Claims Act, on the basis that such methods did not violate international law at the time.[1260] The legality of the use of defoliation strategies at the time was unclear, and it is possible that the law actually tolerated such practices until the Additional Protocols to the Geneva Conventions came into force in 1977.[1261]

Interestingly, there has been a recent non-governmental tribunal on the use of "Agent Orange" in Vietnam, constituted by the International Association of Democratic Lawyers and supported by the Vietnam Agent Orange Relief and Responsibility Campaign, as a response to the failure of civil proceedings to recognise and address the harms perpetrated in Vietnam.[1262] This Tribunal similarly found that the use of dioxins was prohibited by the Hague Convention of 1907 and thus constituted a war crime.[1263] The Tribunal acknowledged the devastating and long-term impacts of the use of dioxins upon the people of Vietnam in

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[1257] The Tribunal analysed a comprehensive report on the use of chemical warfare, including the practice of defoliation. See Edgar Lederer, 'Report on Chemical Warfare in Vietnam' in *ibid*, 203, 204-24

[1258] *ibid*, Summary of the Second Session, 346.

[1259] *ibid*, Summing-up of the Second Session, 328-29

[1260] Memorandum, Order and Judgment In re: *"Agent Orange" Product Liability Litigation, The Vietnam Association For Victims of Agent Orange/Dioxin* against *The Dow Chemical Company* MDL No. 381 United States District Court Eastern District of New York (2005).

[1261] See Article 54 of Additional Protocol I and Article 14 of Additional Protocol II which protect 'objects indispensable to the survival of the civilian population' and prohibit 'starvation of civilians as a method of warfare'. See also Additional Protocol I, Article 55(1) 'Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population'. International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[1262] International Peoples' Tribunal of Conscience In Support of the Vietnamese Victims of Agent Orange 'Executive Summary of the Decision' Paris, May 18, 2009 <http://www.vn-agentorange.org/paris_2009_tribunal_execsummary.html> accessed 8 April 2010.

[1263] *ibid.*

terms of effects on physical health, livelihoods and on the environment.[1264] It concluded that these 'crimes have produced so much pain, suffering and anguish to at least 3 to 4 million people and their families. The effects of these crimes will be felt for generations to come'.[1265] In this way this later tribunal recognised both the mental and the physical aspects of deprivations of subsistence needs and the long-term nature of these harms. The establishment of a subsequent tribunal on this issue illustrates the continued failure of law to address the atrocities committed in Vietnam and the continued feelings of frustration amongst some survivors that harms have not been redressed.[1266]

The Russell Tribunal documented the perpetration of another significant form of subsistence harms; the widespread displacement and internment of the civilian population perpetrated in Vietnam.[1267] The Tribunal found that a large proportion of the population had been displaced and many forced into internment camps.[1268] It condemned the living conditions in these "strategic hamlets", stating that, according to the published reports brought before it, the conditions 'are close to those of a concentration-camp life ... Food and hygiene are almost entirely lacking, which often makes survival impossible'.[1269] Thus, the Tribunal demonstrated some acknowledgement of the impact of displacement and internment in terms of the effect on physical subsistence needs. This contrasts with the approach of official mechanisms, which, as already argued, tend to focus on issues of removal rather than on the conditions experienced by IDPs.

Moreover, it also acknowledged the effects on the ability of families and communities to survive, both physically and socially, which illustrates some recognition of the relationship between the physical and social elements of human subsistence. In summing-up the Second Session, Lelio Basso stated that 'The separation of families is, in Vietnam, more than an attack upon the social institution, for the majority of the people are farmers and the family

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[1264] *ibid.*
[1265] *ibid.*
[1266] See the website of the Vietnam Agent Orange Relief and Responsibility Campaign <http://www.vn-agentorange.org/index.html> accessed 8 April 2010.
[1267] Summary of the Second Session, n 1152 above, 348.
[1268] *ibid*, Lelio Basso, Summing-Up of the Second Session, 333.
[1269] *ibid*, Summing-up of the Second Session, 348.

unit is essential to survival'.[1270] Nevertheless, despite the participation of Simone de Beauvoir, the Tribunal did not acknowledge the gendered aspects of deprivations of subsistence needs or fully examine the mental harms involved and thus did not fully recognise the holistic nature of these harms.

The Tribunal did seek to recognise the gravity of harms related to subsistence needs by defining such displacement and internment, as well as the widespread destruction of food, as genocide.[1271] It recognised the destruction of food stocks and agriculture, not only as destruction of property, as has been the case within international criminal tribunals, but in terms of the direct and long-term impacts of hunger and starvation. Basso argued that in 'the same category of crime [genocide] comes the wilful destruction by fire or chemicals of the food stocks and harvest of the population. This systematic destruction ... has been carried out on a scale that threatens to starve the entire population and make malnutrition and starvation a constant spectre for the future'.[1272] However, while the Tribunal sought to use existing law to encapsulate harms with which it was concerned, it can be criticised for not looking rigorously at the legal requirements of genocide and whether the US Government's actions fulfilled all the elements of the offence.

The Tribunal did not articulate or discuss the inadequacies of the law and whether these harms could truly be seen to fit within current interpretations of genocide. Its aim was to highlight the international crimes committed, and therefore it was not in the Tribunal's interest to highlight the deficiencies of current law. However, had it explored the problems of the legal definitions of crimes in more detail, it may have provided a much more significant discussion of the nature of the harms committed. Although Sartre wrote a separate statement on the issue of genocide, this was largely a philosophical rather than legal interpretation.[1273] The verdict of genocide was not given much legal weight outside of the Tribunal at the time, due to questions over the rigorousness and legal accuracy of the

[1270] *ibid*, 333.
[1271] *ibid.*
[1272] *ibid.*
[1273] Jean-Paul Sartre, 'On Genocide' in n 1152 above, 350-65.

findings, but it did at least attempt to highlight the gravity of the offences committed against the Vietnamese population, in the absence of official legal mechanisms.[1274]

Essentially, given the strict requirements of the Genocide Convention, particularly the specific intent requirement, it is unlikely that subsistence harms committed in Vietnam could come within the existing definition of genocide.[1275] While deprivations of subsistence needs could be argued to come under Article 2(c) of the Convention, in terms of the imposition of conditions of life, the group element and specific intent to destroy the group as such are far more difficult to perceive.[1276] The issue of genocide illustrates the tensions regarding non-governmental tribunals' relationships with law. While drawing on law is an important tactic to challenge law's silencing of certain harms, attempting to fit harms within the existing framework can lessen the rigorousness and power of their challenges to law. Nevertheless, the very struggles that non-governmental tribunals have in applying existing law to certain harms, implicitly illustrates the inadequacies of law and its failure to fully recognise such harms. In some ways, the experience of the Russell Tribunal regarding the crime of genocide can be compared with the more recent experience of the ICC Prosecutor in the *Al Bashir* case, and serves to illustrate the problems of attempting to encompass subsistence harms within the current framework of genocide.[1277]

Regarding issues of responsibility, the Russell Tribunal mainly focused on state responsibility and thus differed from the individual model employed by international criminal tribunals. It held that the US Government was responsible but significantly acknowledged the complicity of other states, such as Thailand, the Philippines and Japan, in giving considerable aid to the US forces, which represents a far broader approach than many truth commissions.[1278] In its verdict of the Second Session, the Tribunal unanimously found that the US Government was guilty of genocide against the people of Vietnam, but failed to examine the complicity of

[1274] Klinghoffer and Klinghoffer, n 1154 above, 155-56.
[1275] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.
[1276] Helen Fein, 'Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined' (1993) 22 (1) *Denver Journal of International Law and Policy* 29.
[1277] *Prosecutor* v. *Hassan Ahmad Al Bashir*, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir', 14 July 2008.
[1278] Verdict of the Second Session, n 1152 above, 365.

non-state actors.[1279] The subsequent International Peoples' Tribunal of Conscience in Support of the Vietnamese Victims of Agent Orange has sought to promote the responsibility of the companies which produced the chemical as well as of the US Government.[1280] This Tribunal found the US Government and specific corporations responsible for war crimes and crimes against humanity regarding the acts committed involving "Agent Orange".[1281]

Essentially, the Russell Tribunal fulfilled an important normative role in promoting a record of atrocities committed in Vietnam and the impact of harms on the local population, through publicising its judgment.[1282] The atrocities committed in the Vietnam War contributed to the emergence of laws prohibiting the use of starvation and also of unnecessary damage to the environment.[1283] The Russell Tribunal may have played an educative role in condemning the use of defoliation as a weapon of conflict, but whether it had any role in influencing international humanitarian law is more difficult to determine. The Tribunal is significant in recognising certain forms of subsistence harms, which law had ignored, and in possibly providing a degree of validation to at least some survivors who were involved in or aware of the Tribunal's work. However, the most important impact of the Tribunal was in setting a precedent for later non-governmental tribunals and thus a model wherein law's silencing of certain harms, including subsistence harms, could be challenged. [1284]

ii) The Commission of Inquiry into the Ukrainian famine

As with other non-governmental tribunals, the Commission of Inquiry of 1990 into the famine in the Ukraine inevitably drew on and was influenced by the precedent of the Russell Tribunal in seeking to highlight and acknowledge silenced harms. The Commission had some similarities to the Russell Tribunal, but in other ways developed different approaches to

[1279] *ibid.*
[1280] International Peoples' Tribunal of Conscience In Support of the Vietnamese Victims of Agent Orange, n 1262 above. See also the website of the Vietnam Agent Orange Relief and Responsibility Campaign <http://www.vn-agentorange.org/index.html> accessed 8 April 2010.
[1281] *ibid.*
[1282] Borowiak, n 1164 above, 170.
[1283] Article 54 and 55 of Additional Protocol I and Article 14 of Additional Protocol II, n 1261 above.
[1284] Borowiak, n 1164 above, 170.

acknowledging harm.[1285] The Commission was established by the World Congress of Free Ukrainians, a nationalist anti-Soviet non-governmental organisation which sought to represent Ukrainians and to publicise Ukrainian history including the history of the famine.[1286] Like the Russell Tribunal, the Commission faced clear questions over its credibility and legitimacy.[1287] Despite the use of eminent jurors on its panel, the Commission's evident ties with the World Congress of Free Ukrainians called into doubt its objectivity. Moreover, the Commission failed to have Soviet participation in the Inquiry and thus can be seen as relatively one-sided.[1288] However, the Commission did aim to adhere to legal procedures as far as was possible, given the time lapse since the famine.

Considering that famine is an extreme form of subsistence harm, the very existence of a tribunal focused on the Ukrainian famine is highly significant.[1289] The work of the Commission stands in contrast to the previous silence towards the famine within international law; particularly in the context of the continued failure to explicitly recognise famine as an international crime and to understand the relationship between famine and deprivations of subsistence needs.[1290] The Commission aimed to inquire into the existence and extent of the famine, its causes, the effect it had on the Ukrainian people, as well as producing recommendations as to responsibility for the famine.[1291] Unlike the Russell Tribunal, it called itself a commission of inquiry and resembled more closely the aims of truth commissions, rather than claiming to be a tribunal with the power to judge.[1292] In addition, the Commission sought to write an historical truth of the famine in Ukraine of 1932-33, rather than documenting a contemporary situation.[1293] However, as with the Russell Tribunal, the Commission was very much an elite panel, which allowed limited space for participation by survivors or their families.

[1285] International Commission of Inquiry into the 1932-33 Famine in Ukraine, 'Final Report' (1990) <http://www.ukrainianworldcongress.org/Holodomor/Holodomor-Commission.pdf> accessed 1 September 2008.

[1286] A. J. Hobbins and Daniel Boyer, 'Seeking Historical Truth: The International Commission of Inquiry into the 1932-33 Famine in Ukraine' (2001) 24 *Dalhousie Law Journal* 139, 143.

[1287] *ibid*, 189.

[1288] International Commission of Inquiry, n 1285 above.

[1289] Hobbins and Boyer, n 1286 above, 189.

[1290] David Marcus, 'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245.

[1291] International Commission of Inquiry, n 1285 above, 2.

[1292] *ibid.* The terms of reference of the Commission were based on a draft Statute for Commissions of Inquiry, proposed to the International Law Association and the Rules of Procedure of the European Commission on Human Rights.

[1293] *ibid.*

While the Commission undoubtedly faced problems regarding the paucity of surviving witnesses, there were some witnesses available who provided testimony to the Commission.[1294] However, it employed witness testimony in its findings in a very limited way and drew far more on expert witnesses and extant documentation. Report of the Commission did not give details of specific witnesses or quote from their testimony, such that the voices of ordinary witnesses were essentially lost.[1295] Consequently, the Report tended to focus on the causes of the famine and issues of responsibility and gave less attention to the impacts and experiences of the famine.[1296] The Report did acknowledge some of the physical suffering caused by the famine, but gave little real detail on these impacts and did not sufficiently acknowledge the mental and social aspects of the famine.[1297] Moreover, the issue of gender was completely absent from the Report, which may in part have been due to the fact that the Commission was comprised solely of men.[1298]

The majority of the Commission found that the famine was caused by the policies of the Soviet regime, which is significant in itself, given the limited acknowledgement within legal discourse of the political causes of famine. It found that 'beyond doubt the immediate cause of the 1932-33 famine lay in the grain procurements imposed upon Ukraine from 1930 onwards' and that 'the dreadful effects of the excessive grain procurements were considerably aggravated by the Soviet authorities trying to carry out forced collectivization of agriculture, to eliminate the kulaks and to snuff out those centrifugal Ukrainian tendencies which threatened the unity of the Soviet Union'.[1299] Moreover, the majority found that the Ukrainian and Soviet authorities were aware of the food scarcity and still did not send any relief until the summer of 1933, which resembles the findings of some notable historians.[1300] This is highly significant in terms of the recognition of harms perpetrated by omission, which have, at best, a tenuous place within current international criminal law.[1301]

[1294] *ibid.*
[1295] *ibid.*
[1296] *ibid.*
[1297] *ibid.*
[1298] *ibid.*
[1299] *ibid*, 4.
[1300] *ibid.* See Robert Conquest, *The Harvest of Sorrow: Soviet Collectivisation and the Terror-Famine* (London: Pimlico, 2002) 308.
[1301] Michael Duttwiler, 'Liability for Omission in International Criminal Law' (2006) 6 *International Criminal Law Review* 1. See also Marcus, n 1290 above.

Unlike the Russell Tribunal, the Commission was more cautious in regard to the crime of genocide and on whether the harms it discussed could have constituted genocide.[1302] There was disagreement within the Commission regarding the crimes of both genocide and crimes against humanity, given the issue of non-retroactivity and the strict requirements of the crime of genocide.[1303] Although the famine predated the Genocide Convention, the majority concluded that genocide 'was contrary to the provisions of international law then in force'.[1304] The Commission similarly perceived that crimes against humanity existed in law at the time, despite it being questionable whether the concept of crimes against humanity predated the Nuremberg and Tokyo Tribunals.[1305] The majority did find that the *actus reus* elements of genocide of killing or causing serious bodily or mental harm were present.[1306]

Nevertheless, while the President of the Commission, Jacob Sundberg, found that the famine was covered by intent, the majority was doubtful whether the element of deliberately inflicting conditions of life calculated to destroy the group was present, due to the lack of evidence necessary to prove specific intent.[1307] The majority found that there was insufficient evidence to prove that the Soviet authorities had devised or planned the famine and expressed doubts over the existence of the group element of the crime.[1308] Interestingly, the majority opinion did conclude that 'it is very likely that the Soviet authorities sought, under the direction of Stalin, to capitalize on the famine once it had started, which explains why for ten months they left the Ukrainian peasantry to its fate'.[1309]

By adhering to the legal framework in their analysis of the famine and their findings, the Commission implicitly highlighted the inability of law to fully recognise and to prosecute famine as an international crime.[1310] The intent requirement, necessary for all the offences associated with starvation within international criminal law, represents the most significant

[1302] International Commission of Inquiry, 'Dissenting Opinion By Professor George Levasseur' n 1285 above, 2-5; International Commission of Inquiry, 'Separate Statement of Professor Covey T. Oliver' n 1285 above, 1-2.
[1303] Hobbins and Boyer, n 1286 above, 179.
[1304] International Commission of Inquiry 'Majority Opinion', n 1285 above, 65.
[1305] Margaret M. de Guzman, 'Crimes Against Humanity' in William Schabas et al. (ed), *Handbook of International Criminal Law* (London: Routledge, 2010).
[1306] International Commission of Inquiry 'Majority Opinion', n 1285 above, 65.
[1307] *ibid*, Separate Opinion of President, Professor Jacob Sundberg, 62.
[1308] *ibid*, Majority Opinion, 60.
[1309] *ibid*, 59-60. This reflects a similar conclusion by Conquest, n 1295 above.
[1310] Marcus, n 1290 above.

problem in including famine within the current framework.[1311] The Commission did find that the Soviet authorities, both local and regional, were responsible for the famine, due to the policies implemented and the failure to provide relief or request aid from other nations.[1312] Seeking to adhere to legal procedure, the Commission was cautious in its findings regarding individual responsibility and was divided over the issue of the groups or individuals responsible.[1313] Indeed, due to the lack of clear evidence, the most that could be said of individuals responsible for the famine was that they recklessly pursued policies which were evidently causing and fostering widespread starvation. The Commission found it impossible to determine responsibility regarding anyone other than Stalin himself, due to the ultimate control he exercised during the regime.[1314] It reasoned that this responsibility must also be shared by other members of the Politburo but found that their precise role could not be determined easily.[1315] The majority stated that the famine 'was the outcome of policies which he [Stalin] initiated when he finally seized power in the Soviet Union' and that he 'could not have been ignorant of the famine, because it was reported to him many times'.[1316]

The problems experienced by the Commission, given the complexity of responsibility, dispersed as it was throughout the Soviet State system, again illustrate the limitations of the current model of individual responsibility.[1317] The famine in the Ukraine was essentially perpetrated through systems of bureaucracies and hierarchies which the model of individual criminal responsibility would fail to fully represent.[1318] Nevertheless, by remaining a commission of inquiry, rather than claiming to be a tribunal, the Commission was able to inquire into the issue of responsibility without falling into some of the pitfalls of the model of individual criminal responsibility. In the light of the paucity of historical evidence, the Commission was able to discuss Soviet responsibility for the famine and document the

[1311] *ibid.*
[1312] Majority Opinion, n 1285 above, 51-54.
[1313] Hobbins and Boyer, n 1286 above, 179.
[1314] Majority Opinion, n 1285 above, 55.
[1315] *ibid*, 54.
[1316] *ibid.*
[1317] For discussion of the problems of the model of individual responsibility see Gerry Simpson, *Law, War and Crime* (Cambridge: Polity, 2007) 157.
[1318] Conquest, n 1295 above, 322-30. For a critique of the model of individual responsibility see Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon: Routledge-Cavendish, 2007), 11; Neta C. Crawford, 'Individual and Collective Moral Responsibility for Systemic Atrocity' 15(2) (2007) *Journal of Political Philosophy* 187, 190.

complexity of such responsibility within the state system, which a criminal trial would not have been able to achieve in the same way.

This illustrates the normative role of the Commission in acknowledging and publicising the previously silenced harms of the Ukrainian famine. Rather than seeking to institute accountability, so long after the actual event, the Commission performed an educative role and provided an historical record of the famine.[1319] It therefore performed a more limited form of recognition than other non-governmental tribunals. However, the timing of the publication of the Final Report, coinciding with the fall of the Soviet Union, served to lessen the impact of the Report in terms of publicising the existence and consequences of the famine.[1320] Nevertheless, as Hobbins and Boyer conclude, 'though it was impossible for the Commission, under the circumstances, to ascertain historical truth, it placed in the public record much sworn and cross-examined testimony of value to the historian'.[1321]

The value of this Commission was, therefore, in voicing the famine and attempting to subject deprivations of subsistence needs to the normative framework of law. However, in discussing the crime of genocide, the Commission implicitly illustrated the weaknesses of the current legal framework. The divisions within the Commission highlight the problems of including subsistence harms within the framework of current law and in adhering to a model of individual criminal responsibility, where responsibility for the famine was so diffused within the bureaucracy and hierarchy of the Soviet regime. The inherent tension in using the current legal framework to recognise silenced harms is an issue that is also evident in the work of the People's Tribunals on food. The next section will focus on the treatment of subsistence harms within the People's Tribunals on food and highlight both the recognition of elements of subsistence harms provided by these tribunals as well as the limitations imposed by law.

[1319] Hobbins and Boyer, n 1286 above.
[1320] *ibid*, 186.
[1321] *ibid*, 189.

iii) The People's Tribunals on Food

The more recent People's Tribunal on Food Scarcity and Militarization in Burma and its successor, the Permanent People's Tribunal on the Right to Food and Rule of Law in Asia, is a particularly interesting tribunal in terms of the recognition of subsistence harms. Establishing a tribunal based around the issue of food and hunger is in itself highly innovative in challenging law's traditional sidelining of these issues. Moreover, it provides significant recognition of some of the elements of subsistence harms. The People's Tribunal on Food Scarcity and Militarization in Burma and its successor, the Permanent People's Tribunal on the Right to Food and Rule of Law in Asia, were initiated by the NGO the Asian Human Rights Commission, and the work of both tribunals has been closely associated with this Organisation.[1322] Therefore, as with the Commission of Inquiry into the Famine in the Ukraine, it is an independent tribunal, not linked to the Permanent People's Tribunal movement. Whilst still calling itself a tribunal, the Permanent People's Tribunal on the Right to Food and Rule of Law has adopted a more pro-active and long-term approach by documenting and publicising harms in order to prevent them occurring, rather than simply presenting findings after the harm has taken place.[1323] In particular, the Tribunal has established a "Hunger Alert System" which uncovers and publicises cases of malnutrition and starvation.[1324]

This differs from the approach of international criminal tribunals and truth commissions which are often limited to investigating harms committed within a specific time-frame. The Tribunal works to promote recognition of the everyday occurrences of hunger, loss of livelihoods, and other forms of violence committed against people's subsistence needs, which law itself all too often accepts.[1325] Nevertheless, the Tribunal has sought to maintain credibility by adhering to legal principles and procedures to some degree.[1326] The Tribunal recognised that its 'salient contribution is not decrying abuse, but investigating and

[1322] People's Tribunal on Food Scarcity and Militarization in Burma, n 1170 above.
[1323] Cusano, n 1169 above.
[1324] See the website of the Tribunal relating to the Hunger Alert system <http://www.foodjustice.net/modules.php?name=Content&pa=list_pages_categories&cid=8> accessed 9 November 2009.
[1325] *ibid.* See also Nayar, n 1153 above.
[1326] People's Tribunal on Food Scarcity and Militarization in Burma, n 1170 above.

explaining which human rights are denied, how and why. Therefore the Tribunal must be orderly and credible'.[1327]

The People's Tribunal on Food Scarcity and Militarization in Burma was established in the context of the silence of international legal institutions and much of western civil society to hunger and starvation in the Burma.[1328] As the Tribunal commented, 'NGOs working on Burma tended to treat violations of the right to food as a small part of their work. Destruction of food by soldiers, shortages of food among displaced populations and other abuses were dutifully recorded but not made the subject of serious discussion'.[1329] This silence has made the role of the Tribunal in publicising harms related to deprivations of subsistence needs all the more significant. As with other non-government tribunals, the Tribunal contested the dominant concerns of the law and of human rights discourse, whilst at the same time using human rights in order to address the perpetration of silenced harms. The Tribunal outlined its scope of inquiry predominantly in terms of the human right to food, as articulated under the International Covenant on Economic, Social and Cultural Rights and Universal Declaration on Human Rights, rather than international criminal law.[1330] It therefore did not fully engage with international humanitarian law and international criminal law and thus analyse the limitations of the current legal framework.

The Tribunal acknowledged that Burma has not acceded to the International Covenant on Economic, Social and Cultural Rights, but argued in terms of the customary nature of the rights, stating that the right to food is a basic right 'the universality of which cannot be reasonably challenged'.[1331] It is debatable, however, whether the right to food has yet reached customary law status and indeed the Voluntary Guidelines on the Right to Food are non-binding.[1332] Essentially, the Tribunal's findings are vague about how the harms committed fit

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[1327] *ibid.*
[1328] *ibid.*
[1329] *ibid.*
[1330] *ibid.* See Article 11, International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, A/6316; Article 25 of the Universal Declaration on Human Rights adopted 10 December 1948 General Assembly Resolution 217 A (III).
[1331] *ibid.* In addition the Tribunal notes that the Government has professed to be committed to achieving food security, for example in its Report of March 1998 to the World Food Summit.
[1332] Food and Ariculture Organization, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, Adopted by the 127th Session of the FAO Council

within a framework of human rights violations and thus there are problems with its use of human rights law. Apart from mentioning the right to work, the Tribunal did not refer to other related rights, such as the right to health or other elements of the right to an adequate standard of living. Consequently, it did not provide a vision of how these rights might be interpreted to relate to deprivations of subsistence needs, in terms of the loss of livelihoods, homes and resultant ill-health.[1333]

Moreover, the Tribunal, consisting of a panel of three eminent male legal experts, did not discuss gender or women's rights. This represents a significant failing considering the gendered nature of subsistence harms and their impacts. Generally, as noted above, the political situation in Burma prevented the Tribunal from holding public hearings.[1334] Information and evidence was presented to the Tribunal by local human rights workers and the Tribunal interviewed and heard testimony from twenty six survivors who had been affected by the harms and violence.[1335] The Tribunal directly quoted from the testimonies throughout its Report and included excerpts of these testimonies in the Appendices to the Report.[1336] The voice of these witnesses/survivors therefore comes through strongly in the evidence and findings of the Tribunal, which contrasts with the approach of the Ukrainian Commission. Nevertheless, the small number of witnesses/survivors who were able to testify does raises the question of how representative the Tribunal was and whether it permitted diverse experiences of the harms perpetrated in Burma to be voiced.

A key part of the mandate of the Tribunal was in assessing the relationship between militarisation in Burma and violations of the right to food.[1337] In this way, the Tribunal explicitly saw deprivations of food and basic resources as a tool of repression and as a military weapon, which is highly significant in terms of recognising the use of subsistence harms.[1338] The Tribunal found militarisation to be ubiquitous within the country and a central

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November 2004, Rome 2005. See also Smita Narula, 'The Right to Food: Holding Global Actors Accountable under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691.

[1333] People's Tribunal on Food Scarcity and Militarization in Burma, n 1170 above. The right to work is stated in Article 6 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

[1334] Cusano, n 1169 above.

[1335] People's Tribunal on Food Scarcity and Militarization in Burma, 'Summary of Evidence', n 1170 above.

[1336] *ibid*, 'Appendix 4: Excerpts from selected testimonies presented to the Tribunal prior to April 1999'.

[1337] *ibid*, 'Scope of Inquiry'.

[1338] *ibid*.

cause of food scarcity.[1339] It found there to be a 'thorough, systematic and nationwide orientation towards military control of agriculture, replete with violence, intimidation and military fanfare' and that 'military structure and ideology take over government, abrogating farmers' self-sufficient way of life'.[1340] One of the major subsistence harms perpetrated in Burma is the widespread destruction of crops, which the Tribunal documented and condemned in its findings.[1341] It found that 'The army does not attempt to distinguish between food intended for civilian consumption and food allegedly destined for the rebels. Instead, the army targets crops which provide the local food supply'.[1342] The Tribunal documented the widespread displacement of civilians due to arbitrary violence and the forced relocation of villages, all of which led to severe hunger and long-term food scarcity.[1343]

Therefore, the Tribunal recognised the interrelationship between the civil/political violations evident in Burma and the perpetration of harms related to subsistence needs, which is often crucial to recognising the nature of subsistence harms and how they are perpetrated. It recognised the profound impacts of these harms on physical survival and quoted extensively from witness testimony in order to describe these impacts.[1344] In addition, the Tribunal recognised, to some extent, the mental and social harms involved, through the testimony it included in the Report: which expressed the frustration and despair caused by the repeated destruction of homes and livelihoods.[1345] However, it could have explored these issues in more detail and included testimony which explicitly cited the experiences of mental and social harms. For example, one witness described the mental impacts of deprivations of subsistence needs, but this was not directly quoted in the Report.[1346]

> When the crop is almost ready, the troops come back again and go directly to the fields and trample the plants when they are due for harvest. The villagers again flee to the forest, leaving their cattle behind, and this also becomes a problem, as the animals roam around eating the crops. All this leaves villagers totally distraught and with no

[1339] *ibid.*
[1340] *ibid.*
[1341] *ibid*, 'Findings'.
[1342] *ibid.*
[1343] *ibid.*
[1344] *ibid.*
[1345] *ibid*, 'Appendix 4'
[1346] *ibid*, Testimony of Saw Htoo K'baw, a 36 year old teacher and father of five from Papun Township, Karen State.

> idea how to feed themselves in the future. All villagers suffer in the same way, this is not just a once-off event, and so are utterly discouraged as to how to work for a livelihood.[1347]

The testimonies quoted in the Report do describe some of the social harms involved, in terms of dispersal of communities and impacts on communal livelihoods.[1348] However, again, the Tribunal did not fully explore this issue and did not sufficiently draw on testimony which highlighted such harms. For example, another witness testified that 'the village is in serious decline. The villagers are totally discouraged, and some want to leave their lands for good and find other work, but as they have never left their area or done any other kind of work, they can't think of where they would go or what they would do. The food that they grow, they don't get to eat. They have to give taxes and meet demands from three sides'.[1349]

Moreover, whilst discussing the effects of the counter-insurgency in its findings, the Tribunal did not mention the issue of the applicability of the law of internal armed conflict, although it did draw on some of the language and norms of humanitarian law, such as the principle of distinction.[1350] In this respect, the Tribunal could have addressed some of these harms more rigorously, in order to challenge law's weak provisions in regard to internal armed conflict and developed alternative visions of law in order to address these harms. In seeking to prevent the previous silence regarding the perpetration of subsistence harms in Burma, the Tribunal did recognise the gravity of the harms and their impact on the local population, through adopting the language of crimes against humanity.

> To document a burned rice field is to allege a crime; but to show that soldiers confiscated the remaining food, that landmines pock the countryside ... that simple diseases kill the young while the old can flee no more, that tomorrow rifles will evict the village, that throughout the country hungry farmers grow rice they cannot afford

[1347] *ibid.*
[1348] *ibid*, 'Summary of Evidence'.
[1349] *ibid*, 'Appendix 4', Testimony of a 26 year old female teacher from Bilin Township, Mon State,
[1350] *ibid*, 'Findings'.

> to eat, and that no jury will hear the truth – is to depict no simple crime, but a crime against humanity.[1351]

However, it provided little indication of how it perceived these harms to fit within the legal framework and thus did not discuss an alternative vision of how such harms might be better recognised as crimes against humanity. Apart from the crime of forcible transfer, it is difficult to see how the harms described above by the Tribunal could come within crimes against humanity.[1352] Certainly proving sufficient intent for the crime of extermination, and that the acts were calculated to bring about the destruction of part of a population would be difficult regarding the situation in Burma. Therefore, although the Tribunal criticised the silence of law regarding these harms, it did not acknowledge or critique the inadequacy of the law and its inability to fully recognise subsistence harms.

In terms of responsibility, the Tribunal did condemn the military government for the abuses and food scarcity.

> Through the systematic militarization of Burmese society, the Government of Myanmar is largely responsible for food scarcity. The Government may be considered guilty of a crime against humanity, punishable under international law. If the Government and other concerned parties fail to reverse this consistent denial of the right to food, it falls within the scope and obligation of international law to investigate.[1353]

Interestingly, the Tribunal saw responsibility as being wider than the military government in terms of policies of starvation having permeated the whole of the state system. It found that 'While government culpability in violating human rights is fact, the inference that mere change in government will undo systemic human rights abuse is fiction. Burma's military

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[1351] *ibid.*

[1352] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), Article 7(1)(d) Deportation or forcible transfer of population; Article 8(2)(a)(vii) Unlawful deportation or transfer or unlawful confinement;

[1353] People's Tribunal on Food Scarcity and Militarization in Burma, n 1170 above.

government has incorporated denial for food into the policies, structure and routine operations of state'.[1354]

Within the highly militarised society of the Myanmar regime, responsibility for harms is often hidden through the systems of bureaucracy and hierarchies, such that pinpointing individual responsibility remains problematic. The Tribunal did recognise the systemic nature of the harms and the complexity of responsibility for them, an approach which contested models of responsibility dominant within international criminal law.[1355] Nevertheless, its discussion of responsibility was brief, which meant that it did not fully address the many forms and complexity of responsibility for the subsistence harms or the issue of third party state complicity.

Due to the nature of the situation in Burma, and the lack of decisive action by the UN, there have been continued perpetrations of subsistence harms since the Tribunal produced its findings.[1356] In addressing the previous silence on hunger and starvation in Burma, the Tribunal sought to bring the specific conditions of food scarcity in the country to the attention of the international community. The work of the Tribunal received some attention from the Special Rapporteur on Human Rights in Myanmar, who referred to and cited its main findings in his 2000 Report.[1357] In addition, due in part to the findings of the Tribunal, the Special Rapporteur on the Right to Food has repeatedly requested to visit Burma to investigate the food situation, but has been denied access by the Government.[1358] This increased international attention has forced the Government to discuss the issue of hunger in Burma, both within the UN and domestically, although it continues to maintain that there is not a food scarcity problem and deny its responsibility for harms perpetrated.[1359] As the Asian Legal Resource Centre highlights, in protesting that there is not food scarcity the

[1354] *ibid*, 'Recommendations'.
[1355] *ibid.*
[1356] See Human Rights Watch, '"They Came and Destroyed Our Village Again": The Plight of Internally Displaced Persons in Karen State' (Report) (9 June 2005) <http://www.hrw.org/en/reports/2005/06/09/they-came-and-destroyed-our-village-again> accessed 14 October 2009.
[1357] Special Rapporteur on Human Rights in Myanmar, 'Situation of Human Rights in Myanmar', 24 January 2000, E/CN.4/2000/38, 10-11.
[1358] *ibid.*
[1359] Asian Legal Resource Centre, 'The Permanent People's Tribunal on the Right to Food and Rule of Law in Asia' (2003) 2(2) *Article 2*.

Government 'is by implication acknowledging the problem, although asserting that it does not exist'.[1360]

The continued perpetration of subsistence harms in Burma prompted the extension and expansion of the work of the Tribunal to become the Permanent People's Tribunal on the Right to Food and Rule of Law in Asia.[1361] 'Although its scope has broadened, at its root is an ongoing commitment to food and water rights through investigating and understanding conditions, with a view to proposing effective remedies where violations are uncovered.'[1362] The Tribunal develops the theme of the interconnection of civil and political with socio-economic rights begun by its predecessor and is founded on the notion of a "food-justice nexus": that the interrelationship between civil/political and socio-economic rights needs to be recognised and addressed.[1363] Again, this recognition is significant in allowing the Tribunal to potentially understand and acknowledge the interrelationships of violence and how subsistence harms are perpetrated and experienced.

So far, the Tribunal has produced reports of continued hunger and repression in Burma and of instances of violations of the right to food and resultant starvation in India and Bangladesh.[1364] The restriction on humanitarian aid allowed into Burma by the Government following Cyclone Nargis has further highlighted the issue of food and starvation in the country and the marginalisation of certain communities.[1365] The Asian Legal Resource Centre submitted an oral statement to the UN Human Rights Council highlighting and

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[1360] *ibid.*

[1361] Asian Legal Resource Centre, 'Written Statement to the UN Commission on Human Rights', 10 March 2003, E/CN.4/2003/NGO/84.

[1362] Asian Legal Resource Centre, n 1359 above, 5.

[1363] *ibid.*

[1364] Asian Legal Resource Centre, 'Written Submission to UNCHR: Food Scarcity in Myanmar' (2001) <http://www.foodjustice.net/report/un-submissions/written-submissions-to-unchr-food-scarcity-in> accessed 23 June 2009; Asian Legal Resource Centre, 'Written Submission to UNCHR: Starvation deaths ongoing due to administrative neglect, India' 22 February 2008, A/HRC/7/NGO/36. The latter Report discusses individual cases of starvation in Uttar Pradesh State in India due to a lack of implementation of the right to food and governmental administrative failings.

[1365] Asian Human Rights Commission, 'Burma: Worst Ever Response to a Disaster' <http://www.foodjustice.net/ahrc-archive/upi-columns-and-articles-in-ahrc-publications/burma-worst-ever-response-to-a-disaster> accessed 30 May 2009; Amnesty International, 'Myanmar Briefing: Human Rights Concerns a Month After Cyclone Nargis' 5 June 2008, AI Index: ASA 16/013/2008.

critiquing the restrictions on and manipulation of food aid.[1366] The Tribunal also established two hearings in 2005 on starvation and government neglect in India, in the regions of West Bengal and Uttar Pradesh, in response to reports of starvation deaths in these regions and sought to document and publicise the situations.[1367] These hearings are highly significant in terms of the recognition of subsistence harms and responsibility for them, since they deal with the failure of the government to act to prevent starvation deaths and loss of livelihoods. Such omissions have been condemned by the Tribunal not merely as incompetence but as the result of systemic neglect towards certain populations, which they perceived as pervasive throughout many parts of Asia.[1368]

Both hearings were able to be considerably more open and inclusive than the Burma hearing, due to the greater political freedoms in India, which allowed those affected to voice their experience of harms in the face of government silence on the situation. The West Bengal hearing gathered over eight hundred complaints and around fifteen hundred villagers gathered at the site of the hearings.[1369] Essentially, the situation in Jalangi, West Bengal concerns a "natural" disaster, the rapid erosion of land by the Padma River which has been occurring for over a decade. This situation has been allowed to occur by local and national government resulting in loss of land, homes and livelihoods of local people, and culminating in their destitution, since the government offered little or no assistance to those displaced.[1370] Interestingly, despite the existence of progressive domestic law regarding the right to food in India, the law has not been enforced by the government.[1371] This illustrates both the continued problem of the enforcement of socio-economic rights, but perhaps also highlights that there remain inherent problems with the concept of the right to food, which does not fully reflect the physical, mental and social nature of human subsistence.[1372]

[1366] Asian Legal Recourse Centre, 'Burma: The Catastrophe Continues' Oral Statement to the 8th Session of the UN Human Rights Council, 6 June 2008.
<http://www.foodjustice.net/ahrc-archive/upi-columns-and-articles-in-ahrc-publications/burma-the-catastrophe-continues> accessed 30 May 2009.
[1367] Asian Legal Resource Centre, 'Two People's Tribunals on Severe Hunger and Utter Neglect in India' (2005) 4(6) *Article 2*, 3.
[1368] *ibid*, 3.
[1369] *ibid.*
[1370] *ibid.*
[1371] See *Olga Tellis* v. *Bombay Municipal Corporation* Indian Supreme Court (1986) SC 180.
[1372] The Interim Order of the Supreme Court of India in writ petition 196/2001 on the right to food.

Whilst some of the material from the hearings, and in particular the testimony of those affected has been publicised, the Tribunal has not produced any findings, which means that it has not developed its assessment of the situation in these regions of India or produced detailed analysis of the relationship between hunger and neglect. Nevertheless, the recognition of such omissions as constituting harms is significant and certain conclusions can be made from the work of the hearings. The situation in India documented by the Tribunal illustrates the phenomenon of subsistence harms in a democracy and that subsistence harms are not merely associated with authoritarian regimes. While visible, large-scale famine may not be politically acceptable and tenable in a democracy, widespread malnutrition, loss of livelihoods and starvation is often accepted.[1373] This is not simply due to corruption and failure of government policies, but rather to the fact that certain populations remain disposable and beyond the limited protection provided by law.[1374]

There has recently been an International Tribunal on Crimes Against Women of Burma, which is unconnected to the People's Tribunals on food.[1375] This Tribunal has sought to voice the experiences of women regarding crimes in Burma, which the food tribunal and other mechanisms have sidelined. The existence of this Tribunal both highlights the limitations of the approach of the food tribunals in not including an understanding of gendered harms, but also the ability of non-governmental tribunals to recognise silenced harms and to cover a range of different issues. The Tribunal argued that it reflected the demands of participants and 'the need to ensure that survivors, women's human rights advocates and communities of women be fully recognized in the processes of international justice, protection and reparations'.[1376] Drawing on the testimony of witnesses, the Tribunal did not only focus on sexual violence, but also recognised forced displacement and the perpetration of socio-economic harms.[1377] While the emphasis on socio-economic rights does not reflect the nature of subsistence harms, it does mark an important move towards

[1373] See Amartya Sen, 'Individual Freedom as a Social Commitment' (1990) 37 (10) *New York Review of Books*.
[1374] See Georgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Ca.: Stanford University Press, 1998); Henry Giroux, 'Violence, Katrina and the Biopolitics of Disposability' (2007) 24 *Theory Culture Society* 305.
[1375] International Tribunal on Crimes Against Women of Burma (2 March 2010) <http://www.nobelwomensinitiative.org/blogs/burmatribunal> accessed 22 July 2010. The Tribunal was organised by the Nobel Women's Initiative and was centred on the testimony of twelve Burmese women who participated in the proceedings.
[1376] *ibid.*
[1377] *ibid.*

recognition of a wider range of gendered harms and of the impact of deprivations of subsistence needs upon women.

Conclusion

The analysis in this chapter has illustrated the way in which non-governmental tribunals may be able to recognise abuses that come within the definition of subsistence harms more fully than current international law. By challenging conventional law, but at the same time drawing on the power of law, non-governmental tribunals are able to provide alternative judgments or findings, which seek to address silenced harms. This chapter has demonstrated that the notion of subsistence harms is being recognised implicitly in the concerns of at least some non-governmental tribunals. In doing so, they have often recognised some aspects of the harms, in terms of impacts on lives and livelihoods, far more effectively than many official mechanisms. Their discussion as to responsibility for these harms also largely avoids the restrictions of international legal models, allowing a broader understanding of responsibility to be voiced.

However, there is also much room for further development of non-governmental tribunals' treatment of subsistence harms. All three tribunals discussed in the last section can be critiqued for not fully recognising the nature of subsistence harms or of analysing the problems of recognising these harms within the current legal framework. While recognising the physical elements of subsistence harms, these tribunals did not explore in sufficient detail the mental and social elements of such harms. Consequently, they did not fully recognise and reflect the holistic and interrelatedness nature of the physical, mental and social elements of subsistence in terms of the dynamics of human existence and survival. The lack of gender awareness is particularly problematic, reflecting and perpetuating similar silencing of gendered harms within official legal mechanisms.

Moreover, while the tribunals discussed in this chapter have actively sought to include harms which international law sidelines, they have not fundamentally challenged the framework of the law in relation to subsistence harms. Clearly, for many tribunals attempting to fit harms

within the current framework of law is the more preferable strategy. Nevertheless, tribunals dealing with issues of deprivations of subsistence needs may need to follow the path of non-governmental tribunals, such as the Tribunal on Global Corporations and Human Wrongs, which have sought to highlight structural forms of violence and thus not allowed themselves to be restricted by the legal framework.[1378]

The proliferation of non-governmental tribunals in recent years, coupled with increasing questions within legal discourse as to the exclusive role of the state in judging harms, may mean that such tribunals will become an increasing force and voice within the discourse surrounding international law.[1379] Nevertheless, the position of these tribunals in relation to law remains complex and potentially problematic. Their lack of legal authority and unofficial status undoubtedly impacts on perceptions as to the credibility of their findings. On the other hand, the other role of non-governmental tribunals in providing an alternative space outside of conventional law to deal with certain harms can also be seen as both positive and problematic. While it is important that subsistence harms are recognised by non-governmental tribunals, there is the danger that the work of the tribunals could undermine formal recognition and accountability for such harms. In recognising silenced harms, non-governmental tribunals could be promoting the view that these harms are not serious enough for conventional law to address.[1380] However, the work of these tribunals has provided an alternative space wherein at least some survivors' experiences of harms related to deprivations of subsistence needs can be heard and acknowledged. This may be a limited recognition, but it is one which is significant and should not be underestimated.

The next chapter will continue the analysis of alternative uses of law as a way of addressing subsistence harms. It will focus on the relationship between law and social movement activism in terms of the use of human rights to address grassroots concerns. In many ways, social movement praxis avoids some of the restrictions of legal processes and language, through their redefinition and reframing of rights. Nevertheless, there remains a tension in

[1378] Permanent People's Tribunal, n 1228 above.
[1379] Borowiak, n 1164 above, 186; Nayar, n 1153 above.
[1380] Terrell, n 1183 above, 131.

regard to the use of law to address silenced harms and the restrictions imposed by law, an issue which emerges strongly in the following chapter.

Chapter 6

Long-term approaches to subsistence harms: human rights and social movement praxis

This chapter further develops the arguments of the thesis in contending that fully recognising subsistence harms requires long-term measures to protect subsistence needs and prevent further grievances. The thesis has so far focused on the recognition of subsistence harms in relation to international criminal law, and thus how and to what degree recognition is performed within the mechanisms of international criminal and transitional justice, as well as within non-governmental tribunals. While there are clear problems regarding the recognition of subsistence harms in international criminal justice, promoting recognition through international criminal law is crucial in terms of beginning to addressing these harms. As argued, recognition within international criminal justice would illustrate the gravity of these harms and provide a crucial normative function in condemining such harms and promoting a degree of validation of survivors' experiences. Nevertheless, while addressing subsistence harms through international criminal law is the focus of the thesis, it also perceives an important, if secondary, role for human rights law. This role is twofold, in terms of the recognition of instances of subsistence harms which fall below the gravity threshold or resources of international criminal justice and in terms of addressing the long-term issues surrounding the perpetration of all forms of subsistence harms.

While international criminal law and human rights are separate areas of law, there is, as already argued, significant overlap between them, such that they may be used to complement each other in the recognition of harms. Essentially, as some commentators have begun to argue, law's role should not be perceived solely in terms of the "justice" phase. It can also play a key role in promoting deeper societal changes through the use of human rights, and

particularly socio-economic rights.[1381] Transitional justice potentially provides the opportunity for international criminal law and human rights law to be used in complementary ways to recognise a range of harms and to address long-term grievances and consequences of violence. Truth commissions, in particular, often draw on both human rights law and international criminal law in order to categorise and condemn certain suffering. Transitional justice can also set the agenda for the promotion of human rights in transitional societies, in order to address long-term issues. However, at present, the narrow focus of transitional justice on civil/political rights issues means that socio-economic rights remain sidelined.

Nevertheless, the use of human rights to address long-term issues regarding subsistence harms does raise further issues for consideration. In particular, human rights remain problematic regarding their ability to recognise and address subsistence harms and underlying grievances.[1382] The role that the thesis perceives for socio-economic rights is in providing a normative framework wherein socio-economic concerns may be articulated as rights. This framework provides an authoritative language and mobilising tool through which local movements can frame their concerns.[1383] This chapter therefore looks at ways in which socio-economic rights are used and redefined by social movements and how this may play a role in recognising and addressing subsistence harms and underlying socio-economic grievances which have been ignored by law.[1384]

The chapter looks in detail at the example of the Food Sovereignty Movement, which, by both drawing on and reframing human rights, provides important alternative visions of how

[1381] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40(1) *International Law and Politics* 1; Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (2009) Office of the High Commissioner for Human Rights, Women's Human Rights and Gender Unit <http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed 12 May 2010; Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal' (2008) 2(3) *International Journal of Transitional Justice* 378, 385; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, Ma.: Polity, 2002).

[1382] Makua wa Mutua, 'Hope and Despair for a New South Africa: The Limits of the Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63; Jacqueline Mowbray, 'The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger' (2007) 20 *Leiden Journal of International Law* 545.

[1383] Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 441, 460.

[1384] For discussion of the role of social movements in international law see Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

socio-economic grievances relating to deprivations of subsistence needs may be able to be reflected in law.[1385] This particular social movement has been chosen because it provides significant alternative ways of protecting socio-economic rights and addressing harms in the long-term. Interestingly, the emerging literature on socio-economic issues within transitional justice has yet to engage with the concept of food sovereignty.[1386] The thesis therefore seeks to remedy the lack of attention given by legal scholars to the concept of food sovereignty. It argues that the concept has significant implications for the recognition of subsistence harms both in using a re-framed vision of rights to address silenced harms and in promoting long-term societal transformations.

1) Addressing violence in the long term: subsistence harms and human rights law

The long-term issues of addressing and acting to prevent further violence do already come within the remit of international law, to some extent, through the frameworks and principles of refugee law, the principles on internal displacement and particularly through human rights law.[1387] Peace agreements and transitional constitutions often include human rights, as seen, for example, within the Lomé Peace Agreement in Sierra Leone and the Liberian Comprehensive Peace Agreement.[1388] Therefore, the chapter argues that human rights law could play some role in addressing longer-term issues of violence and the consequences of subsistence harms, but that at present, this role is not being fully realised. In particular the current emphasis within transitional justice and peace-building discourses on civil and political rights has led to the exclusion of socio-economic rights issues.[1389] Given the linkages between socio-economic grievances and open violence, law could play some role in preventing the recurrence of subsistence harms through promoting the protection of socio-

[1385] For discussion of the meaning of food sovereignty and of the establishment and membership of the Movement see pp.291-93 below.
[1386] Pasipanodya, n 1381 above. While Pasipanodya mentions the inclusion of food sovereignty within the Nepalese Peace Agreement, the article does not explain or discuss the concept.
[1387] Convention Relating to the Status of Refugees, Geneva, 28 July 1951; Office for the Coordination of Humanitarian Affairs, Guiding Principles on Internal Displacement (2004).
[1388] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999; Peace Agreement Between the Government of Liberia (GOL), The Liberians United for Reconciliation and Democracy (LURD), The Movement for Democracy in Liberia (MODEL) and the Political Parties, Accra, Ghana, 18th August 2003. Article XII (1)(a) states that 'The Parties agree that the basic civil and political rights enunciated in the Declaration and Principles on Human Rights adopted by the United Nations, African Union, and ECOWAS, in particular, the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights, and as contained in the Laws of Liberia, shall be fully guaranteed and respected within Liberia'.
[1389] See Arbour, n 1381 above.

economic rights.[1390] Nevertheless, the chapter also acknowledges the limitations of current understandings of socio-economic rights and the need for alternative visions of rights to be explored.

i) Towards an increased role for socio-economic rights in transitional settings

Peace-building is now the dominant language of long-term societal change within international agencies in addressing transitional societies. However, the language and strategies of peace-building are often detrimental to issues concerning subsistence needs and socio-economic rights. Peace-building has been defined as 'actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation' which may include the 'creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for reintegration and rehabilitation programmes, and creating conditions for resumed development'. [1391] Peace-building is therefore intended as a broad process of societal reconstruction, which goes beyond peace agreements and initial peacekeeping. Nevertheless, much peace-building praxis reflects a narrow vision of a move towards liberal peace which is focused on ending political violence and instituting the necessary mechanisms for a liberal democracy, such as civil and political rights.[1392]

Peace-building is primarily associated with post-conflict situations and thus largely does not address issues of "peacetime" and ongoing forms of violence. The current emphasis upon liberal peace within both transitional justice and wider peace-building discourses stems from many factors, particularly the focus on fostering short-term solutions to end violence, rather than on more long-term goals, as well as the influence of western concepts of liberal democracy and neoliberalism.[1393] As Chinkin critiques, 'There appears to be an almost

[1390] On the relationship between socio-economic grievances and conflict, see again Frances Stewart, 'Crisis Prevention: Tackling Horizontal Inequalities' (2000) 28(3) *Oxford Development Studies* 245.
[1391] Kofi Annan, 'The Causes of Conflict and the Promotion of Durable Peace in Africa', Report of the Secretary-General to the UN Security Council, 16 April 1998, A/52/871-S/1998/318, para. 63.
[1392] For criticisms of such approaches see Rama Mani, 'Balancing Peace with Justice in the Aftermath of Violent Conflict' (2005) 48(3) *Development* 25, 29; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *International Journal of Transitional Justice* 28.
[1393] Christine Chinkin, 'Gender, International Legal Framework and Peace-building' in Kari Karamé (ed), *Gender and Peace-building in Africa* (Oslo: Norsk Utenrikspolitisk Institutt, 2004); Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21 (4) *Global Society: Journal of Interdisciplinary International Relations* 579.

unquestioning faith about the appositeness of these principles to post-conflict peace-building, and their suitability for opening the area to the free flow of capital and foreign investment, irrespective of the causes of the specific conflict, its location and the participation of diverse actors'.[1394]

Despite efforts to broaden the scope of peace-building strategies, the emphasis often remains upon consolidating "negative peace" by preventing open, public violence, which allows less visible forms of violence, such as the aftermath of subsistence harms and underlying socio-economic concerns, to continue.[1395] Law also plays its role in promoting these concerns due to the traditional legal hierarchy of civil and political over socio-economic rights. Despite some increasing recognition of the need, at least to be seen, to address socio-economic concerns, the very concept of peace-building, as constituting liberal peace, remains focused on a narrow conception of human rights law, which does little to address subsistence harms in the long-term. Thus, while peace agreements now tend to include specific commitments to human rights, socio-economic rights remain largely excluded, as seen for example with regard to both the Lomé Peace Agreement in Sierra Leone and the Liberian Peace Agreement mentioned above.[1396] Since peace agreements often set the agenda for future political and legal systems and processes, this neglect of socio-economic rights means that such rights are likely to remain sidelined within the society concerned.[1397]

The increased recognition within human rights discourse of the indivisibility of all human rights and the justiciability of socio-economic rights, as seen in South Africa, illustrates that such rights potentially could be used to transcend the limitations of transitional justice and peace-building discourses.[1398] Fundamentally, human rights are concerned with situations of

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[1394] *ibid.*

[1395] On the issue of the focus on "negative" peace and the gendered implications of this see Donna Pankhurst, 'The "Sex War" and Other Wars: Towards a Feminist Approach to Peace Building' (2003) 13(2/3) *Development in Practice* 154, 156.

[1396] Sierra Leone Peace Agreement, n 1388 above; Liberian Peace Agreement, n 1388 above.

[1397] United Nations Secretary-General, 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council": Question of the realization in all countries of economic, social and cultural rights', 13 February 2007, A/HRC/4/62, 16.

[1398] The indivisibility of rights was recognised within the Limberg Principles. United Nations, Limberg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights, E/CN.4/1987/17. For key cases on socio-economic rights within the South African Court see *Government of the*

ongoing and "peacetime" violence and already transcend the limited time frames and scope of transitional justice and peace-building strategies. There is no legal reason why socio-economic rights cannot be promoted equally alongside civil and political rights, in order to address the consequences of subsistence harms and long-term grievances.[1399] As the UN Secretary General acknowledged, there is 'no legal, conceptual or instrumental justification for the comparative neglect of economic, social and cultural rights in conflict and post-conflict societies'.[1400] Socio-economic rights, therefore, form an existing mechanism through which law could be used and redefined to begin to address more long-term issues around subsistence needs.

Despite the trend of excluding socio-economic rights from peace agreements and new constitutions, some countries have explicitly included socio-economic rights. The obvious example is South Africa, which, despite the failure of the TRC to acknowledge socio-economic rights issues and subsistence harms, famously included socio-economic rights within its post-Apartheid Constitution.[1401] Moreover, the 2002 Constitution of East Timor also includes some socio-economic rights.[1402] However, it is notable that, despite the inclusion of the rights to health and to housing in the East Timor Constitution, the right to an adequate standard of living remains conspicuous by its absence.[1403] The exclusion of the right to food is particularly problematic given East Timor's history of subsistence harms, as highlighted in the CAVR report.[1404] Indeed, the fact that the right to an adequate standard of living has not been included in the Constitution illustrates the lack of political and legal influence exerted by CAVR, in part due to its short-term mandate.

As with transitional justice strategies, peace-building often reflects a "top-down" approach, with survivors and grassroots organisations given little say in the type of societal changes

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Republic of South Africa and Others v *Grootboom and Others* 2000 (1) SA 46 (11) BCLR 1169 (CC) and *Minister of Health and Others* v *Treatment Action Campaign and Others* 2002 (5) SA 721 (10) BCLR 1033 (C).

[1399] Arbour, n 1381 above, 23.

[1400] United Nations Report of the Secretary-General, (2007) n 1391 above, 11.

[1401] The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. See in particular, Chapter Two – Bill of Rights, Article 26, Housing, Article 27, Health Care, Food, Water and Social Security.

[1402] The Constitution of the Republic of East Timor, Title III: Economic, Social and Cultural Rights.

[1403] *ibid.*

[1404] CAVR, 'National Public Hearing: Famine and Forced Displacement' July 2003 <http://www.cavr-timorleste.org/phbFiles/03_famine_eng-WEB.pdf> accessed 20 March 2009.

promoted.[1405] Peace-building is essentially formulated and instituted by the UN and the International Financial Institutions (IFIs) and remains focused on states.[1406] This has often led to the promotion of a "one-size-fits-all" vision of a liberal peace based around principles of liberal democracy and the rule of law.[1407] The process of peace-building may indeed allow for some local engagement and the implementation of peace-building policies may be subject to some degree of local mediation and adaption.[1408] Nevertheless, the fundamental model of a liberal peace itself is often forced on transitional states with little real sensitivity to regional or local dynamics.[1409] Dominant, liberal understandings of peace and peace-building have meant that social and economic issues have often been left in the hands of the IFIs, as the organisations which tend to dominate development strategies. While these institutions may pay lip-service to human rights discourse, including increasingly socio-economic rights, in reality the neoliberal strategies promoted and enforced by these institutions may prevent the realisation of access to subsistence needs.[1410]

In the DRC, for example, this approach has led to peace-building strategies which have ignored regional differences, in particular the nature of the conflict in eastern parts of the country.[1411] Indeed, the term peace-*building* suggests a technocratic approach where peace can be built through certain strategies, rather than emphasising more locally appropriate approaches. As Lederach highlights, the limitations of current post-crisis approaches 'emerge from a reductionism focused on techniques driven by a need to find quick fixes and solutions to complex, long term problems rather than a systemic understanding of peace-

[1405] Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008) 99, 103.
[1406] Lambourne, n 1392 above, 28.
[1407] David Keen, 'War and Peace: What's the Difference?' (2000) 7(4) *International Peacekeeping* 1.
[1408] Jonathan Goodhand and Oliver Walton, 'The Limits of Liberal Peacebuilding? International Engagement in the Sri Lankan Peace Process' (2009) 3(3) *Journal of Intervention and Statebuilding* 303.
[1409] Oliver P. Richmond, 'Becoming Liberal, Unbecoming Liberalism: Liberal-Local Hybridity via the Everyday as a Response to the Paradoxes of Liberal Peacebuilding' (2009) 3(3) *Journal of Intervention and Statebuilding* 324.
[1410] On the issue of the lack of attention still given by IFI's to the socio-economic rights implications of their policies see Margot E. Saloman, 'International Economic Governance and Human Rights Accountability' London School of Economics Law, Society and Economy Working Papers 9/2007 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013505> accessed 5 November 2010; Mac Darrow, *Between Light and Shadow: The World Bank, International Monetary Fund and International Human Rights Law* (Portland, Ore.: Hart Publishing, 2003).
[1411] Stein Sundstøl Eriksen, 'The Liberal Peace Is Neither: Peacebuilding, Statebuilding and the Reproduction of Conflict in the Democratic Republic of Congo' (2009) 16(5) *International Peacekeeping* 652, 661.

building as a process-structure'.[1412] In this way, the concepts of post-conflict and peace-building are often perceived within a linear trajectory, whereas in reality violence and peace need to be seen in terms of a continuum, where peace is an ongoing process.[1413]

Such approaches are highly counterproductive to the aims of consolidating even "negative peace". Issues of subsistence needs and wider socio-economic concerns remain largely unaddressed within peace-building policies, which mean that such issues are left to fester. Socio-economic grievances do play some role in the outbreak of open violence, such that simply allowing such grievances to fester may promote the recurrence of open violence in the future.[1414] As Agbakwa argues, the inclusion of socio-economic issues in long-term strategies is 'fundamental for peace and stability'.[1415] Given that the protection of human rights is often perceived as crucial to conflict prevention, this failure to include or give sufficient attention to the issue of socio-economic rights within peace-building strategies is particularly problematic.[1416] For example, the emphasis on liberal peace-building by UN agencies in East Timor has led to a neglect of socio-economic needs and lack of engagement with survivors' concerns, which has resulted in further outbreaks of open violence.[1417]

Current emphases on reconstruction in the aftermath of "crisis" situations promote a return to previous situations, which may perpetuate violence and socio-economic inequalities. As Keen highlights, 'We hear a lot about rehabilitation, reconstruction, resettlement and all the various "re"s of post-conflict work. But if you could recreate and reconstruct the exact social and economic conditions prevailing at the outset of a civil war, would it simply break out all

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[1412] John Paul Lederach, 'The Challenge of the 21st Century: Just Peace' in State of the World Forum, *People Building Peace: 35 Inspiring Stories from Around the World* (Utrecht: European Centre for Conflict Prevention, 1999).

[1413] Johan Svensson, 'Bottom-up vs Top-down Approaches in Peacebuilding and Democratisation', Proceedings of a conference and workshop in Uppsala, Violent Conflict and Democracy – Risks and Opportunities April 7–8, 2005 <http://www.kus.uu.se/pdf/publications/outlook_development/outlook27.pdf#page=23> accessed 4 May 2010.

[1414] Karen Ballentine and Jake Sherman (eds), *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder, Colo.: Lynne Rienner, 2003); Stewart, n 1390 above.

[1415] Shedrack C. Agbakwa, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa' (2003) 47(1) *Journal of African Law* 38, 57-58.

[1416] *ibid.*

[1417] Oliver P. Richmond and Jason Franks, 'Liberal Peacebuilding in Timor Leste: The Emperor's New Clothes?' (2008) 15(2) *International Peacekeeping* 185.

over again - for the same reasons as before?'.[1418] There is therefore a need to understand the interrelationship between socio-economic and political grievances and the benefits that open violence confers on certain groups.[1419] Attention should be given to the needs of all survivors, including perpetrators, in order to prevent further grievances from developing.[1420]

The current lack of serious attention given to subsistence harms and underlying socio-economic concerns permits and condones the suffering of survivors and their continued experience of violence.[1421] Moreover, the narrow concerns of peace-building discourse and practice are again clearly gendered.[1422] While women play a key role in challenging violence and campaigning to redress harms at an informal level, they are often excluded or sidelined from formal peace-building strategies.[1423] Although there is increasing recognition of the importance of women's involvement in peace-building decision-making, as illustrated by Security Council Resolution 1325, such inclusion still tends to be a token gesture, which has not led to full participation of women.[1424] As Chimni highlights, 'because gender inequality or structural inequality based in gender is rarely seen as a cause of armed conflict it does not find a place in the reform agenda'.[1425]

Thus, the ending of political violence does not necessarily constitute the end of socio-economic violence and other forms of violence which many women, in particular, continue to experience.[1426] As Ní Aoláin argues, peace negotiators 'may leave untouched socioeconomic

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[1418] Keen, n 1407 above, 15.
[1419] Alessandro Preti, 'Guatemala: Violence in Peacetime - A Critical Analysis of the Armed Conflict and the Peace Process' (2002) 26(2) *Disasters* 99.
[1420] Keen, n 1407 above, 15.
[1421] Arbour, n 1381 above.
[1422] Chinkin, n 1381 above.
[1423] Pankhurst, n 1395 above; See Romi Sigsworth, 'Gender-Based Violence in Transition' (2008) Centre for the Study of Violence and Reconciliation concept paper <http://www.csvr.org.za/docs/genderbased1108.pdf> accessed 24 September 2009; Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building* (UNIFEM, 2002) ch. 6; Ann Jordan, 'Women and Conflict Transformation: Influences, Roles and Experiences' (2003) 13(2& 3) *Development in Practice* 239.
[1424] United Nations, 'Women, Peace and Security' Security Council Resolution 1325, 31 October 2000; Christine Chinkin and Hilary Charlesworth, 'Building Women into Peace: the International Legal Framework' (2006) 27(5) *Third World Quarterly* 937, 940.
[1425] B. S. Chimni, 'Refugees, Return and Reconstruction of "Post-Conflict" Societies: a Critical Perspective' (2002) 9(2) *International Peacekeeping* 163, 169-170.
[1426] Fionnuala Ní Aoláin, 'Political Violence and Gender during Times of Transition' (2006) 15 *Columbia Journal of Gender and Law* 829, 847.

exclusions (which may themselves constitute violent experiences for women) and other forms of violence, which women may not see as compartmentalised into "conflict" and "non-conflict". Rather ... women may experience forms of violence on a continuum only partially addressed, or not addressed at all, by cease-fires'.[1427]

The continued experience of the consequences of subsistence harms and wider socio-economic concerns is illustrated, for example, by the post-conflict situation in East Timor. Harris Rimmer's research has suggested that the consequences of deprivations of subsistence needs continue to be felt, particularly by women, and that the peace-building strategies have not resulted in subsistence needs being met.[1428] There is also a need to recognise that the emphasis on the rule of law and liberal democracy can be gendered in terms of entrenching the dichotomy between public and private spheres and sidelining issues of socio-economic inequalities.[1429] Indeed, as socio-economic issues are often sidelined, this prevents issues of land ownership and access to basic resources, which are profoundly gendered, from being acknowledged and addressed.[1430]

Existing human rights law therefore provides some basis upon which long-term socio-economic issues may at least be recognised. However, socio-economic rights remain sidelined within existing transitional justice and peace-building practices. As Lambourne argues, it is important to 'rethink our focus on "transition" as an interim process that links the past and the future, and to think instead in terms of "transformation", which implies long-term, sustainable processes embedded in society and adoption of psychosocial, political and economic, as well as legal, perspectives on justice'.[1431] The term "societal transformation" suggests a long-term process which requires deeper changes in society in order to address underlying concerns and grievances and emphasises the role of societies themselves rather

[1427] *ibid*, 831.
[1428] Susan Harris Rimmer, 'Surfacing Gender in the Constitution of Timor Leste' in William Binchy (ed), *The Constitution of Timor Leste* (Dublin: Clarus Press, 2009) 5.
[1429] Fionnuala Ní Aoláin, 'Gender and the Rule of Law in Transitional Societies' (2009) 18 *Minnesota Journal of International Law* 380.
[1430] Chinkin, n 1381 above, 41; Chaloka Beyani, 'Key Issues' in United Nations Development Fund for Women, 'Women's Land and Property Rights in Situations of Conflict and Reconstruction: A Reader Based on the February, 1998 Inter-Regional Consultation in Kigali, Rwanda' (2001) <http://www.icarrd.org/en/icarrd_doc_tec/batch3_Womens.pdf> accessed 28 March 2010.
[1431] Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *International Journal of Transitional Justice* 28. 30.

than primarily a "top-down" approach. If law is to play a positive role in societal transformation, in addressing issues surrounding subsistence needs and socio-economic concerns, then this cannot simply involve an application of conventional law or dominant legal discourses on human rights.

ii) The limitations of socio-economic rights: using rights to promote alternative approaches

Socio-economic rights, and human rights in general, remain problematic and, as currently conceived, are not sufficient to address the experience and consequences of subsistence harms and underlying socio-economic issues. Rather, law needs to be responsive to alternative understandings of harms and rights, particularly those stemming from social movement activism, since these understandings may reflect at least some of the concerns of survivors on the ground.[1432] Over-reliance on the dominant discourses of human rights can hide the way that human rights law all too often supports the social and economic status quo.[1433] Human rights can be used to uphold socio-economic inequality and violence rather than fundamentally challenging it. Indeed, the use of human rights language by the IFIs draws attention away from how they frequently institute policies which are contrary to the protection of subsistence needs.[1434] As suggested above, adopting the language of socio-economic rights can sometimes become token gestures in the path towards liberal democracy. Care should therefore be taken to prevent socio-economic rights being used to support and perpetuate the current models of transition and peace-building.

The example of South Africa illustrates that constitutional inclusion of socio-economic rights may have little substantive impact on addressing issues of subsistence needs, if there is insufficient political will to institute deeper societal changes. This inclusion has not led to comprehensive responses to the widespread socio-economic grievances following apartheid in South Africa, largely due to the imposition of neoliberal structures within the peace-building process, coupled with the failure of the TRC to recognise and voice such grievances. Thus, while socio-economic rights have been included in the Constitution, the Government's

[1432] On the issue of how human rights are adapted and translated into local settings by activists and local groups see Levitt and Merry, n 1383 above, 441.
[1433] Mowbray, n 1382 above, 545.
[1434] B. S. Chimni, 'Refugees, Return and Reconstruction of "Post-Conflict" Societies: a Critical Perspective' (2002) 9(2) *International Peacekeeping* 163.

neoliberal policies, such as the privatisation of basic resources, have served to reinforce existing inequalities.[1435] As Mutua has argued, in the 'current unabashedly pro-capitalist and anti-redistributive climate, rights language in South Africa has taken on the color of oppression in that it primarily has left undisturbed the economic hierarchies of apartheid'.[1436]

The South African example essentially illustrates the problem of instituting human rights without acknowledging and addressing the past in order to understand historic inequalities and grievances. As Muvingi argues 'Economic and social asymmetries need to be interrogated, in particular, in the context of societies transitioning from repression, because advocating rights in the here and now misses a key element of marginalization and denial of rights'.[1437] In constitutionalising socio-economic rights without addressing the use of subsistence harms and socio-economic violence within the Apartheid regime, such rights become de-contextualised and illusory.

While attention was also paid to socio-economic rights within the Guatemalan Peace Accord this has not led to widespread improvement regarding access to subsistence needs.[1438] Although the Peace Accord has shown some awareness of socio-economic rights issues such as provisions for return of housing to displaced persons, they have not been backed up by effective mechanisms of enforcement.[1439] As the Special Rapporteur on the Right to Food has highlighted, 'violations of the right to food persist, particularly with persistent agrarian conflict. Poverty is widespread, and Guatemala has the highest level of malnutrition in Latin America, concentrated amongst the indigenous peoples'.[1440]

[1435] P. Bond and J. Dugard, 'Water, Human Rights and Social Conflict: South African Experiences' (2008) *Law, Social Justice and Global Development Journal* <http://www.go.warwick.ac.uk/elj/lgd/2008_1/bond_dugard> accessed 19 May 2010.

[1436] Mutua, n 1382 above, 113.

[1437] Ismael Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *International Journal of Transitional Justice* 163, 169.

[1438] See Special Rapporteur on the Right to Food, 'Mission to Guatemala' 18 January 2006, E/CN.4/2006/44/Add.1

[1439] Chimni, n 1434 above, 169.

[1440] Special Rapporteur on the Right to Food, n 1438 above.

Therefore, the existence of these rights does not automatically lead to improvements on the ground. A right to food may have little meaning in reality since survivors 'can't eat the constitution'.[1441] Moreover, there needs to be far more gender awareness within international law regarding socio-economic rights, since at present these rights do not sufficiently address the importance of gender inequalities.[1442] While there are anti-discrimination provisions within human rights law, there generally remains a lack of attention to women's socio-economic rights within human rights discourse.[1443] In particular, human rights and transitional justice discourses should pay more attention to inequalities regarding women's access and rights to land, housing and basic resources.[1444] For example, in Rwanda, women's limited rights regarding land ownership has been a particular feature of their marginalisation and lack of economic independence.[1445] As Chinkin and Charlesworth critique, 'international human rights law has traditionally offered very little to women: it is predicated upon protecting men from state intervention in areas of concern to them rather than upon guaranteeing human dignity and optimum choice to all individuals'.[1446]

Such limitations of law should be recognised not so as to reject law but to realise the importance of the potential influence that social movement activism may have on law.[1447] Human rights can provide a starting point towards promoting societal transformation. The constitutional inclusion of socio-economic rights must not be viewed as an accomplishment in and of itself, but as a step which could allow survivors and civil society groups to frame

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[1441] Mariam Bibi Jooma, '"We Can't Eat the Constitution" Transformation and the Socio-Economic Reconstruction of Burundi' Institute for Security Studies, Occasional Paper 106, May 2005 <http://www.iss.co.za/pubs/papers/106/Paper106.htm> accessed 8 June 2009. See also Katerina Tomasevski, 'Human Rights and Wars of Starvation' in Joanna Macrae and Anthony Zwi (eds), *War and Hunger: Rethinking Responses to Complex Emergencies* (Zed Books: London, 1994) 71.

[1442] Sandra Fredman, 'Engendering Socio-Economic Rights' (2010) University of Oxford Legal Research Paper Series <http://www.ssrn.com/link/oxford-legal-studies.html> accessed 12 November 2010.

[1443] For a recent attempt to highlight issues of gender inequality regarding socio-economic rights see Economic and Social Council, 'Report of the United Nations High Commissioner for Human Rights', 6 June 2008, E/2008/76.

[1444] Chimni, n 1434 above.

[1445] Catharine Newbury and Hannah Baldwin, 'Aftermath: Women in Postgenocide Rwanda', Center for Development Information and Evaluation, U.S. Agency for International Development (2003) <http://pdf.dec.org/pdf_docs/pnacj323.pdf> accessed 19 May 2010.

[1446] Chinkin and Charlesworth, 1424 above, 943.

[1447] *ibid.*

their demands through rights-language.[1448] As already argued, the institutionalisation of human rights has lessened the emancipatory potential of conventional understandings of rights and has permitted rights to be used to serve the interests of powerful states as well as the interests of elites within third world states.[1449] Conventional human rights discourse has been used to sideline certain forms of suffering, particularly structural forms of violence and to uphold dominant power structures.[1450]

However, it is important to understand the way that human rights can constitute both an elite discourse used by powerful states and a language used by social movements to challenge dominant political and economic structures and the experience of suffering.[1451] While the constitutional inclusion of socio-economic rights in South Africa has not led to comprehensive redress of inequalities and socio-economic grievances, it has undoubtedly provided a space for civil society activism surrounding the promotion of such rights. In the context of ongoing inequality and socio-economic marginalisation, the existence of socio-economic rights language provides a mobilising tool for the many social movements which have emerged in post-Apartheid South Africa to promote socio-economic concerns.[1452]

Social movements do not simply use human rights in an instrumental way to demand the enforcement of rights but, more fundamentally, rethink the conceptual basis of rights and harms in profoundly different ways from conventional law. The language of human rights is 'used by actors to contest politics and law in pragmatic, critical, and innovative ways'.[1453] Human rights provide a language of injustice and violation which enables socio-economic concerns to be expressed as rights rather than simply as needs or demands.[1454] The normative and authoritative power of human rights provides social movements with a crucial basis from which to develop alternative understandings of rights, in order to reflect the needs of their

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[1448] Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) Vol. 2(3) *International Journal of Transitional Justice* 331, 351.
[1449] Conor Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006).
[1450] Rajagopal, n 1384 above, 194-97.
[1451] *ibid.*
[1452] Richard Ballard, Adam Habib et al., 'Globalization, Marginalization and Contemporary Social Movements in South Africa' (2005) 104(417) *African Affairs*, 615.
[1453] *ibid*, 196.
[1454] Katherine G. Young, 'Freedom, Want, and Economic and Social Rights: Frame and Law' (2009) 24 *Maryland Journal of International Law* 182, 191.

membership.[1455] Such understandings challenge the legal framework by demanding new forms of rights, such as peasants' rights, which will be discussed below, and through providing alternative understandings which contest the individualistic or state-centric foundations of rights.[1456] For example, as Speed has illustrated, the Zapatista Movement has appropriated and redefined human rights in order to challenge the state-centric model and the role law plays in upholding dominant political and economic structures.[1457] Women's organisations have also been active in using the language of rights to address their concerns.[1458] Thus, while conventional human rights law remains limited in regard to addressing the range of gendered harms experienced, women's organisations have appropriated and reinterpreted rights in order to address their concerns.[1459]

There is therefore a complex and sometimes paradoxical relationship between social movements and human rights discourse.[1460] On the one hand, human rights can provide a crucial language to contest dominant understandings of rights and political and economic structures. On the other hand, while social movements are certainly innovative in rethinking the norms and concepts surrounding human rights, the institutionalisation of rights may restrict the ability of movements to influence law "from below".[1461] As argued in previous chapters, law is potentially open to some degree of transformation, and should not be thought of as completely static and immutable.[1462] Nevertheless, law is resistant to development "from below" and there is also the danger of co-option of alternative visions of rights, such that any possible social movement influence would be subject to a degree of dilution in order to fit in with existing legal concepts and frameworks.[1463] In this way, some degree of influence is possible, but this is unlikely to result in substantial transformation of existing

[1455] Sally Engle Merry, Mihaela Şerban Rosen et al., 'Law From Below: Women's Human Rights and Social Movements in New York City' (2010) 44(1) *Law and Society Review* 101, 108; Levitt and Merry, n 1383 above, 460.
[1456] Rajagopal, n 1384 above, 263-64.
[1457] Shannon Speed, 'Exercising Rights and Reconfiguring Resistance in the Zapatista Juntas de Buen Gobierno' in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press 2007) 187.
[1458] Niamh Reilly, 'Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach' (2007) 3(2) *International Journal of Law in Context* 155, 156.
[1459] Merry and Rosen, n 1455 above.
[1460] Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009).
[1461] *ibid.*
[1462] *ibid*, 178.
[1463] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995); Boaventura de Sousa Santos and César A. Rodríguez-Garavito, *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 17.

legal concepts and frameworks.[1464] Thus, while the thesis sees an important role for social movements, in terms of providing alternative visions of rights which may promote a degree of recognition of subsistence harms, it also acknowledges the need for awareness of the limitations which may be imposed through law and legal institutions.

It is also important to recognise that social movements may suffer from limitations of their own and to recognise the differences between them. Social movements do not necessarily always promote interpretations of law which prevent the marginalisation of certain groups, or promote issues associated with subsistence harms.[1465] As already acknowledged, not all social movements are gender-sensitive and thus drawing on these discourses may perpetuate rather than challenge gender inequalities.[1466] Moreover, it is important to examine the type of social movement engaged in a particular situation and to recognise the need to reflect a range of different, and possibly conflicting, voices. The work of grassroots organisations and social movements reflects their own internal heirarchies and structures, which may perpetuate certain inequalities, particularly gender inequalities, and which therefore need to be acknowledged. As Eschle and Maiguashca argue, 'difference within movements is not simply a question of varying identities, but also reflective of the inequalities generated by power relations from which movements are not immune'.[1467] Therefore, each social movement needs to be assessed individually, regarding the merits of its claims and structures.

The next section will therefore discuss the work of the Food Sovereignty Movement, in order to argue that the movement provides important spaces for the recognition of long-term grievances and harms related to the perpetration and experience of subsistence harms.[1468] Moreover, the Movement's alternative understandings of violence and rights could

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[1464] For acknowledgement of the way in which international law allows limited opportunity for social movement challenges to current power structures, see Obiora Chinedu Okafor, 'Poverty, Agency and Resistance in the Future of International Law: An African Perspective' (2006) 27(5) *Third World Quarterly* 799, 811.

[1465] On the need for caution regarding social movements, and awareness that not all social movements may promote emancipatory visions of rights see Rajagopal, n 1384 above; Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 125.

[1466] Chinkin and Charlesworth, n 1424 above, 942.

[1467] Catherine Eschle and Bice Maiguashca, 'Rethinking Globalised Resistance: Feminist Activism and Critical Theorising in International Relations' (2007) 9 *British Journal of Politics and International Relations* 284, 293.

[1468] See La Via Campesina, 'Gender: Via Campesina III International Conference' (2000) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=433&Itemid=39> accessed 10 October 2008.

potentially be used to influence law, to some degree, "from below". The work of this movement is particularly relevant to subsistence harms and underlying socio-economic grievances, since the movement is centred on issues relating to access to food. It is significant both in beginning to recognise some deprivations of subsistence needs and their impacts on survivors and in providing ways in which long-term socio-economic issues may be addressed, to some degree.

Nevertheless, it must be remembered that the movement focuses on food rather than on subsistence more generally and thus does not reflect all the issues surrounding human subsistence. The movement's use of the right to food also serves to illustrate the relationship and tensions between using law to frame demands and avoiding the potential restrictions which law imposes in recognising silenced forms of harm and grievances. Essentially, the Food Sovereignty movement is used in this chapter to express and analyse the way that human rights may be interpreted through social movement praxis to potentially recognise at least some of the long-term issues related to the perpetration and experience of subsistence harms.

2) Subsistence harms and social movement praxis: insights from the Food Sovereignty Movement

The Food Sovereignty Movement is a social movement comprised of various local and transnational organisations, the most notable being La Via Campesina (The Peasants' Way), which aim to promote the rights of peasants and the struggle against neoliberal systems of food production.[1469] The Movement essentially emerged as a reaction and challenge to the inadequacy of existing concepts of the right to food and food security in the context of the marginalisation of peasants and widespread violence perpetrated against them. It therefore identifies itself as a peasant movement, which it defines in a broad way as applying to small-scale farmers, landless persons and 'any person engaged in agriculture, cattle-raising,

[1469] La Via Campesina, 'La Via Campesina Policy Documents' 5th Conference, Mozambique, 16th to 23rd October 2008, 99 <http://viacampesina.org/downloads/pdf/policydocuments/POLICYDOCUMENTS-EN-FINAL.pdf> accessed 9 May 2010.

pastoralism, handicrafts-related to agriculture or a related occupation in a rural area'.[1470] This definition is inclusive of rural workers or small-scale farmers in developed countries, and is not only focused on the "South" in a geographical sense but also marginalised groups within the "North".[1471]

The use of the term "peasant" or "campesino" stems from the Movement's Latin American roots, and while it does not necessarily have the same negative connotations as in English, it is still associated with backwardness and the past.[1472] As with other social movements, the Food Sovereignty Movement re-appropriated a negative, oppressive identity, in this case the term peasant, into a positive and empowering identity, in order to embrace the work and grievances of small scale farmers and indigenous peoples, which is crucial to its shared solidarity.[1473] Since the term food sovereignty was coined by La Via Campesina in 1996, the Movement has grown significantly and now has global membership.[1474] While avoiding the influence of western NGOs, the Movement increasingly works with other social movements in order to challenge dominant economic and political systems and is involved in the Assembly of Social Movements, which was founded within the World Social Forum processes as a way of strengthening the voice of transnational social movements.[1475]

i) Subsistence harms, the right to food and food sovereignty: towards an empowering vision of rights

Food sovereignty 'includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and culturally appropriate food and to food-producing

[1470] La Via Campesina, 'Declaration of Rights of Peasants - Women and Men: Peasants of the World need an International Convention on the Rights of Peasants' (2009) <http://viacampesina.net/downloads/PDF/EN-3.pdf> accessed 5 February 2010.
[1471] Annette Aurelie Desmarais, *Globalization and the Power of the Peasants: La Via Campesina* (London: Pluto Press, 2007) 33.
[1472] Annette Aurelie Desmarais, 'The Power of Peasants: Reflections on the Meanings of La Via Campesina' (2008) 24 *Journal of Rural Studies* 138, 139-40.
[1473] On the issue of how social movements use such negative identities to voice their grievances see *ibid*; Stammers, n 1460 above, 170.
[1474] La Via Campesina, 'Food Sovereignty: A Future Without Hunger' (1996) <http://www.voiceoftheturtle.org/library/1996%20Declaration%20of%20Food%20Sovereignty.pdf> accessed 12 October 2008.
[1475] La Via Campesina, 'La Via Campesina Policy Documents', n 1469 above, 110.

resources and the ability to sustain themselves and their societies'.[1476] Therefore, while using the language of human rights, the Movement's conceptualisation and deployment of rights differs considerably from legal discourse and provides an important challenge to conventional legal frameworks.[1477] The concept of food sovereignty does not simply encompass a right to food in terms of access to food but concerns 'where that food comes from or how it is produced'.[1478] 'While the right to food emphasizes the *outcome* to be achieved, namely that all individuals have "adequate food", food sovereignty emphasizes instead the *process* whereby decisions relating to food are to be made.'[1479] The Movement interrogates and critiques the dominant economic and political structures that place food production in the hands of large agricultural corporations.[1480] It provides a different approach towards, and understanding of, human rights and the right to food, based around the issue of food production, which may enable it to address, to some degree, long-term issues regarding subsistence harms and needs.

The Food Sovereignty Movement argues that a right to food sovereignty would be more effective at ensuring universal access to food.[1481] This is not merely rhetoric. Rather, the Movement promotes sustainable and highly productive measures for producing food, which could potentially ensure that local populations have greater access to affordable and culturally appropriate food.[1482] As highlighted in previous chapters, addressing subsistence harms which fall below the gravity threshold or resources of international criminal law through human rights law remains problematic, not least in terms of the individualistic and state-

[1476] NGO/CSO Forum for Food Sovereignty, 'Food Sovereignty: A Right For All' <http://www.nyeleni2007.org/spip.php?article125> accessed 11 November 2008.
[1477] Jayan Nayar, 'People's Law: Decolonising Legal Imagination' (2007) 1 *Law, Social Justice and Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/nayar/nayar.pdf> accessed 12 October 2008.
[1478] Peter Rosset, 'Food Sovereignty: Global Rallying Cry of Farmers Movements' (2003) 9(4) *Institute for Food and Development Policy.*
[1479] Mowbray, n 1382 above, 568.
[1480] La Via Campesina, 'Impact of the WTO on Peasants in Southeast Asia and East Asia' (2009) <http://viacampesina.net/downloads/PDF/lvcbooksonwto.pdf> accessed 1 May 2010.
[1481] Forum For Food Sovereignty, 'Synthesis Report: Nyéléni 2007' <http://www.foodandwaterwatch.org/world/global-trade/NyeleniSynthesisReportEN.pdf> accessed 12 October 2008.
[1482] There are many examples of the use of sustainable practices which promote greater food production without the need for agriculture to be controlled by big business. For example, in Guatemala the use of the macuna bean by small farmers has increased food production without the need for more land to be cultivated. See 'The Magic Bean' BBC2 Correspondent Programme (June 10th 2001), transcript accessed at <http://news.bbc.co.uk/hi/english/static/audio_video/programmes/correspondent/transcripts/1377830.txt> accessed 16 February 2010.

centric view of rights. The Food Sovereignty Movement develops human rights in a fundamental way by placing both individual and communal autonomy and empowerment at the centre of its discourse, which fits in with this thesis' definition of subsistence harms regarding their often communal and social nature.

The emphasis on individual and communal autonomy permeates the Movement's discourse as articulated within its documents and declarations as well as its practices and campaigns.[1483] While the declarations of the Movement do not have any legal character, they provide clear articulations of the Movement's main concepts and goals and have often been drawn up through participatory discussions within the Movement.[1484] The Movement does not completely reject the importance of the state, promoting the right of developing countries to free themselves from the trade restrictions placed on them by the current international system, but this autonomy is seen primarily in terms of the local community rather than of a centralised state government.[1485] Therefore, adopting the term 'food sovereignty' can be seen as a way of reclaiming sovereignty by offering an alternative vision of this established international legal concept, in which small scale food producers and local communities claim the right to promote their concerns and in doing so participate in shaping international law and politics, through the declarations of the Food Sovereignty model.[1486]

Clearly, while such declarations do not have any legal standing, they do aim to promote the concerns of the Movement in ways which draw on the language of law and even seek to

[1483] See La Via Campesina, 'La Via Campesina Policy Documents', n 1469 above; Declaration of Rights of Peasants - Women and Men' (2008), n 1470 above; La Via Campesina, 'Final Declaration of International Conference on Peasant's Rights' (2008) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=572&Itemid=40> accessed 3 January 2009; La Via Campesina, 'Food Sovereignty for Africa: A Challenge at Fingertips' (sic) (2008) <http://viacampesina.org/main_en/images/stories/pdf/Brochura_em_INGLES.pdf> accessed 2 January 2009.

[1484] La Via Campesina, 'La Via Campesina Policy Documents', *ibid.* As the Policy Documents state, many of the documents and declarations of the movement have been produced during its conferences and thus involve a wide range of participants.

[1485] La Via Campesina, 'Food Sovereignty: A Future Without Hunger', n 1474 above.

[1486] La Via Campesina, 'The Rights of Peasants to Strengthen the Human Rights System' 10 March 2010 <http://viacampesina.org/en/index.php?option=com_content&view=article&id=882:the-rights-of-peasants-to-strengthen-the-human-rights-framework&catid=19:human-rights&Itemid=40> accessed 9 May 2010.

influence international law in the future.[1487] Rather than rejecting the language of sovereignty, due to its association with repressive state structures and the primacy of the state in the international legal framework, the Food Sovereignty Movement re-imagines sovereignty in a fundamentally different way from current international law and politics. 'Food Sovereignty is the RIGHT of peoples, communities, and countries to define their own agricultural, labor, fishing, food and land policies which are ecologically, socially, economically and culturally appropriate to their unique circumstances.'[1488]

This emphasis upon local communities does provide a significant counter to the state-centric emphasis of international law and the dominance of NGOs within legal engagements with civil society. Fundamentally, the Movement's understanding of rights takes the exclusive protection of human rights out of the hands of the state and legal mechanisms and calls for people themselves to act in order to decide on policies to promote the right to food in locally appropriate ways.[1489] The Movement's approach is therefore transgressive, 'insofar as it orients itself not toward the institutions that enshrine, enforce, and police rights, but toward the people who are meant to hold them'.[1490]

The thesis argues that this vision of rights could promote a far greater grassroots engagement with and control over how to address the aftermath of subsistence harms, which may reflect the diverse experiences of such harms more fully. Socio-economic issues and subsistence

[1487] For declarations made by the movement see Declaration from Social Movements/NGOs/CSOs Parallel Forum to the World Food Summit on Food Security, 'Final Declaration: People's Food Sovereignty Now!' (2009) <http://peoplesforum2009.foodsovereignty.org/final_declarations> accessed 2 February 2010; La Via Campesina, Declaration of Rights of Peasants - Women and Men' (2008), n 1470 above; La Via Campesina, 'Final Declaration of International Conference on Peasant's Rights' (2008), n 1483 above.

[1488] NGO/CSO Forum for Food Sovereignty, n 1476 above.

[1489] See Rajeev Patel, 'Transgressing Rights: La Via Campesina Call for Food Sovereignty' (2007) 13(1) *Feminist Economics* 87, 91. This does not mark a complete rejection of the global, since the movement has actively forged links with peasants and workers in many different areas of the world, as well as with other social movements and NGOs and thus is a dynamic transnational movement. As such, the movement is similar to other social movements which 'think locally by pursuing local solutions to local problems, but act globally, to generate political momentum to support the local changes' and foster transnational solidarities, which increases the voice and significance of the movement. See Peter Evans, 'Fighting Marginalization with Transnational Networks: Counter- Hegemonic Globalization' (2000) *Contemporary Sociology* 230.

[1490] Patel, *ibid*, 92-93.

needs are often of central concern to survivors and grassroots organisations.[1491] Thus, greater control of human rights issues by survivors may enable far more attention to be placed on the issue of redressing such harms and underlying grievances. However, as already highlighted, emphasising local approaches may raise other issues which need to be acknowledged, particularly in terms of the marginalisation of certain groups, such as women.[1492] Nevertheless, the Food Sovereignty Movement is aware of gender issues and women are increasingly involved in the work of the Movement and in lobbying for gendered issues concerning food sovereignty.[1493]

Although, at first slow to address women's concerns, the Movement has worked to include gender issues within the concept of food sovereignty and to ensure the active participation of women within the Movement.[1494] It has produced declarations and policy documents arguing for equality and women's rights, often drafted by a range of grassroots participants, both women and men, during its international conferences.[1495] The Movement has recognised the central role of women in food production within rural communities as well as their traditional role in feeding their families, which is crucial to understanding the gendered aspects of subsistence harms.[1496] It therefore acknowledges the unique experiences of women and their traditional marginalisation, both as peasants and as women, and the particular ways in which rural women experience harms based on their subsistence needs.[1497]

Interestingly, although the Movement recognises women's rights, it does not articulate these rights through women's human rights instruments. This may in part be due to the weakness

[1491] Ellen A. Waldman, 'Restorative Justice and the Pre-Conditions for Grace: Taking Victim's Needs Seriously' (2007) 9 *Cardozo Journal of Conflict Resolution* 91, 94; Lambourne, n 1392 above, 14-15; Recovery of Historical Memory Project, *Guatemala: Never Again!* (Maryknoll, NY: Orbis Books, 1999) 97.

[1492] Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008) 10.

[1493] La Via Campesina, 'Women's Declaration on Food Sovereignty', Nyéléni, 27 February 2007 <http://www.viacampesina.org/en/index.php?option=com_content&view=article&id=490:womens-declaration-on-food-sovereignty&catid=20:women&Itemid=39> accessed 10 May 2010.

[1494] Annette Aurelie Desmarais, 'The Via Campesina: Peasant Women on the Frontiers of Food Sovereignty' (23(1) *Canadian Woman Studies* 140, 144.

[1495] La Via Campesina, 'Gender: Via Campesina III International Conference' (2000) n 1468 above; La Via Campesina, 'Women's Declaration on Food Sovereignty', n 1493 above; La Via Campesina, 'Declaration of South Asian Women of La Via Campesina' International Women's Day, Kathmandu, Nepal, 8 March 2010 <http://www.viacampesina.org/en/index.php?option=com_content&view=article&id=884:declaration-of-south-asian-women-of-la-via-campesina&catid=20:women&Itemid=39> accessed 10 May 2010.

[1496] La Via Campesina, 'Women's Declaration on Food Sovereignty', *ibid.*

[1497] La Via Campesina, 'Gender: Via Campesina III International Conference', n 1468 above.

of CEDAW, as highlighted in chapter 1, in terms of addressing socio-economic rights and subsistence harms.[1498] Since CEDAW does not articulate a right to food or to subsistence needs, it provides little scope for the Movement to develop a gendered understanding of food sovereignty based specifically on women's rights instruments.[1499] Therefore, in understanding the role of women in food production and acknowledging the harms they experience, the Movement provides an alternative vision of human rights, wherein the gendered nature of subsistence needs and socio-economic concerns of rural women are more fully acknowledged. However, as with official international organisations, the Food Sovereignty Movement often looks at gender as a side issue rather than fully encompassing a gender perspective throughout its policies and praxis.[1500]

The communal emphasis of the Movement seeks to address the paradoxes of the current legal framework of human rights through countering the dominance of the state, which may be both the perpetrator of subsistence harms and at the same time be responsible for ensuring that human rights are upheld. It also highlights the actions of transnational corporations in violating rights and perpetrating deprivations of subsistence needs, through the confiscation of land and livelihoods, particularly as part of development projects, and the overproduction and dumping of food, which damages local production and puts food beyond the reach of certain populations.[1501] The Movement therefore promotes recognition of the responsibility for human rights violations by non-state actors which international law is yet to sufficiently recognise or address.[1502]

In articulating the call for food sovereignty, the Movement also challenges law's traditional support of property rights. This is particularly significant in reflecting the essence of

[1498] Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979.
[1499] Isabella Rae, 'Women and the Right to Food: International Law and State Practice' Right to Food Unit, Food and Agriculture Organization (2008)
< http://www.fao.org/righttofood/publi08/01_GENDERpublication.pdf> accessed 10 October 2009.
[1500] For a critique of the Food Sovereignty movement's current approach towards gender see Richard Goulet, "Food Sovereignty": A Step Forward in the Realisation of the Right to Food' (2009) *Law, Social Justice and Global Development Journal*
<http://www.go.warwick.ac.uk/elj/lgd/2009_1/goulet> accessed 12 February 2010.
[1501] NGO/CSO Forum for Food Sovereignty, n 1476 above.
[1502] On the issue of the position of non-state actors within international law see Chris Jocknick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 56.

subsistence harms, in terms of physical, mental and social aspects of human subsistence needs. It thus provides insights which could be applied to the problems of law's categorisation of deprivations of subsistence needs as deprivations of property: i.e. seeing subsistence in predominantly material terms. The Movement fundamentally rejects the understanding of food primarily as a commodity, which can be freely bought and sold, emphasising the value of food for nutrition and subsistence needs. La Via Campesina argues that 'Food is first and foremost a source of nutrition and only secondarily an item of trade'.[1503]

The Movement therefore understands the danger of treating food merely as property in terms of obscuring the effects on lives and livelihoods. However, in focusing on food and nutrition, the Movement does not explicitly highlight the full impacts of deprivations of subsistence needs and the relationship with other subsistence needs. Nevertheless, the work of the Movement is significant to subsistence harms in providing an alternative vision of how law should value food and reject current concepts of property. The Movement argues within its declarations and policy documents that current trade rules, implemented by the WTO and IFIs, and promoted by dominant states, have prevented the fulfilment of food sovereignty and have served to perpetuate widespread hunger by treating food as property.[1504] It therefore implicitly highlights the conflict between the traditional civil and political right to property and the protection of socio-economic rights within the framework of human rights law.

In this sense, the Food Sovereignty Movement is part of a wider logic and discourse of contemporary social movements which critique current concepts of property, and the individualistic framework of human rights law.[1505] 'The cultural politics of social movements ... pose serious challenges to liberal categories such as rights and property in their received modes, by articulating alternative visions of modernity and development that may be pursued through these categories, and thereby re-conceive these very categories themselves'.[1506] Such movements, including the Food Sovereignty Movement, instead emphasise notions of

[1503] La Via Campesina, 'Food Sovereignty: A Future Without Hunger' n 1474 above.
[1504] La Via Campesina, 'The Offensive Of The Transnational Corporations Against Agriculture' in La Via Campesina Policy Documents, n 1469 above.
[1505] Rajagopal, n 1384 above, 264.
[1506] *ibid.*

autonomy which focus on relations between individuals and communities, rather than as individuals as the sole holders of rights.[1507] Thus, whilst emphasising the rights of peasants to have autonomy over their production of food, this is conceptualised by the Movement in terms of solidarity between peasants and within local communities, as well as the welfare of the wider community, by ensuring access to food for all.

In addition, the Movement emphasises the rights of future generations, based on the protection of natural resources and the environment, which provides an alternative vision of rights and harms.[1508] Recognition of the rights of future generations is crucial to understanding the essence of subsistence harms regarding their long-term nature and impacts. This understanding of the rights of future generations goes beyond the emerging concept of intergenerational rights within international law.[1509] By emphasising the protection of natural resources through the adoption of food sovereignty approaches, and condemning the current destruction of the environment through conflict, violence and development projects, the Movement provides a long-term vision for protecting against hunger and ensuring the continuity of livelihoods. La Via Campesina has stated that 'Land is a good of nature that needs to be used in a sustainable way for the welfare of all, including those yet to come'.[1510]

The Food Sovereignty Movement, therefore, not only critiques dominant power structures but, like other social movements, provides alternative interpretations and visions of law and rights. While the Movement is in many ways quite narrow, in terms of its focus upon issues of food production, its praxis is undoubtedly relevant to the issues surrounding subsistence harms, in particular its emphasis on communal understandings of harm, its rejection of traditional, legal understandings of property and its emphasis on long-term environmental issues. The next section will further illustrate the relevance and significance of the work of

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[1507] *ibid*, 248 and 266.

[1508] NGO/CSO Forum For Food Sovereignty, n 1476 above. The documents produced at the Nyéléni 2007 Forum for Food Sovereignty stated that the concept of food sovereignty 'defends the interests and inclusion of the next generation', particularly through the protection of the environment.

[1509] On the issue of intergenerational rights see Edith Brown Weiss, 'Opening the Door to the Environment and to Future Generations' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 338, 350.

[1510] La Via Campesina, 'Proposals For Farm-Based, Sustainable Agriculture (2002) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=50&Itemid=42> accessed 14 November 2008.

the Movement in relation to subsistence harms, through its recognition of socio-economic violence. It will argue that the Movement provides key insights into possible strategies for societal transformation following situations of violence and discrimination, through promoting the need to address underlying socio-economic grievances and implement food sovereignty approaches.

ii) Food sovereignty, violence, and subsistence harms

The Movement is increasingly recognising that the prevention of open violence and of the widespread repression of peasants is a pre-requisite to the realisation of food sovereignty.[1511] It recognises that rural workers are particularly vulnerable to deprivations of subsistence needs from conflict, development projects and other forms of violence.[1512] While the emphasis on such experience of harms is welcome, the rural emphasis of the Movement does serve to exclude recognition of similar forms of violence and deprivations against other groups, particularly urban populations. Nevertheless, because the Movement emphasises the relationship between food production and access of wider society to food, it does, if implicitly, recognise relationships of violence and thus that attacks upon peasants may lead to lack of access to food amongst other groups.

In its first articulation of the concept of food sovereignty, La Via Campesina argued that 'Food must not be used as a weapon'. It went on to highlight that 'Increasing levels of poverty and marginalization in the countryside ... aggravate situations of injustice and hopelessness. The ongoing displacement, forced urbanization and repression of peasants cannot be tolerated'.[1513] The Movement therefore recognises that violations of food sovereignty are directly related to deprivations of subsistence needs which are also interrelated to civil and political forms of violence. For example, La Via Campesina has condemned the repression of peasants in Guatemala who have been demanding the adoption of food sovereignty approaches.[1514] This is significant in highlighting that, despite the

[1511] La Via Campesina, 'Food Sovereignty: A Future Without Hunger', n 1474 above.
[1512] See La Via Campesina, 'Violations of Peasants' Rights: A Report on Cases and Patterns of Violence' (2006) <http://www.viacampesina.org/main_en/images/stories/annual-report-HR-2006.pdf> accessed 15 November 2008.
[1513] La Via Campesina, 'Food Sovereignty: A Future Without Hunger', n 1474 above.
[1514] La Via Campesina, 'Violations of Peasants' Rights', n 1512 above.

country's "transition", violence based around subsistence needs has continued. Moreover, the continuing concerns of peasants in Guatemala, regarding access to livelihoods and basic resources, illustrates the problems of not attending to socio-economic grievances, despite the inclusion of socio-economic issues within the peace agreement, and of adopting mainstream development approaches.

The Movement acknowledges that lack of food sovereignty may be a cause of conflicts and violence, particularly in terms of struggles over the control of natural resources.[1515] This is significant given the general failure of legal discourse to engage with understandings of the relationship between resources, socio-economic grievances and open violence.[1516] The work of the Movement provides insights into actual grassroots experiences of such violence, through the campaigns of its members.[1517] The Movement recognises that armed conflict and disasters can provide the context for the perpetration of subsistence harms in terms of the dispossession of people from land and natural resources and prevention of the production of food through insecurity, displacement and destruction of livelihoods.[1518] La Via Campesina has highlighted that 'Many armed conflicts and wars are occurring in rural areas. Land grabbing and destruction of harvest are often being used as a weapon against civilian rural populations'.[1519]

The recent Declaration of the Parallel Forum to the World Summit on Food Security called 'attention to the violations of rights of people, both urban and rural, living in areas under armed conflict or occupation and in emergency situations'.[1520] The Declaration of the Parallel Forum was drafted by members of the Food Sovereignty Movement to challenge official debates during the 2009 World Summit on Food Security and to promote food

[1515] La Via Campesina, 'Food Sovereignty for Africa' n 1483 above.
[1516] On the role of grievances in conflict see again Stewart, n 1414 above; Ballentine and Sherman, n 1414 above.
[1517] La Via Campesina, 'Food Sovereignty for Africa', n 1483 above.
[1518] La Via Campesina, 'Mission to Palestine: La Via Campesina Demands Respect For Food Sovereignty' (2002) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=354&Itemid=29> accessed 2 December 2008.
[1519] La Via Campesina, 'Final Declaration of International Conference on Peasant's Rights' n 1483 above.
[1520] Declaration from Social Movements/NGOs/CSOs Parallel Forum to the World Summit on Food Security, n 1487 above.

sovereignty as an alternative model.[1521] The Declaration argued that the 'international community must urgently address violations of human rights like those related to forced displacement, confiscation and alien exploitation of property, land, and other productive resources, demographic manipulation and population transfers'.[1522] The Movement also has shown particular awareness of the deprivations of subsistence needs perpetrated in the conflict in the DRC where local populations have been forced from their livelihoods and thus been unable to produce food for themselves or their communities.[1523]

Importantly, the Movement is beginning to recognise how food sovereignty may be an important transformative strategy to empower survivors of violence or conflict and help to prevent its recurrence. By focusing on an empowering approach towards the right to food, the Movement may provide a model of societal transformation which would promote socio-economic concerns and thus play a role in minimising the risk of grievances re-emerging to fuel further violence. The emphasis on local autonomy and communal rights may be important in fostering solidarity amongst survivors and in doing so promote more long-term forms of reconciliation within a particular society, following violence and repression, and thus provide a crucial alternative to dominant transition strategies.

Considering the lack of similar approaches within the legal framework or legal discourse, the Movement's recognition of the widespread perpetration of deprivations of subsistence needs and the need to prevent their recurrence is highly significant. The 2007 Forum for Food Sovereignty argued that 'where food sovereignty is present communities and their production systems are better able to survive and recover including sourcing local foods to avert famine'.[1524] As such, the Movement is highly critical of the inappropriate use of humanitarian aid, which often involves the dumping of excess food produced by powerful states and agricultural companies.[1525] La Via Campesina has criticised the influx of humanitarian aid

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[1521] *ibid.*
[1522] *ibid.*
[1523] See La Via Campesina, 'Congo: Call for International Solidarity' (2008) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=648&Itemid=29> accessed 4 January 2009.
[1524] La Via Campesina, 'Food Sovereignty for Africa' n 1483 above.
[1525] *ibid.*

during the conflict in the DRC, which far from aiding local populations has contributed to 'the accelerated disappearance of peasant men and women, and of peasant agriculture'.[1526]

This criticism, therefore, highlights the problems of current approaches towards subsistence harms which do not address the real nature of the harm in terms of the loss of livelihoods and resources, but seek to provide short-term relief which is either insufficient or else may actually create further harm. As already argued, such aid can reinforce displacement, through the use of IDP camps, and can perpetuate the dependence and destitution caused by subsistence harms in the long-term.[1527] The recent Declaration of the Parallel Forum to the World Food Summit on Food Security further emphasised this issue arguing that while 'Governments have obligations to provide emergency aid ... this must not undermine food sovereignty and human rights. Emergency aid should be procured as locally as possible ... Food must never be used as a political weapon'.[1528]

The Movement also criticises the implementation of reconstruction strategies based on mainstream conceptions of development, which can act against the attainment of subsistence needs and help to generate further violence.[1529] The Movement has been particularly critical of the reconstruction strategies implemented in the wake of the Asian Tsunami, which have severely undermined traditional livelihoods and food sovereignty, and thus have led to deprivations of subsistence needs.[1530] The Movement has argued that 'Rehabilitation and reconstruction efforts in the affected areas should be undertaken only after ensuring that the sovereignty and future livelihood prospects of the victims and their organizations are

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[1526] La Via Campesina, Congo: Call for International Solidarity' n 1523 above.
[1527] B.E Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford: OUP, 1986); David Keen, *Complex Emergencies* (Cambridge: Polity Press, 2008) 130.
[1528] Declaration from Social Movements/NGOs/CSOs Parallel Forum to the World Food Summit on Food Security, n 1487 above.
[1529] NGO/CSO Planning Committee for Food Sovereignty Asia, 'Jakarta Declaration for Food Sovereignty: Asserting Our Rights Reclaiming Our Land and Culture' (2006) <http://www.foodsovereignty.org/public/documenti/2006%20Declaration%20of%20the%20IPC%20Asia%20Jakarta.doc.> accessed 9 November 2008.
[1530] Joint NGO Statement, 'Regional Conference on Rebuilding Peasants' and Fisherfolk's Livelihoods after the Earthquake and Tsunami Catastrophes' (2005) <http://www.icsf.net/icsf2006/jspFiles/tsunami/docs/rehabDocs/ind0402.doc.> accessed 10 November 2008.

guaranteed ... Rehabilitation and reconstruction efforts should always uphold the principle of food sovereignty, ensuring the delivery of safe and healthy food'. [1531]

This is an important critique, which recognises that deprivations of subsistence needs can be perpetrated in the aftermath of natural disasters, as seen in Burma following Cyclone Nargis.[1532] La Via Campesina argued that the 'rehabilitation work is often contributing or leading to human rights violations of peasants including fisher folk in coastal regions, coastal communities without rights to land and access to coastal resources and peasants evicted from their traditional lands'.[1533] This has also been the case in East Timor, where there have recently been popular calls and protests for food sovereignty.[1534] Food sovereignty is a particularly pertinent issue in East Timor, since a large percentage of the population rely on agriculture for their livelihood, and as noted above, rates of hunger and malnutrition have remained high in the post-independence era.[1535] Such calls are especially significant considering the recognition by CAVR of some forms of subsistence harms, but also its failure to promote redress for such harms.[1536] This suggests that there is a desire, among at least some survivors in East Timor, for post-conflict transitional strategies to redress subsistence harms and promote socio-economic concerns, but that this has yet to be taken seriously within transitional justice mechanisms or peace-building policies.

In addition, the 2007 Forum for Food Sovereignty has begun to discuss how engagement with international law may help to protect people in the wake of conflict and violence. The Forum discussed 'how to secure the benefits from legal frameworks that should maintain

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[1531] *ibid*

[1532] See EAT and JHU CPHHR, 'After the Storm: Voices from the Delta: A Report on Human Rights Violations in the wake of Cyclone Nargis' (2009) <http://www.reliefweb.int/rw/rwb.nsf/db900SID/ASAZ-7PRKLM?OpenDocument> accessed 2 May 2009; Amnesty International, 'Myanmar Briefing Human Rights Concerns a Month after Cyclone Nargis' (2008) AI Index: ASA 16/013/2008.

[1533] La Via Campesina, 'Violations of Peasants' Rights During the Rehabilitation of Tsunami' (2005) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=89&Itemid=40> accessed 15 November 2008.

[1534] La Via Campesina, 'East Timor: Protests Call for Food Sovereignty' (2007) <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=458&Itemid=38> accessed 15 November 2008.

[1535] World Food Programme, 'Timor-Leste Overview' <http://www.wfp.org/countries/timor-leste> accessed 27 July 2009; Ben Moxham, 'Market-imposed hunger adds to Timor misery'(2005) *Asia Times* <http://www.atimes.com/atimes/Southeast_Asia/GB16Ae02.html> accessed 26 June 2009.

[1536] CAVR Recommendations, n 1403 above.

biodiversity and provide compensation when the livelihoods of communities are intentionally destroyed ... especially for communities living with conflict, occupation or disaster'.[1537] The emphasis on compensation for livelihoods is particularly significant, given the failure of transitional justice mechanisms to provide sufficient reparations or other forms of redress for subsistence harms. The Movement proposes compensation to communities, which may be important in promoting collective forms of reparation.[1538]

The work of the Movement could potentially promote greater awareness of the need to redress livelihood issues, perhaps partly through the use of collective forms of reparations. However, the Movement's emphasis on food sovereignty approaches and critique of mainstream development policies would provide a very different approach to the current use of reparations within transitional justice. Indeed, transitional justice approaches have so far shown a tendancy to merge collective reparations with mainstream development, which may act to perpetuate existing marginalisation of certain groups and individuals and act against their attainment of subsistence needs. Food sovereignty approaches would instead emphasise collective reparations as a way of promoting and fulfilling the aims of food sovereignty against the imposition or continuation of mainstream development policies, in order to attempt to empower communities.

The early stage of the discussions begun at the 2007 Forum means that the Movement has yet to define clear policies regarding how to address deprivations of subsistence needs in the context of open violence and how food sovereignty may be implemented as a key transformative strategy. However, the fact that the Movement is beginning to discuss these issues should not be dismissed, and, given the significance of its alternative vision of law relating to food sovereignty, the Movement may provide some interesting ways of understanding subsistence harms, violence and the law in the future. Therefore, once the Movement has developed its ideas within this area, there will need to be further analysis of the merits of food sovereignty as a transformative strategy.

[1537] Forum for Food Sovereignty, 'Theme 5. Conflict and Disaster: Responding at Local and International Levels' (2007) Nyéléni Conference <http://www.nyeleni2007.org/spip.php?article112> accessed 9 November 2008.

[1538] Lisa Magarrell, 'Reparations in Theory and Practice' (2007) International Center for Transitional Justice Reparative Justice Series <http://www.ictj.org/static/Reparations/0710.Reparations.pdf.> accessed 20 April 2008.

The concept of food sovereignty is undoubtedly gaining some recognition within international discourse and most notably the concept has been discussed and endorsed within one of the Reports of the Special Rapporteur on the Right to Food, as a possible alternative to the problems and inequalities of the current global trade system.[1539] While, the concept has yet to be employed within the Food and Agriculture Organization and other UN agencies, and has for obvious reasons been ignored by the IFIs, the concept has been included in Nepal's Interim Constitution as a fundamental right of all citizens.[1540] The Constitution establishes the right of all citizens 'to education, health, housing, employment and food sovereignty'.[1541]

Social movements in Nepal have played a key role in promoting the concept of food sovereignty as a way of responding to the aftermath of recent conflict and to address long-standing concerns regarding inequality and lack of access to subsistence needs.[1542] At present, the Nepalese Government is showing some adherence to the concept of food sovereignty. As the Nepalese Minister for Agriculture has recently stated, 'It is our view that people's right to food can be ensured only if four aspects of food sovereignty are properly addressed: availability, supply, access, and consumption. The glaring gaps among these constituents need immediate attention to address vulnerabilities'.[1543] However, given that specific policies regarding the implementation of the right to food sovereignty have yet to be framed, such a right at present may be largely symbolic.[1544] While the inclusion of the concept and language of food sovereignty is highly significant, the issue remains whether there is any political or legal will to implement and enforce food sovereignty approaches.

[1539] Special Rapporteur on the Right to Food, Report submitted by the Special Rapporteur on the Right to Food, Jean Ziegler, in accordance with Commission on Human Rights Resolution 2003/25 (9 February 2004) E/CN.4/2004/10.

[1540] Interim Constitution of Nepal 2063 (2007) Part 3, Art. 18.

[1541] *ibid*, Part 4, Art. 33(h).

[1542] Keshab Khadka, *Food Sovereignty as Peoples' Fundamental Right: Nepalese Perspective* (Kathmandu: All Nepal Peasants' Association, 2005).

[1543] Address by the Honourable Mrigendra Kumar Singh Yadav, Minister for Agriculture and Cooperatives of the Federal Democratic Republic of Nepal and the leader of the Nepalese delegation at the World Summit on Food Security held in Rome, Italy, on 17 November 2009 <http://www.fao.org/fileadmin/templates/wsfs/Summit/Statements_PDF/Tuesday_17_PM/48_Nepal_Speech_171109_PM.pdf> accessed 5 February 2010.

[1544] La Via Campesina, 'Nepal: Defend Food Sovereignty, Agrarian Reform and Peasants' Rights! Impressions from the International Conference in Nepal', 28 September 2007 <http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=448&Itemid=38> accessed 16 November 2009.

The increased international recognition of the concept of food sovereignty therefore opens up some interesting issues which have significant implications for addressing subsistence harms in the long-term. The growth and spread of the concept globally through transnational political mobilisation, to include many different organisations and individuals within a wide range of countries including in the West, illustrates the fact that issues of subsistence needs and food sovereignty approaches are of considerable and widespread concern. Moreover, it illustrates the deficiencies of current human rights law regarding its failure to address socio-economic grievances. However, the very success of the Food Sovereignty Movement in drawing on and interpreting human rights also raises issues of whether the concept is compatible with current human rights law and whether the term may be misappropriated by states and international organisations, so as to lose its essence and power.

The Special Rapporteur on the Right to Food has recognised that the right to food 'provides an important legal basis for the fight for food sovereignty'.[1545] However, since the concept of food sovereignty rejects the individualistic and state-centric models of human rights law it may require some wider reconceptualisation of human rights.[1546] It could be argued that so-called "third generation rights" provide a more compatible framework of rights for the Food Sovereignty Movement to draw on, as they tend to emphasis more collective understandings of rights and are less focused upon the state.[1547] However, as Rajagopal highlights, with regard to the right to development, such rights are still fundamentally associated with the state-centric model and have done little to challenge the dominant framework of human rights.[1548] Clearly, the right to food provides an important legal authority for promoting food sovereignty. However, by drawing on the right to food, which is essentially conceptualised by law in a traditionally narrow way, food sovereignty approaches need to ensure that they do not become caught up in such restrictions. As already argued, the key concepts of rights

[1545] Special Rapporteur on the Right to Food, n 1439 above.
[1546] For discussion of the way in which many social movements reject the individualistic and state-centric models of human rights law see Rajagopal, n 1384 above, 199.
[1547] For a discussion of "third generation" rights and how they relate to civil/political and socio-economic rights see Carl Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22 *Human Rights Quarterly* 639.
[1548] Rajagopal, n 1384 above, 222; General Assembly, Declaration on the Right to Development, 4 December 1986, A/RES/41/128.

inherent in the law inevitably pose limits to the extent to which the law can be broadened or transformed.[1549]

Recently, within its 'Declaration of Rights of Peasants – Women and Men', the Food Sovereignty Movement has begun to demand the need for a peasants' rights convention. It has argued that the gaps in the current human rights system serve to undermine the rights of peasants and rural workers, which necessitates a separate convention to address these rights, as well as to ensure the right to food for all.[1550] While the Movement argues that ensuring the rights of peasants would ensure access to food for all, the narrow scope of the Movement regarding its focus on small farmers does need to be acknowledged. Therefore, there remains an issue over whether there would, in fact, be a tension between peasants' rights and the rights of other marginalised groups.

The Declaration articulates a model for a peasants' rights convention, which it argues should provide the basis for the proposed convention that could be elaborated on by the UN, hopefully with the full participation of La Via Campesina and other representatives of civil society.[1551] The Declaration draws on the structure of the UN Declaration on the Rights of Indigenous Peoples and reaffirms existing human rights such as the rights to life, to an adequate standard of living as well as civil and political rights such as freedom of association.[1552] In addition, it articulates new forms of rights including the right to land and territory (Art. IV); the right to seeds and traditional agricultural knowledge and practice (Art. V); the right to protection of local agricultural values (Art. IX) and the right to preserve the environment (Art. XI).

By campaigning for the legal mechanism of a convention, the Movement is therefore actively seeking to develop, but also to challenge, the current framework of international human rights law. While drawing on existing rights, the Movement is also attempting to promote a move

[1549] Upendra Baxi, 'Politics of Reading Human Rights' in Saladin Meckled-García and Başak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Oxford: Routledge, 2006) 184.
[1550] La Via Campesina, 'Declaration of Rights of Peasants - Women and Men', n 1470 above.
[1551] *ibid.*
[1552] *ibid.*

beyond the current, narrow framework of human rights law. The new forms of rights which the Movement articulates not only seek to broaden the legal framework but to introduce new concepts grounded in the notion of food sovereignty. Thus, the Movement's vision of communal autonomy is promoted through its articulation of rights involving traditional practices and local values and its long-term vision of rights is promoted through the right to preserve the environment. In this way, the Declaration draws on the language of rights and the model of existing legal conventions, but does so in order to promote rights which challenge traditional legal conceptualisations. In particular, it challenges existing concepts by emphasising communal control over land and livelihoods, in opposition to current development policies, rather than an individualistic or state-centric model, which has often served to uphold such policies.[1553]

Using the language of law provides a crucial tool for the Food Sovereignty Movement to make its demands. However, in adopting such language and reaffirming existing rights, there is the danger that the Movement may undermine its challenges to law. Moreover, while using the language of law may enable the concept of food sovereignty to be amenable to legal discourse and analysis and thus to potentially influence law in the future, this also poses considerable issues which need to be acknowledged. The Movement's positioning of food sovereignty concerns as rights has enabled these concepts to come to the attention of some UN structures and personnel.

Significantly, the Declaration on the Rights of Peasants has been acknowledged and supported by the Human Rights Council Advisory Committee in its Report on 'Discrimination in the Context of the Right to Food'.[1554] This illustrates the significance of social movements in having the potential to influence international law "from below".[1555] The Advisory Committee has stated that 'One of the most important new developments in the protection against discrimination in the context of the right to food was the adoption of the Declaration on the Rights of Peasants – Women and Men by La Via Campesina ... it is time

[1553] *ibid.*
[1554] Human Rights Council Advisory Committee, 'Discrimination in the Context of the Right to Food' 15 January 2010, A/HRC/AC/4/2.
[1555] Rajagopal, n 1384 above.

to undertake a preliminary study on the significance and importance of a possible new instrument on the rights of peasants and other people living in rural areas'.[1556]

While it is significant that food sovereignty approaches are gaining some acknowledgement within some UN structures, it remains questionable whether this will mean that law and legal mechanisms will ultimately be responsive to such alternative approaches, given the narrow framework of law and its traditional conceptions of harms and rights. The Movement needs to ensure that such support by the Human Rights Council Advisory Committee for a peasants' convention does not serve to diminish the force of its alternative understanding of rights. If the Movement is not careful, its alternative visions of law may be misappropriated and institutionalised, so as to lose much of the inherent value.[1557] Human rights practitioners may in time begin to pay lip service to the concept of food sovereignty without fundamentally rethinking concepts of human rights that are incompatible with food sovereignty approaches. Unless law is interpreted in a way consistent with the alternative vision of rights and harms promulgated by social movements, the use of the law by these movements may present problems in perpetuating the conceptual limitations of the existing legal framework regarding the recognition of harms and underlying grievances.

The issue of recognition of subsistence harms by the Movement is therefore caught up in this relationship with law. Food sovereignty approaches do potentially provide crucial alternative approaches to issues of societal transformation through addressing long-term impacts of harms and underlying socio-economic grievances. However, if these alternative visions of law are restricted and institutionalised, then this may limit the ability of such understandings of rights and harms to fully capture and recognise subsistence harms and to provide long-term ways of addressing and potentially preventing these harms. Therefore, it must be remembered that law is resistant to influence "from below" and can impose conceptual and institutional restrictions which may limit the significance of alternative visions of law.[1558] However, such realisations of the restrictions of law should not be used to reject the work of social movements or view them as insignificant. Ultimately, the use of alternative visions of

[1556] *ibid*, 20.
[1557] de Sousa Santos and Rodríguez-Garavito, n 1463 above, 17; Rajagopal, n 1384 above, 10; Stammers, n 1460 above.
[1558] Stammers, n 1460 above.

law can provide crucial forms of recognition of subsistence harms beyond the conceptual boundaries of law and could potentially begin to influence international legal discourse, at least to some small degree.

Conclusion

The chapter has argued that addressing subsistence harms and underlying socio-economic concerns and grievances in the long-term can and should be within the remit of law. Socio-economic rights, though often problematic in themselves, could play some role in placing such concerns on the transitional justice agenda. At present law plays a very limited role in addressing subsistence needs both within the "justice" phase and in the longer-term. The concept of transitional justice suggests that law's role is temporal and that it is only concerned with the "justice" phase within a short-term transition strategy. While the concept of peace-building is more long-term and does include human rights to some degree, subsistence needs and socio-economic rights issues are frequently left off the peace-building agenda. The failure to address these issues could be particularly dangerous given the role socio-economic grievances and economic benefits of conflict play in generating and fostering further violence.

Law can begin to play a more significant role in societal transformation, particularly through socio-economic rights and should do so not only in regard to post-conflict situations but also "peacetime" situations of political repression or widespread discrimination. While socio-economic rights remain problematic regarding their ability to fully recognise subsistence harms, such rights could play a role in beginning to addressing long-term concerns. Socio-economic rights can legitimise and provide a language, as well as domestic legislation, for survivors' organisations to mobilise around and frame their demands. Indeed, the example of the Food Sovereignty Movement shows that social movements rely on the existence of socio-economic rights to frame their concerns. Social movement activism is crucial in countering the use of socio-economic rights as a token gesture within peace-building strategies, which are otherwise based upon implementing conventional, neoliberal understandings of development. The Food Sovereignty Movement provides significant insights into and

critiques of the current conceptualisation of human rights and, in doing so, a space for the recognition of some of the elements of subsistence harms.

The example of the Food Sovereignty Movement has illustrated alternative visions of human rights which recognise the communal nature of human subsistence and the importance of addressing underlying socio-economic grievances. The Movement's interpretation of rights in terms of local autonomy, its critique of the predominantly individualistic and state-centric approach of law and of dominant understandings of food and basic resources as constituting property, provides a model of human rights which would be far more suited to addressing subsistence harms. While subsistence harms and their long-term impacts clearly cannot be addressed through the concept of food sovereignty alone, due to the narrow focus of the Movement on issues of food production, the concept could provide a framework for recognising and addressing some of the aspects and consequences of subsistence harms. The food sovereignty Movement is only one social movement, further research therefore needs to be conducted in the future in order to analyse whether other social movement praxis may provide insights into ways of recognising subsistence harms.

As highlighted above, the concept of food sovereignty is beginning to enter mainstream discourse. While this is certainly to be welcomed, there is the danger that law could fundamentally restrain the concept, so as to absorb it into the current legal framework. This should not be allowed to happen; rather the recognition of the concept of food sovereignty within law requires a concomitant rethinking of some of the core concepts of human rights law. The growth and proliferation of social movements in reaction to globalisation and current boundaries of international law illustrates the significance of such movements and the need for international law to be far more responsive to social movement action if it is to address and redress the experience and perpetration of subsistence harms and underlying forms of violence.[1559] Social movements do not in any way provide a solution to subsistence harms, but they do provide important challenges to some of the conceptual boundaries within international law which prevent recognition of these harms. As such, they play an important role both in providing alternative spaces for the recognition of subsistence harms and in

[1559] Rajagopal n 1384 above, 23.

challenging law in the future to possibly rethink some of these conceptual boundaries, so as to further recognise these silenced harms.

Concluding chapter

1) Subsistence harms and legal recognition: bringing the arguments together

The thesis has argued that understanding the nature of human subsistence and the concept of subsistence harms is central to perceiving the significance of these harms and the failure of international law to fully recognise them. The concept of subsistence harms has extended previous understandings of subsistence, going beyond economic and material concerns to emphasise the physical, mental and social elements of human survival. Moreover, in tying the concept of subsistence to that of harms, the thesis has defined deprivations of subsistence needs as a discrete type of violence centred on attacking or totally disregarding human subsistence. The term includes an understanding of both the perpetration and experience of these harms and emphasises a holistic understanding of the interrelationship of physical, mental and social aspects of human subsistence needs. The understanding of the gendered nature of these harms and their disproportionate impact on women is also crucial in highlighting subsistence harms as a significant and prevalent form of gendered harm. Essentially, this understanding of subsistence harms illustrates the inherent limitations of legal concepts of harm and current definitions of international crimes and human rights.

The research in chapter 1 has shown the widespread perpetration of subsistence harms, both throughout history and within contemporary contexts. It has illustrated that there are clear continuities in the use and experience of subsistence harms in terms of the continued employment of strategies based on scorched-earth policies, removal from homes and livelihoods and the use of camp situations. However, it also documented key changes in recent conflict and forms of discrimination, in relation to the development of new technologies, such as herbicides, and political/economic situations, in particular those associated with the rise and fall of communism and the post-Cold War shifts in military funding. These changes have allowed subsistence harms to be perpetrated on a wider scale and rendered subsistence harms a particularly potent weapon of contemporary conflict and repression. The shift towards the prevalence of non-international conflict has meant that

recent conflicts have increasingly been centred on attacking civilians, often through the widespread perpetration of subsistence harms, which allow conflicts to be funded cheaply and for perpetrators to reap the benefits of land and livelihoods.

Despite the prevalence of subsistence harms throughout history, and the fact that such shifts arguably have rendered these harms all the more significant in contemporary situations, international law has yet to seriously address such violence. Indeed, law has manifested some degree of tolerance for subsistence harms. Therefore, while the thesis has argued that subsistence harms can and should be a matter for law, it has also analysed some of the profound tensions between law and the recognition of subsistence harms. The arguments within the various chapters have highlighted both the potential of international law to recognise and condemn violence, but also law's narrow conceptualisation of harm and justice and its complicity in the silencing of certain harms.

Examining the performance of recognition in different legal mechanisms was important in highlighting the different forms of recognition, such as truth-telling, accountability and redress, which they could provide regarding subsistence harms. Moreover, the performance of recognition within legal mechanisms could serve to influence further recognition of these harms within the legal framework, through interpretation of the law. However, the analysis of the treatment of subsistence harms within legal mechanisms highlighted some developments in the recognition of these harms, but argued that such developments remain limited due to the restrictions of the legal framework and the ongoing impact of traditional conceptualisations of serious harm.

While there were some developments in regard to deprivations of subsistence needs within the case law of international criminal tribunals, this did not significantly challenge understandings of existing offences so as to reflect the perpetration and experience of subsistence harms in and of themselves. The approach of the ICC Prosecutor in the *Al Bashir* case presents some hope that these harms may begin to be taken seriously.[1560] Nevertheless,

[1560] Office of the Prosecutor, 'Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir', 14 July 2008.

even then, the current framework does not permit a comprehensive understanding of subsistence harms and fails to reflect their often gendered nature. Moreover, the Prosecutor's approach towards subsistence harms so far has been inconsistent, in terms of silencing and sidelining these harms within the other situations and cases before the Court.[1561]

While truth commissions have the potential to provide truth-telling, reconciliation and some form of redress regarding subsistence harms, they have also largely marginalised or silenced these harms. Such silencing raises serious doubts over the claims of truth commissions to promote truth-telling and reconciliation in general. Again the framework of international law and traditional conceptualisations of harm have restricted the scope of truth commissions' investigations leading to the sidelining of subsistence harms. This is most clearly illustrated in the approach of the South African TRC, which focused on physical integrity harms and silenced the perpetration of subsistence harms and the existence of underlying socio-economic grievances.[1562]

However, while the work of CAVR represents a significant development in the recognition of at least some aspects of the subsistence harms perpetrated in East Timor, it did not address the gendered nature of these harms or sufficiently recognise their mental and social aspects. Moreover, its approach towards reparations perpetuated the traditional hierarchy between physical integrity harms and deprivations of subsistence needs.[1563] Thus, within many

[1561] For analysis of deprivations of subsistence needs perpetrated in these other situations see again Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda' (Report) (2005) <http://www.hrw.org/en/reports/2005/09/19/uprooted-and-forgotten-0> accessed 2 April 2009; Human Rights Watch, 'Abducted and Abused: Renewed War in Northern Uganda' (Report) (2003) <http://www.hrw.org/en/reports/2003/07/14/abducted-and-abused-0> accessed 2 April 2009; International Crisis Group, 'The Congo's Transition is Failing: Crisis in the Kivus' (Report) 30 March 2005 <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/091-the-congos-transition-is-failing-crisis-in-the-kivus.aspx> accessed 8 October 2008.; Human Rights Watch, 'Central African Republic, State of Anarchy: Rebellion and Abuses Against Civilians' (Report) (2007) <http://www.hrw.org/en/reports/2007/09/13/state-anarchy> accessed 5 April 2009.

[1562] On the silencing of socio-economic issues see Mahmood Mamdani, 'The Truth According to the TRC' in Ifi Amadiume and Abdullahi An-Na'im (eds) *The Politics of Memory: Truth, Healing and Social Justice* (London: Zed Books, 2000) 176.

[1563] Lia Kent, 'Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process' Judicial System Monitoring Programme (2004) <http://www.cavr-timorleste.org/otherFiles/Lia%20Kent_Report.pdf> accessed 20 November 2008.

situations where truth commissions have operated, the perpetration and ongoing impact of subsistence harms remains a source of grievances and suffering.[1564]

The thesis has argued that wider contexts of socio-economic violence and grievances need to be recognised by law in order to address the perpetration and experience of subsistence harms. Rather than reifying victim/perpetrator identities and focusing primarily on political and cultural violence and grievances, transitional justice also needs to acknowledge and begin to address the socio-economic causes of marginalisation and the gendered elements of this. The thesis, therefore, has argued for a more comprehensive understanding of transitional justice which advocates longer-term responses to harm and addresses not simply "crisis" situations, but also ongoing violence. However, even given such a broader understanding of the aims of "transitional" justice, there are limitations to the scope of international criminal tribunals and truth commissions and what they can be reasonably expected to achieve.[1565]

The critical approach of the thesis has enabled it to look outside of conventional law in order to analyse alternative uses of law and illustrate the importance of further engagement by legal practitioners and scholars with non-governmental tribunals and social movements. Alternative understandings of law stemming from non-governmental and social movement praxis play a key role in voicing and recognising subsistence harms and underlying grievances. The thesis has not sought to argue that these alternative spaces for recognition provide a solution to the recognition of subsistence harms, since both non-governmental tribunals and social movements remain limited in the scope of their action and what they can be expected to achieve.

While non-governmental tribunals provide a space for the voicing of harms ignored or silenced by conventional law, they may be limited in their ability to reach survivors and can provide little in the way of redress for harms experienced. Similarly, social movements may

[1564] See Penelope E. Andrews, 'Reparations for Apartheid's Victims: The Path to Reconciliation?' (2004) 53 *De Paul Law Review* 1155, 1164; Joseph Nevins, 'Restitution over Coffee: Truth, Reconciliation and Environmental Violence in East Timor' (2003) 22 *Political Geography* 677.

[1565] Derek Powell, 'The Role of Constitution Making and Institution Building in Furthering Peace Justice and Development: South Africa's Democratic Transition' (2010) 4(2) *International Journal of Transitional Justice* 1, 19.

focus on one particular issue of concern or on particular groups within society and thus only partially address the complex issues surrounding subsistence harms. Nevertheless, in using and reframing law, they can provide alternative understandings of harm and justice which challenge the "crime of silence".[1566] Such alternative understandings allow for the recognition of harms beyond conventional legal mechanisms and also may provide possible frameworks for influencing law "from below" in the future.

However, this is where the tension between law, recognition and subsistence harms again becomes apparent. While alternative visions and framings of law can be used to lobby for changes to international law, law resists such reframing through the dominance of conventional conceptualisations of harm and current frameworks of rights and crimes. The use of law by non-governmental tribunals provides important challenges to conventional law. However, at the same time law can restrict the work of non-governmental tribunals which attempt to place silenced harms within the problematic framework of existing law. Moreover, while social movement praxis challenges and redefines legal understandings of harms and rights, the ability of such praxis to truly influence law "from below" remains open to question.

While law may be responsive to some change "from below", legal institutions and discourse may absorb alternative framings of law into the current legal framework, such that efforts at influencing law to recognise silenced harms and rights "from below" become diluted to some extent. Therefore, while social movements seek to promote some legal recognition of subsistence and other silenced harms through their alternative visions of harms and rights, such efforts may continue to be marginalised to some degree by the dominant legal framework.

[1566] On the work of social movements and their alternative visions of law see Neil Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 *Human Rights Quarterly* 980; Boaventura de Sousa Santos and César A. Rodríguez-Garavito, *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 15; Sally Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29 *Law & Society Review* 11.

The research and arguments of the thesis therefore raise many more questions than it can answer. Essentially, there is not an easy solution to the issue of subsistence harms and their relationship to law. The thesis' analysis of existing legal mechanisms and of unofficial mechanisms or movements has illustrated that there remain considerable barriers to the full recognition of subsistence harms due to the very nature of law. The issue of recognition of subsistence harms through law must be acknowledged to be complex and, at times, paradoxical. This should not mean that law should be rejected as a means of recognising harms. Law remains important, both as a source of recognition in itself and in terms of the language it provides for alternative forms of recognition outside of legal institutions. Rather, the thesis argues that if subsistence harms are to be addressed, law should be used to do so, but at the same time there needs to be awareness of the potential pitfalls of legal approaches. While the thesis has not been able to offer a simple solution to the issue of subsistence harms its research and arguments have sought to contribute to international legal and interdisciplinary discourse in this area. Since the existing international legal literature has tended to ignore or sideline issues of deprivations of subsistence needs, the thesis, hopefully, will contribute to developing a discourse in this area.

Within the thesis, there was a conscious decision not to examine in detail the possible framework of any changes to the law to further recognise subsistence harms. Essentially, this would both be beyond the scope of the thesis and may also be contrary to the norms and ethos of the research. Suggesting a legal solution may end up closing off other possibilities, rather than fostering an holistic understanding of ways to recognise and address harms. Moreover, legal change may suggest a "top-down" approach, which considering the importance of civil society involvement in the recognition of subsistence harms, could be particularly problematic. The next section will look at possible avenues for future research building on the foundations provided by this thesis. It will examine legal change as one possible area of such research, but will argue that while legal changes may at first seem desirable, there are many issues which would need to be addressed and pitfalls to be avoided.

2) Avenues for further research regarding the recognition of subsistence harms

Given the paucity of existing literature regarding the position of deprivations of subsistence needs within international law, there are many potential areas of future research to further develop the work of the thesis. This section will therefore briefly discuss some significant areas of research, which may be suggested and promoted by the work of the thesis. One possible direction is examining the potential development of international criminal law to further recognise these harms. The thesis has argued that while international law does not completely ignore subsistence harms the existing recognition is both partial and fragmented, which suggests the need for a more integrated framework regarding subsistence harms. Essentially there could be two main avenues for legal change so as to recognise subsistence harms more comprehensively: either there could be developments through case law interpretations of existing offences so as to further include subsistence harms, or a new convention could be proposed in order to define subsistence harms as a particular category of international crime.

As already shown, the existing case law is restricted by the very nature of the current framework, meaning that while there may be some developments regarding the recognition of deprivations of subsistence needs, this is unlikely to lead to comprehensive recognition of these harms. On the other hand, the idea of a new convention on subsistence harms, in theory at least, presents more possibilities for transcending the limitations of the current framework. A new convention on subsistence harms would undoubtedly highlight the significance of these harms and thus serve a powerful normative function. It would not only recognise subsistence harms as constituting a particular and heinous form of violence, but in doing so would condemn perpetrations of these harms and send out a powerful signal that they were no longer tolerated within international law.

Therefore, the purpose of a new convention would be to propose an integrated framework for subsistence harms, which promoted a more comprehensive recognition of this type of violence, as a discrete harm. As a minimum, a new convention on subsistence harms would need to be centred on the physical, mental and social aspects of deprivations of subsistence needs and reflect the gendered nature of these harms. A new convention may also reflect

different levels of subsistence harms in terms of their gravity and the potential impact on survivors. These levels could be based on the *mens rea* of the perpetrator and also the possible impact of the harms upon victims/survivors. The issue of the *mens rea* for subsistence harms remains a possibly contentious issue. As argued, a *mens rea* of intent would in many cases preclude successful prosecution of these offences. A new convention would therefore need to be based on a lower *mens rea* requirement of knowledge or perhaps advertent recklessness. However, given the emphasis on intent within the existing core crimes, there may be considerable legal opposition to defining an international crime in such a way.

As mentioned above, there is a need for caution regarding the suggestion of a new convention, in terms of how it is conceived and by whom. Conventions in international law usually follow a "top-down" approach which may again reflect traditional understandings of harm and thus fail to encompass the nature of subsistence harms, their relationship to underlying socio-economic grievances and the long-term needs of survivors. However, this does not necessarily always need to be the case, as seen in the example of the Food Sovereignty Movement approach, which has drafted and promoted its own convention on peasants' rights (although obviously this has yet to be adopted by the UN or ratified by states). If a new convention were to promote the aims of the thesis in fully recognising subsistence harms and their relationship to long-term socio-economic concerns, then there would need to be considerable legal engagement with social movement activism and other civil society groups such as local NGOs. Any proposal for the development of the law regarding subsistence harms would require significant thought and consultation with grassroots movements, legal practitioners, states and UN agencies, which goes far beyond the scope of this thesis.

However, it is questionable whether international law has the ability to address underlying socio-economic issues which are central to the perpetration of subsistence harms. Thus, whether it is conceivable in the near future that a convention could be drafted and ratified which addressed all the issues surrounding subsistence harms, and thus captured the nature of these harms, is questionable. Clearly, to be legally binding, a new convention would require widespread state ratification. It is difficult to perceive any legal or political will to transcend

the framework of the core crimes at present. Considering the widespread perpetrations of subsistence harms, it is unlikely that many states would be willing to bind themselves to such a convention, when they are often perpetrators of such crimes themselves, or at least are complicit in their perpetration. This does not mean that there is no possibility of a new convention being signed, but that it is unlikely, given the general lack of recognition of these harms inside and outside legal discourse.[1567]

While the use of "soft law" documents may be one way in which attention can be drawn to the issue of subsistence harms, there would need to be caution regarding such measures. As seen with regard to the problems of the Voluntary Guidelines on the Right to Food or the Guiding Principles on Internal Displacement, such documents draw overly on existing law and thus perpetuate many of its problems.[1568] Moreover, there is the danger that using "soft-law" documents may prevent the development of legally binding documents in the future. Therefore, the issue of legal reform regarding subsistence harms raises many complex issues, which could be explored in future research.

Another area of future research that could be further developed and which fits closely with the critical approach of the thesis, is the issue of how social movement activism may be able to address long-term issues regarding subsistence harms and some of the harms which fall below the gravity threshold of international criminal law. The work of the Food Sovereignty Movement has illustrated the relevance of some social movement activism to subsistence harms and underlying socio-economic grievances. Nevertheless, this is only one movement amongst many. Future research could therefore look in more depth at how social movements are recognising subsistence harms and underlying grievances, both at a grassroots level, but also through transnational campaigns. While there is already extensive literature on social movements and international law, further research on social movements in relation to

[1567] See Marcus' article which discusses the possibility of a new convention on famine crimes. David Marcus, 'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245, 281.
[1568] United Nations, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted pursuant to Commission Resolution 1997/39, 11 February 1998, E/CN./1998/5/Add.2, at 3.

subsistence harms may contribute to this literature by providing an understanding of the specific way in which social movements promote recognition of these, and related, harms.[1569]

Ultimately, the lack of legal research within the area of subsistence harms means that much more research is needed on these harms. The thesis has hopefully provided a foundation and platform for such research within international legal discourse. Fundamentally, there needs to be much more awareness within international law of the issue of subsistence harms: how and why they are perpetrated, who is most affected and the long-term impacts of these harms. Throughout many places across the world, subsistence harms are being perpetrated and experienced as this thesis is written. It is therefore crucial that law begins to recognise these harms. Although law clearly cannot, on its own, address the reasons for and the impact of these harms, it could provide a first step towards recognising deprivations of subsistence needs as harms, rather than as "indirect" or unforeseen consequences of physical integrity harms or indeed as the results of "natural" disasters. The "crime of silence" must be challenged by legal scholars, as it has been by some non-governmental tribunals and social movement activism.

This requires an understanding not only of the use and power of law to name harms but also of the complicities and inherent limitations of law and the current legal framework. Enlarging the scope of transitional justice towards a greater emphasis on socio-economic issues may play a role in promoting greater engagement with subsistence harms and underlying grievances.[1570] However, the nature of law means that legal recognition will only ever provide a partial recognition of the various forms of subsistence harms and of their long-term impacts on survivors. Acknowledging these issues may in itself provide an important starting point towards addressing subsistence harms, which will remain a complex and ongoing journey, but one on which law and legal discourse should begin to embark.

[1569] Stammers, n 1566 above; de Sousa Santos and Rodríguez-Garavito, n 1566 above, Merry, n 1566 above; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

[1570] Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development' (2007) 10 *Yale Human Rights and Development Law Journal* 141; Powell, n 1565 above, 6-7.

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