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Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?

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Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?

Larissa van den Herik*

1. Introduction

The last two decades witnessed the spectacular promotion of international criminal law as a new sub-discipline of international law. The human rights movement constituted one of the strongest forces in this rise.[1] For instance, as is well-known, it was a vigorous advocate in the campaign for a permanent International Criminal Court (ICC). In this dynamic, the ICC was perceived as an additional enforcement mechanism to address the most severe human rights violations. The involvement of human rights activists as driving forces in the ICC's establishment is illustrative of the close synergies that undeniably exist between human rights law and international criminal law. The historical kinship between international criminal law and human rights law has even led some scholars to claim that the sub-disciplines are both part of the same family of rules directly concerned with individuals.[2]

It is true that international criminal law and international human rights law share significant existential traits. Yet, the articulation between international criminal law and human rights law seems rather one-sided. International criminal law is primarily concerned with violations of civil and political rights. More concretely, the right to life and the right to physical and mental integrity are the central values shaping the register of international crimes. Economic, social and cultural rights have, so far, less directly inspired the development of international criminal law, if at all. The bias against socio-economic and cultural rights might be explained by the traditional conceptualization of this generation of human rights as having the character of programmatic aspirations rather than justiciable rights. In a related vein, economic, social and cultural rights are often characterized as entailing obligations of result rather than obligations of conduct.

Taking into account the alleged limited normative substance of economic, social, and cultural rights, this chapter seeks to revisit the theoretical explanation for the disconnect between international criminal law and economic, social and cultural rights. It addresses the following questions: Does the special character of socio-economic and cultural human rights render them less easily reconcilable with the strict *mens rea* requirements that pervade international criminal law, or are socio-economic and cultural human rights less susceptible to international criminalization for another reason? Does the overall non-criminalization of violations of cultural

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[1] W.A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 397.

[2] Sir R. Jennings, 'The Role of the International Court of Justice', 68 *British Yearbook of International Law* 58 (1997).

and socio-economic rights in fact display a hidden sense of hierarchy despite the lofty promises of Vienna 1993? In grappling with these questions, this chapter explores concrete examples and case scenarios in which international crimes prosecution could have a socio-economic or cultural dimension. This exercise will also identify limits of the current international crimes-catalogue in respect of redressing second generation rights. The chapter concludes with some thoughts on the instrumentality of international criminal justice as a means to protect economic, social and cultural rights.

2. The Kinship between International Criminal Law and Human Rights Law

International criminal law and human rights law are two normative fields of international law that share core values in regard to human dignity and the autonomy of the individual. In contrast to other chapters of international law, such as treaty law or trade law, these two fields of law are primarily concerned not with relations between States but rather with the individual. The identification and rise of the individual as a new participant in international law was a reactionary movement that gained force in the aftermath of World War II. As both human rights law and international criminal law were part of this movement, it can be said that the two areas of law "have a common base".[3] However, while human rights have been steadily developed on the basis of post-war treaties and instruments, international criminal law came to a virtual standstill after the Nuremberg and Tokyo spectacles. Only in the 1990s – after the end of the Cold War – was this field of law reactivated with the foundation of the *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and eventually, the permanent International Criminal Court. In its revival, international criminal law was seen as a renewed promise to punish severe human rights violations that could potentially fill the gap of effective enforcement. Indeed, the Preamble of the Rome Statute evidences that ending impunity was one of the ICC's foundational values.[4] Yet the precise relationship and interaction between human rights law and international criminal law is both complex and elusive and, in fact, has morphed over time as international criminal law matured and its criminal law-characteristics became more prominent.[5]

Although international criminal law is seen by some as the ultimate mechanism for ensuring compliance with human rights, and therefore, in fact, an extension of it, the ways in which the individual is central to both fields of law are diametrically opposed. Human rights places obligations on States to treat individuals well. International criminal law, on the other hand, identifies the individual behind the State with the aim of prosecution. This takes place on the basis of the Nuremberg maxim that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[6] This dichotomy of the two fields of law is further complicated by the fact that international criminal law itself is founded on a paradox whereby

[3] R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure)*, Cambridge University Press, 2nd ed., 2010, p. 13.
[4] 4th paragraph of the Preamble of the ICC Statute.
[5] On the nature of international criminal law and its relationship to human rights law, see generally, A. Clapham, 'Three Tribes Engage on the Future of International Criminal Law', 9 *Journal of International Criminal Justice* 689 (2011); C. Stahn and L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', in L van den Herik and C. Stahn, *The Diversification and Fragmentation of International Criminal Law*, Martinus Nijhoff Publishers, 2012, pp. 21-89.
[6] Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945 - 1 October 1946, published at Nürnberg, Germany, 1947, p. 223.

two contradictory aims have to be reconciled with each other. On the one hand, international criminal law as a form of criminal law is based upon principles of a classic liberal criminal law system which emphasises respect for the independence of the individual, in particular the defendant. On the other hand, the human rights perspective, and possibly its very origin, focuses on the protection of victims. This paradox leads to a tension, in substantive international criminal law in particular, whereby it is difficult to reconcile strict methods and principles of interpretation, such as *in dubio pro reo*, with the teleological and more victim-oriented interpretation methods which are typical in human rights.[7]

In the construction phase of international criminal law that took place in the 1990s, the teleological approach prevailed and the *ad hoc* Tribunals had occasional recourse to human rights law to interpret the material elements of substantive crimes.[8] The paucity of precedent and the lack of a sufficiently fleshed out international criminal code stimulated references to human rights as a means to shape definitions and elucidate elements of crimes.[9] These practices were justified on the basis of similarities and synergies in goals, values and terminology between international criminal law and human rights law.[10] In this spirit, definitions and concepts from the 1984 Torture Convention,[11] the 1926 Slavery Convention[12] and other human rights treaties were given extra-conventional importance.[13] They were transposed to the international criminal law context to lend greater specificity to the statutory crime definitions of the *ad hoc* Tribunals. In this process, the ICTY recognized two crucial structural differences between human rights law and international criminal law, namely that human rights law establishes a list of protected rights and exclusively binds states, whereas international criminal law establishes a list of offences and is binding on the individual.[14] It thus acknowledged that there is a certain normative separation between the two areas of law beyond the mere fact that not all human rights violations are subject to international criminalization.

The relationship between human rights law and procedural international criminal law has its own intricacies. In fact, the first forms of actual interaction between the two fields of law concerned questions of procedural international criminal law and more specifically the right of the defendant to a fair trial. In one of its first rulings, the ICTY concluded that article 6 of the European Convention of Human Rights (ECHR) was only relevant to a limited degree for the

[7] D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* 4: 925-963 (2008).
[8] T. Meron, 'Human Rights Law Marches into New Territory: The Enforcement of International Human Rights in International Criminal Tribunals (Marek Nowicki Memorial Lecture)', in T. Meron. *The Making of International Criminal Justice; A View from the Bench – Selected Speeches*, OUP, 2011, pp. 181-198, especially pp. 189-197.
[9] ICTY, *The Prosecutor v. Kunarac,* Judgement, Case No. IT-96-23-T & 92-23-1-T, 22 February 2001, para. 467.
[10] *Ibid.*
[11] ICTY, *The Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1968, para. 162; ICTY, ICTY, *The Prosecutor v. Mucić* et. al.**,** Case. No. IT-96-21-T, Judgement, 16 November 1998, paras. 447-459**.**
[12] ICTY, *The Prosecutor v. Kunarac,* Judgement, Case No. IT-96-23-T & 92-23-1-T, 22 February 2001, para. 519.
[13] In considering the existence of a right to freedom of expression under customary international law in *Bikindi*, Trial Chamber III referred to*, inter alia*, the 1948 Universal Declaration of Human Rights, the 1966 International Convention on Civil and Political Rights, the 1966 Convention on the Elimination on All Forms of Racial Discrimination, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1969 Inter-American Convention on Human Rights, and the 1981 African Charter on Human and Peoples' Rights: ICTR, *The Prosecutor v. Bikindi*, Judgment, Case No. ICTR-01-72-T, 2 December 2008, paras. 379-380.
[14] ICTY, *The Prosecutor v. Kunarac,* Judgement, Case No. IT-96-23-T & 92-23-1-T, 22 February 2001, para. 470.

Tribunal because it operated on the basis on its own "unique legal framework".[15] It espoused that "[i]n international law, every tribunal is a self-contained system (unless otherwise provided)".[16] More specifically, the Tribunal ruled that the shocking nature of the crimes and the special context in which the Tribunal was operating could justify a more flexible attitude to rules of evidence and the rights of the defendant.[17] It held that,

> "the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations."[18]

In later jurisprudence, this heavily criticised position was modified and greater value was given to the ECHR and the jurisprudence of the European Court of Human Rights.[19] Nevertheless, the special circumstances in which the Tribunal operates can lead to adapted interpretations of certain aspects of the right to a fair trial. The issue here is not – as in the relationship between human rights and substantive international criminal law outlined above – one of tension in relation to the adapted interpretation method which works out either in favour of the victim or of the defendant. In procedural international criminal law the rights of the defendant correspond with human rights as protected in Article 6 of the ECHR. However, the question which does arise in the dynamic between human rights law and procedural international criminal law is whether the human rights which have been formulated to operate at the level of the State can be directly applied in the context of international tribunals or whether a transposition should take place given the structural differences between national and international procedures. In his dissenting opinion in the *Erdemovic* case, Cassese has described these structural differences in as follows:

> "...international criminal courts are not part of a State apparatus functioning on a particular territory and exercising an authority of which courts partake. International criminal courts operate at the state

[15] ICTY, *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, paras. 26-28.
[16] ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T, 10 August 1995, para. 11.
[17] The special context related to the fact that the Tribunal was operating while the conflict was still ongoing, and that the Tribunal did not have its own police force or witness protection programme, see also T. Meron, Human rights law marches into new territory: the enforcement of international human rights in international criminal tribunals (Marek Nowicki Memorial Lecture), in T. Meron, *The Making of International Criminal Justice; A View from the Bench – Selected Speeches*, OUP, 2011, 181-198, p. 185.
[18] ICTY, *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, para. 27.
[19] See e.g., ICTY, *Prosecutor v. Jankovic*, Decision on Referral of Case under Rule 11 *bis*, Case No. IT-96-23/2-PT, 22 July 2005, paras. 28, 47-48 and 73; ICTY *Prosecutor v. Delalić et al*., Case No. IT-96-21-A, Judgement, 20 February 2001, paras. 782-783; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 69; ICTY, *The Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1968, para. 160. ICTY, *Prosecutor v. Prlić et al*., Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, paras. 51 and 53. Similar jurisprudence has come from the ICTR, see, e.g., ICTR *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 paras. 83-84,88-89; *The Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 22 February 2012, para. 30.

> level. They discharge their functions in a community consisting of sovereign States. The individuals over whom these courts exercise jurisdiction are under the sway and control of sovereign States."[20]

Taken all together, these examples show that the ICTY, as one of the most prominent international criminal tribunals before the ICC came into operation, has been inspired by human rights and more specifically by the jurisprudence of the ECHR. Nonetheless, the Tribunal was to a certain extent, quite aware of the multifold structural differences between the two fields of law which impede a too mechanical transplantation of concepts and principles.

The ICC's creation and operation marked a momentum in international criminal law. In this new phase, the penal nature of international criminal law increasingly gained prominence over its function as an enforcement mechanism of human rights norms.[21] Article 21 of the ICC Statute on applicable law and in particular the phrasing of the legality principle in Article 22(2), which includes the instruction to the ICC judiciary only to engage in strict interpretation of crime definitions, reflect this trend. Human rights are not mentioned as a direct source of international criminal law, but Article 21(3) does prescribe that the application and interpretation of international criminal law by the ICC judges must be "consistent with internationally recognized human rights".[22] This provision has been used in practice to bolster the rights of the accused and to some extent to flesh out procedural rights and notions in relation to victim participation.[23] The interpretational instruction of Article 22(2) combined with the elaborate definitions of crimes in the ICC Statute and the Elements of Crimes leaves considerably less space for direct recourse to human rights concepts in the realm of substantive criminal law.[24] This constellation might thus not be the most conducive for a further integration of socio-economic and cultural notions in international criminal law. On a deeper level, there may also be structural impediments which could be explanatory to the disconnect between international criminal law and ESCR rights.

3. Revisiting the Disconnect between International Criminal Law and ESC Rights

The legal status of socio-economic rights and their alleged nature as aspirational, programmatic or non-justiciable has been much discussed in scholarly writing.[25] It has also been asserted that

[20] ICTY, *The Prosecutor v. Erdemovic*, Case No. IT-96-22-A, 7 October 1997, para. 5.

[21] In this spirit, some scholars made the appeal of a more forceful divorce between international criminal law and human rights law, also advising against the use of human rights law as guidance for the interpretation of substantive criminal law, G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *Journal of International Criminal Justice*, pp. 539-561, p. 544.

[22] ICC Statute, art 21(3).

[23] W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute,* OUP, 2010, pp. 397-401.

[24] The argument has been made that, even if unintentional, the sweeping language of Article 21(3) could be used to broaden the ICC's competence by declaring certain Elements of Crimes incompatible with human rights. See M.H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *American Journal of International Law* 22-43**,** p. 29 (1999). On the perplexity of this provision, see also, A. Pellet, 'Applicable Law', in A. Cassese and others (eds.), *The Rome Statute for an International Criminal Court; A Commentary, Volume II,* OUP, 2002, pp. 1051-1084, pp.1079-1082; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 2009, Martinus Nijhoff Publishers, pp. 285-304.

[25] See *e.g.*, M.J. Dennis and D.P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 98 *American Journal of International Law*, pp. 462-516.

the rights concerned are more political in nature.[26] Alternatively, the argument could be made that even if the rights concerned have been codified in an international treaty and are binding as such, they do not specify concrete legal obligations and thus lack normative content.[27] The question arises whether the presumed softness that is inherent in socio-economic rights renders them incompatible with the legality concerns that permeate international criminal law. In addition, there may be other interrelated features of these second generation rights that generate a certain unsuitability for international criminalization.

The legality principle underpins international criminal law as a system of *criminal* law.[28] This fundamental principle of criminal law encapsulates several dimensions. In addition to the prohibition of retroactivity, it also requires that crimes be prescribed with sufficient clarity and precision so as to provide fair warning to individuals of what constitutes criminal conduct. Such requirements contrast sharply with the relatively vague formulation of socio-economic rights, in particular, as they have been codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[29] The imprecise wording, or softness, of socio-economic rights may thus present a certain technical barrier that hinders direct criminalization. It has been suggested that these considerations should not be exaggerated. Firstly, the precise formulation of given rights differs per convention. In particular, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families evidences a more detailed and rights-oriented wording of concrete rights.[30] Furthermore, the Committees have instilled socio-economic provisions with greater normativity through their particularized General Comments.[31] In a more general fashion, the Committee of Social and Economic Rights has presented the idea that, based on the *raison d'être* of the ICESCR, a certain minimum core of each right can be identified which must be respected regardless of available resources.[32] It cemented this idea by providing specific examples of minimum essential levels of each right that must be guaranteed. For instance, a State party may not deprive a significant number of individuals of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.[33] In particular the deprivation of essential means of subsistence directly corresponds to the right to life and can thus be said to be sufficiently tangible

[26] E.G. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', (1978) 9 *Netherlands Yearbook of International Law*, p. 103.
[27] Such indeterminate treaty provisions may be called "soft law", see D. Shelton, 'Soft Law', in D. Armstrong (ed), *Routledge Handbook of International Law*, Routledge, 2009, pp. 68-80, p. 69. On this conception of soft law, see also J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', (2008) 19 *European Journal of International Law*, pp. 1075-1093.
[28] G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *Journal of International Criminal Justice*, pp. 539-561, p. 541.
[29] P. Alston, 'No right to complain about being poor: the need for an optional protocol to the Economic Rights Covenant', in: A. Eide, and J. Helgesen (eds.), *The Future of Human Rights Protection in a Changing World*, Norwegina University Press, 1991, p. 86.
[30] As noted by M. Scheinin, 'Economics and Social Rights as Legal Rights', A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers, 2nd ed., 2001, p. 31.
[31] These comments are non-binding and, in the words of Boyle and Chinkin, they are part of a process of soft law formation, whose strength depends on levels of consistency and persuasiveness, A. Boyle and C. Chinkin, *The Making of International Law*, OUP, 2007, pp. 154-157.
[32] CESCR, 'The nature of State Parties' Obligations', General Comment 3, 14 December 1990, para. 10. For a critical appraisal, see, K. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Contents', (2008) 33 *Yale Journal of International Law*, pp.113-175.
[33] CESCR, 'The Nature of State Parties' Obligations', General Comment 3, 14 December 1990, para. 10.

to offer a primary norm that is susceptible to being criminalized.[34] In later comments, the Committee has added that these core obligations are non-derogable[35] and thus also apply in times of armed conflict.[36]

An intertwined second feature that characterizes socio-economic human rights conventions is that they generally spell out positive obligations, *i.e.*, obligations of result. A violation of such obligations is mostly constituted by a failure to act. Conversely, criminal law is generally concerned with commission of acts rather than omission. The question to what extent a failure to act can result in criminal liability has occupied legal scholars and philosophers for eons. Even if international criminal law is not entirely adverse to the idea of criminal omission or omission liability, as it has been codified through certain theories on individual responsibility such as the concept of command responsibility, the criminalization of omission remains an exception to the rule.[37] This is also exemplified by the intricate drafting discussions and the subsequent codification of a policy requirement for crimes against humanity. This requirement is laid down in Article 7(2)(a) of the Rome Statute and further elaborated in the Elements of Crimes, which require that "the State or organization actively promote or encourage such an attack against a civilian population".[38] Interestingly, this specification is footnoted as follows,

> "… Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."[39]

This phrasing exhibits a delicate compromise through which for instance mass starvation in a famine could be captured but only if proven that there was a certain deliberateness involved.[40]

A palpable third impediment to direct criminalization relates to the different addressees of human rights law and international criminal law respectively. Human rights conventions postulate obligations for *States*, whereas international criminal law targets *individuals*. The mainstream position is that non-State actors, including individuals, are not directly legally bound by human rights law.[41] Therefore this area of law cannot provide the primary norms of international crimes without a certain transposition.

Overall, the inherent nature of socio-economic rights renders *direct* criminalization impossible. However, this does not preclude that factual socio-economic misconduct and abuses can be captured by the existing international crimes repertoire and conversely that socio-economic

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[34] In the context of the right to self-determination, the right has also been formulated in absolutist terms. Article 1(2) of both the ICCPR and the ICESCR reads: "in no case may a people be deprived of its own means of subsistence".
[35] CESCR, 'The Right to the Highest Attainable Standard of Health', General Comment 14, 11 August 2000, para. 47.
[36] CESCR, 'Statement on Poverty and the ICESCR', UN Doc. E/C.12/2001/10, 10 May 2001, para. 18.
[37] See on commission and omission in international criminal law, E. van Sliedregt, *Individual Criminal Responsibility in International Law*, OUP, 2012, pp. 54-57.
[38] Elements of Crimes, Crimes Against Humanity, Introduction, para. 3.
[39] *Ibid.*, footnote 6.
[40] See on famine causation and prevention, A. Sen, *Development as Freedom*, OUP, 1999, in particular chapter 7.
[41] J.H. Knox, 'Horizontal Human Rights Law', (2006) 102 *American Journal of International Law,* 2008, pp.1-47. But see for a different view: A. Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', (2006) 88(863) *International Review of the Red Cross*, pp. 491-523.

human rights provisions can be utilized as a source of inspiration and guidance. In addition, the international criminal judiciary could draw on another area of law that protects certain socio-economic values in both direct and more indirect manners, namely international humanitarian law.

It is by including socio-economic criminal misbehaviour in international crime adjudication in particular, that greater sensitivity can be created to the values underpinning socio-economic rights. Under certain circumstances socio-economic acts can fulfill existing substantive crime definitions. The *ad hoc* Tribunals have experimented with this potential to some extent. Former High Commissioner for Human Rights Louise Arbour has also advocated for a different vision of justice that is more inclusive of social justice. She insisted that the current neglect of socio-economic rights in mainstream justice must be corrected and urged to further explore and capitalize on the potential of international criminal law to address the socio-economic dimensions of conflict.[42]

4. Criminalizing the Socio-Economic and Cultural Dimensions of Conflict

As sketched in the previous sections, in the formative stages of international criminal law in the 1990s, similarities in normative content between human rights law and substantive international criminal law were recognized and exploited to give shape to the relatively loose definitions of crimes in the Statutes of the *ad hoc* Tribunals. In this human rights-friendly environment, the Tribunals were not entirely agnostic to the possibility of addressing socio-economic abuses through international criminal law. In particular the broad crime definitions of persecution and other inhumane acts as crimes against humanity offered some leeway to import socio-economic human rights notions. In this vein, the Trial Chamber in the *Brdjanin* case considered that the cumulative denial of the right to employment, the freedom of movement, proper judicial process and proper medical care, if committed on discriminatory grounds, could be qualified as a violation of fundamental rights fulfilling one of the elements of the crime of persecution.[43] Similarly, in the *Simić* case, the Trial Chamber found that when prisoners did not have sufficient food and water supply, were kept in unhygienic conditions and had insufficient access to medical care, this, in combination with the findings that the prisoners were subjected to beatings, led to the conclusion that the prisoners were confined under inhumane conditions which constituted cruel and inhuman treatment as an act of persecution.[44] These examples portray an understanding that socio-economic acts can, in certain contexts, be qualified as persecution, or perhaps also as other acts that constitute a crime against humanity. In this construction there is no direct criminalization of socio-economic rights, but rather a pronounced appreciation of the socio-economic dimensions of crimes.

In the ICC setting, there is perhaps a slightly reduced opportunity to maneuver socio-economic narratives into crime charges. In addition to Article 22(2)'s interpretational instructions of strict

[42] L. Arbour, 'Economic and Social Justice for Societies in Transition', (2007) 40 *International Law and Politics*, pp. 1-27, p. 16.
[43] ICTY, *The Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 para. 1031-1049. See also, ICTY, *The Prosecutor v. Kuprešić* et. al., Case No. IT-95-16-T, Judgment, 14 January 2000, paras. 605, 619; ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, paras. 193, 195; ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001, para. 535. Cf ICTY, *Prosecutor v. Statić*, Case. No. IT-91-24-T, Judgement, 31 July 2003, para. 773.
[44] ICTY, *The Prosecutor v. Simić* et. al., Case No. IT-95-9-T, Judgment, 17 October 2003, para 775.

construction, the drafters of the ICC Statute crafted more precise definitions of crimes, which were coupled with the elaborate Elements of Crimes. In reaction to the ICTY's creative use of the open-ended definitions of persecution and other inhumane acts, the Elements of Crimes specifically lift the standards for these two *actus rei* of crimes against humanity.[45] Yet even in this more refined constellation, there are criminal acts and crime headings that could possibly capture certain cultural and socio-economic features of international crime scenes. Alternatively, the commission of crimes will often have socio-economic consequences for the victims involved that are immediately destructive to their life, health and dignity. It could serve the expressive and preventative value of international criminal law well if some more attention was paid to the socio-economic nature of these consequences. A range of different socio-economic notions may be implicated. These are briefly discussed in turn without the aim of being exhaustive.[46] The relevant human rights protecting these notions serve as the starting point for the analysis, in full awareness that these are not directly applicable or transposable to the international criminal law setting. The idea is to identify the underlying value that these human rights aim to protect and in particular to zoom in on specific features of these rights as applicable in times of violence or armed conflict, and subsequently to look for synergies with international criminal law both in statute and in practice. To this end, some concrete examples are given, where possible and relevant, of instances in which the ICC actors have or could have taken note of the socio-economic dimensions of the crimes they were prosecuting. The aim of this exercise is not to provide a comprehensive, all-encompassing overview, but rather to explore the potential of international criminal law to engage with some cultural and socio-economic notions and on the basis of a few pertinent examples to engage with the underlying question whether international criminal processes are the most appropriate avenue to address cultural and socio-economic abuses and perhaps root causes of conflict.

4.1 Food

The right to adequate food is protected in Article 25 of the Universal Declaration of Human Rights (UNDHR) and Article 11 of the ICESCR under the general heading of a right to adequate living standards. In General Comment 12, the UN Committee on Economic, Social and Cultural Rights (CESCR) elucidated that the right to food was inextricably linked to the inherent dignity of the human person.[47] It explicitly held that the prevention of access to humanitarian food aid during internal conflict could constitute a violation of the right to food.[48] In addition, international humanitarian treaties contain provisions specifically geared towards guaranteeing access to food during armed conflict for persons not participating in the hostilities.[49] In elaborating the basic humanitarian principle of distinction that applies during combat situations,

[45] For instance for persecution, it must be established that the persecutory act was committed in connection with another crime in the jurisdiction of the ICC, Article 7(1)(h), Element no. 4 and for other inhumane acts, it must be proven that the act was of a character similar to any other act that can constitute a crime against humanity in the definition of the ICC Statute, Article 7(1)(k), Element no. 2.

[46] See for a comprehensive overview in relation to war crimes, E. Schmid, War Crimes Related to Violations of Economic, Social and Cultural Rights, (2011) 71(3) *Heidelberg Journal of International Law* pp. 523-540.

[47] CESCR, 'The Right to Adequate Food (Article 11)', General Comment 12, UN Doc. E/C.12/1999/5, 12 May 1999, para. 4.

[48] *Ibid.*, para. 12.

[49] See generally, J. Pejic, 'The Right to Food in Situations of Armed Conflict: The Legal Framework', (2001) 83(844) *International Review of the Red Cross*, pp. 1097-1109.

the Additional Protocols prohibit starvation of civilians as a method of warfare.[50] The provisions specify that,

> "it is prohibited to attack, destroy, remove or render useless for that purpose, 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."[51]

The commentaries to these provisions explain that starvation can also result from omission if there is a deliberate decision not to take necessary measures.[52] They also explicate that a variety of verbs is used to make sure that all eventualities are covered, including pollution of water supplies by chemical agents or the destruction of a harvest by defoliants.[53] Starvation of civilians as a war crime is included in the ICC Statute in Article 8(b)(xxv) but only for international armed conflict.

Outside the context of armed conflict, international criminal law also has the potential to capture severe and large-scale deprivation of food. For instance, it could be qualified as the genocidal act of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", [54] when all the other crime elements are met. The footnotes in the Elements of Crime explain that the mentioned "conditions of life" may include deliberate deprivation of resources for survival, such as food or medical services.[55] Similarly, extermination as a crime against humanity can cover food deprivation as this is explicitly mentioned in Article 7(2)(b) and the Elements of Crime.[56]

These provisions recognize that food can be a deadly weapon, a fact well known in particular since 7 to 10 million of Ukranians perished in Europe's breadbasket under Stalin's rule in the famine of 1932-1933. In the context of ICC situations, this was most pertinently noted in relation to Darfur. The Commission of Inquiry headed by Cassese found that access to food was curtailed for civilians in various severe ways during the conflict. During the destruction of villages, crops were burnt, implements for food processing wrecked, and cattle and other livestock looted.[57]

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[50] Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, Article 54; Additional Protocol II of 8 June 1977 to the Geneva Conventions of 12 August 1949, Article 14.

[51] Additional Protocol II of 8 June 1977 to the Geneva Conventions of 12 August 1949, art. 14. Article 54 of Additional Protocol I is phrased slightly differently and adds that the motive for which the starvation is undertaken, to starve out civilians or to cause to move them away or for any other motive, is irrelevant.

[52] Y. Sandoz, C. Swinarski, and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987) International Committee of the Red Cross / Martinus Nijhoff Publishers, para. 4800.

[53] *Ibid.,* para. 4801.

[54] ICC Statute, Article 6(c)

[55] Elements of Crime, Article 6(c), Element 4, fn. 4.

[56] Elements of Crime, Article 7(1)(b), Element 1, fn. 9.

[57] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, para. 235 and 305. On issues relating to access to food in the context of the conflict in Darfur, see e.g., UN Economic and Social Council, 'Situation of human rights in the Darfur region of the Sudan', Report of the United Nations High Commissioner for Human Rights and Follow Up to the World Conference on Human Rights, Sudanese Human Rights Organization, 'The Situation of Human Rights In Sudan', 26 March 2003; Sudanese Human Rights Organization, 'Report on the situation of Human Rights in Sudan, October 1, 2003 – January 31, 2004', 5 February 2004, Amnesty International, 'Sudan: No One to Complaint To: No Respite for the Victims, Impunity for the Perpetrators', 2 December 2004.

Moreover, living conditions in the camps and settlements were dire, with inadequate access to food.[58]

Similarly, the ICC Prosecutor charged Al Bashir with indirect methods of killing as an integral part of an overall genocidal policy and of the commission of crimes against humanity. These methods included: (i) subjecting the group to destruction of their means of survival in their homeland; (ii) systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation and disease; (iii) usurpation of the land; and (iv) denial and hindrance of medical and other humanitarian assistance needed to sustain life in camps for internally displaced persons.[59] This policy of including slow-death measures in the charges presents a significant attempt to integrate socio-economic abuses in the overall crime picture and thus to take the socio-economic dimension into account at the ICC setting.

4.2 Water

The right to water is not recognized as such in the ICESCR and not even in the UDHR. In 2002, the CESCR did, however, adopt General Comment No. 15 on the Right to Water, which brought this right in the realm of Article 11(1) on adequate standards of living, stating that,

> "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."[60]

It further specified, "an adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease."[61]

In addition, the General Comment made reference to concrete obligations arising from international humanitarian law with the following statement,

> "during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.[62]

Even if the affirmation, or perhaps creation, of the right to water has not remained undisputed, these statements do recognize that the deprivation of safe water may, in the extreme, have direct repercussions for the life, health, and dignity of individuals – values that international criminal law purports to protect.

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[58] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, para. 196.
[59] ICC, *The Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, para. 34.
[60] CESCR, 'The Right to Water (Articles 11 and 12)', General Comment No. 15, (2002), para. 3, UN Doc. E/C.12/2002/11.
[61] *Ibid.*, para. 2.
[62] *Ibid.*, para. 22. Relevant provisions include Article 14 of Additional Protocol II of 8 June 1977 to the Geneva Conventions of 12 August 1949,

The Cassese Commission of Inquiry also recognized how water was used as a method of warfare in Darfur. Water pumps, wells and containers were systematically destroyed and poisoned by dropping the carcasses of cattle into them.[63] Moreover, women who would go to fetch water outside the camps ran the continuous risk of being raped.[64] In the second Arrest Warrant against Al Bashir, which reinstated genocidal charges, it was explicitly acknowledged that, in furtherance of a genocidal policy, the Sudanese State forces had contaminated the wells and water pumps of the town and villages which were primarily inhabited by the targeted tribal groups.[65] So even if the general existence of an overall right to water as a human right remains disputed, within the international criminal law context it is appreciated that severe deprivation may amount to an international crime. As was already indicated above, the charges against Al Bashir display a certain awareness that the socio-economic dimensions of violence may be of comparable gravity as more direct forms of killing and mistreatment.

4.3 Health care

The right to health is protected by Article 12 of the ICESCR as well as by other provisions in specialized human rights treaties.[66] General Comment 14 purports to provide an authoritative interpretation of this right. In its Comment, the CESCR specifically refers to more concrete legal obligations for states in times of armed conflict arising from international humanitarian law. In this context, the CESCR explicitly specified that the obligation to respect the right to health includes an obligation for States to refrain from limiting access to health services as a punitive measure.[67] International humanitarian law does indeed provide a set of quite detailed rules on protecting health during armed conflict. In fact, the aim to collect and care for the wounded was one of the primordial concerns that prompted Dunant to write about the *Battle of Solferino* and which underlies the entire Red Cross/Crescent movement. In particular the First and Second Geneva Convention of 1949 and Part II of Additional Protocol I of 1977 contain a great set of provisions regulating the protection and care of the wounded and sick and establishing a system of protection for medical personnel and equipment, hospitals, ambulances and other medical transport. The Third and Fourth Protocol provide complementary medical protection for prisoners of war and civilians and the Hague Regulations also contain some relevant provisions.[68]

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[63]Antonio Cassese et. al., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, paras. 235 and 305; UN Economic and Social Council, 'Situation of human rights in the Darfur region of the Sudan', Report of the United Nations High Commissioner for Human Rights and Follow Up to the World Conference on Human Rights, Sudanese Human Rights Organization, 'The Situation of Human Rights In Sudan', 26 March 2003, para. 50.

[64] Antonio Cassese et. al., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, paras. 341 and 342.

[65] ICC, *The Prosectuor v. Al Bashir*, Case No. ICC-02/05-01/09, Second warrant of arrest issued by Pre-Trial Chamber I, 12 July 2010, p. 7.

[66] 1965 Convention on the Elimination of all forms of Racial Discrimination, Article 5(e)(iv); 1979 Convention on the Elimination on all forms of Discrimination Against Women, Articles 11(1) and 12; 1989 Convention on the Rights of the Child, Article 24, ICESCR, Article 11; 1981 African Charter on Human and Peoples' Rights, Article 16 ACHPR, Additional Protocol on Economic and Social Rights to the 1969 Inter-American Convention on Human Rights, Article 10; CESCR, 'The Right to the Highest Attainable Standard of Health (Article 12)', General Comment No. 14, (2000) UN. Doc., E/C.12/2000/4, para. 2.

[67] CESCR, 'The Right to the Highest Attainable Standard of Health (Article 12)', General Comment No. 14, (2000) UN. Doc., E/C.12/2000/4, para. 34.

[68] See eg., 1907 Regulations Concerning the Laws and Customs of War on Land, The Hague, Articles 27, 56.

Some of these Geneva provisions have been criminalized and codified as international crime in the ICC Statute. These include for instance the prohibition of biological, medical and scientific experiments.[69] The Elements of Crimes explain that the word "health" refers to physical and mental health or integrity.[70] Other provisions specifically protect buildings dedicated to public health from attack[71] as well as objects and persons using the Geneva Conventions emblem.[72] The deprivation of medicines or access to medical services may, if all other conditions are met, also arise to genocide or a crime against humanity as set out above.

In line with the rather articulated web of provisions protecting health care and medical assistance during armed conflict, several international prosecutions with a medical angle to it have been undertaken both at the ICTY and the ICC. Defendants Mrkšić, Radić, Šljivančanin were jointly prosecuted at the ICTY in relation to an incident where Serb soldiers transferred approximately 300 Croats and non-Serbs who had sought refuge at the Vukovar Hospital to a Yugoslav People's Army barracks as a precursor to persecutions, extermination, murder, torture, inhumane acts, and cruel treatment.[73] At the ICC, the denial and hindrance of medical assistance was charged as part of a greater plan in the case against Al Bashir.[74] Furthermore, in the context of preliminary examinations in the situation of Afghanistan, attacks on hospitals and MEDEVAC helicopters were singled out as constituting an attack on protected objects.[75] These examinations have not led to actual prosecutions, but they do display a certain sensitivity on the part of the Prosecutor to the medical aspects of crime scenes. Perhaps a more intricate question is to what extent the ICC Prosecutor should engage with diseases that are the consequences of crime? In many situations where rape is used as a weapon of war, the additional consequences are that victims get infected with HIV/AIDS.[76] The ICC Prosecutor has included, on occasion, references to these consequences without necessarily making them part of the core charges.[77] Such references may serve as an acknowledgement to victims and perhaps on certain occasions these consequences may also be used to prove a given intent, or they may be invoked as aggravating

[69] This is prohibited by Article 13 of the Third Geneva Convention and Article 32 of the Fourth Geneva Convention and Article 11(2)(b) of Additional Protocol I. There is no specific prohibition for internal armed conflict, but the prohibition is understood to be covered by common article 3, see W. A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 217. The prohibition is criminalized in Article 8(2)(a)(ii), 8(2)(b)(x) and 8(2)(e)(xi) of the ICC Statute.

[70] Elements of Crimes, Article 8(2)(a)(ii)-1, War Crime of Torture, para. 1, Article 8(2)(a)(ii)-2, War Crime of Inhuman Treatment, para. 1, Article 8(2)(b)(x)-1, War Crime of Mutilation, para. 1, Article 8(2)(b)(x)-2, War Crime of Medical or Scientific Experiments, para. 1, Article 8(2)(e)(xi)-1, War Crime of Mutilation, para. 1, Article 8(2)(e)(xi)-2, War Crime of Medical or Scientific Experiments, para. 1.

[71] Article 8(2)(b)(ix) and 8(2)(e)(iv).

[72] Article 8(2)(b)(xxv).

[73] ICTY, *The Prosecutor v. Mrkšić* et. al., Case No. IT-95-13/1.

[74] See above in section 4.1 on Food. ICC, *The Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, para. 34.

[75] ICC Office of the Prosecutor, *Report on Preliminary Examination Activities*, 13 December 2011, para. 28 and ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2012*, 22 November 2012, para. 31.

[76] See eg., M. Pratt et. al, 'Sexual Terrorism: Rape as Weapon of War in Eastern Democratic Republic of Congo: An Assessment of Programmatic Responses to Sexual Violence in North Kivu, South Kivu, Maniema, and Orientale Provinces, January 9-16 , 2004', USAID/DCHA Assessment Report, 18 March 2004; J. Kelly, 'Rape in War: Motives of Militia in the DRC', United States Institute of Peace, Special Report No. 243, June 2010.

[77] ICC, *The Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Public Redacted Version of Document Containing the Charges, 1 October 2008.

factors for sentencing purposes. Even in situations where socio-economic consequences are not directly relevant to fulfill elements of crimes, they may thus be used in a variety of different ways linked to the criminal process.

4.4 Humanitarian assistance

The right to humanitarian assistance is not included as such in the ICESCR, but is encompassed by the obligation of States to ensure access to food and medicine.[78] International humanitarian law provides a more detailed set of rules applicable during armed conflict. Both the more explicit provisions regulating humanitarian assistance during international armed conflict, and the sparser provision for non-international armed conflict, regulate relief actions, but subject these to State consent.[79] In addition, Additional Protocol I contains a specific provision protecting relief personnel.[80] This level of protection was increased with the ICC Statute's criminalization of intentional attacks against personnel, installations, material, units and vehicles involved in humanitarian assistance or peacekeeping missions as a war crime both in international as well as in non-international armed conflict.[81] Through an analogue interpretation of Article 9 of the Convention on the Safety of the UN and Associated Personnel, abduction can also be regarded as an attack and thus come with the purview of the relevant ICC provisions on war crimes. As indicated by various scholars, this provision does not add much in terms of legal framework, since civilian personnel and objects already enjoyed a good level of protection. It has thus been argued that the provision is merely symbolic. Yet, the articulation that attacks against personnel and objects involved in humanitarian assistance missions are considered international crimes does serve the expressive function of international criminal law and sends a clear political message of the importance that the international community attaches to such undertakings.[82] The ICC Prosecutor has already brought charges on the basis of this provision.[83] These charges concerned peacekeeping missions rather than humanitarian assistance missions, but this practice does demonstrate that the mere symbolic value of the provision in legal terms is overtaken by its expressive potential in terms of the message that is being conveyed. In addition to this concrete protective provision, willfully impeding relief supplies can also be a war crime under Article 8(2)(b)(xxv) if it is done with the intention to starve the civilian population. Again, the criminalization in this respect is limited to the context of international armed conflict.[84]

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[78] ICESCR, Articles 11 and 12. See also, First Geneva Convention of 1949, Articles 12 and 32; Second Geneva Convention of 1949, Article 12; Third Geneva Convention of 1949, Articles 26, 28, 30-31; Fourth Geneva Convention of 1949, Articles 23, 55, 59, 76, 87, 89 and 91-92, Additional Protocol I of 1977 to the Geneva Conventions of 1949, Articles 10-11, 54 and 69; Additional Protocol II of 1977 to the Geneva Conventions of 1949, Articles 5, 7, 14 and 18.

[79] See eg., Fourth Geneva Convention of 1949, Articles 23, 30, 55, 59(1), 142; Additional Protocol I of 1977 to the Geneva Conventions of 1949, Articles 68, 69, and 70(1)-(5); Additional Protocol II of 1977 to the Geneva Conventions of 1949, Article 14(1)-(2). See further, J. Pejic, 'The Right to Food in Situations of Armed Conflict: The Legal Framework', (2001) 83(844) *International Review of the Red Cross*, pp. 1097-1109, pp. 1102-1108.

[80] Article 71 Additional Protocol I of 1977.

[81] Article 8(2)(b)(iii) and (2)(e)(iii) of the ICC Statute.

[82] W. A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 229.

[83] See eg., ICC, *The Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on Confirmation of Charges, 8 February 2010, para. 21.

[84] See more elaborately, C. Rottensteiner, 'The denial of humanitarian assistance as a crime under international law', 835 *International Review of the Red Cross* 555 (1999).

A distinct, but notable instance in which the actions of humanitarian organizations also played a role in the construction of legal realities concerned the Darfur situation. The Commission of Inquiry had the specific task of investigating whether acts of genocide had been committed in Darfur. It concluded that no genocidal policy could be established. One of the arguments that no genocidal intent could be found, was that humanitarian organizations had been allowed to offer their assistance which undermined the theory that Sudanese state officials had acted with an intent to destroy the entire population.[85] Even if perverse, such reasoning might constitute an incentive to abusive authorities to allow humanitarian organizations access.[86] In sum, the current ICC constellation is not entirely insensitive to the need to protect humanitarian assistance.

4.5 Housing

The right to adequate housing is protected, among others, in Article 11(1) of the ICESCR as part of the right to adequate living standards. The ICESCR has further elaborated on this right in its General Comment no. 4. In this Comment, it states, *inter alia*, that forced evictions are *prima facie* incompatible with the Covenant provisions and can only be justified in the most exceptional circumstances. This statement has been further elaborated in a specific General Comment on Forced Evictions.[87] These rules are complemented by specific provisions of international humanitarian law applicable in times of armed conflict.[88] The understanding of a need to protect adequate housing and shelter also resonates in several ICC crimes, such as deportation or forced displacement as a crime against humanity[89] or a war crime,[90] attacks against civilian objects[91] and the attack or bombardments of towns and villages as war crimes.[92]

Deportation and forced displacement were much included counts at the ICTY.[93] In the context of Darfur, both the Commission of Inquiry and the ICC Prosecutor in various cases have exposed the massive displacement of the population and large-scale destruction of villages – two practices that directly impede the adequate housing of civilians. In the preliminary examinations of the situation of Afghanistan, the ICC Prosecutor investigated a different infringement of respect for adequate housing. In this instance, the Prosecutor looked at the use of human shields by forcing villagers to host and feed Taliban members and using civilian houses as military bases and check points.[94] So even if the denial of adequate housing is not criminalized as such, there are a significant number of crimes that have direct repercussions for housing, which are included in the regular international crimes catalogue.

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[85] Antonio Cassese et. al., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, para. 515.

[86] As set out in section 4.1, the ICC Prosecutor had a different vision on the reality on the ground and alleged that the denial and hindrance of humanitarian assistance in the IDP camps in fact constituted an element that proved genocidal intent.

[87] CESCR, 'The right to adequate housing (Art.11.1): forced evictions', General Comment 7, 20 May 1997.

[88] Fourth Geneva Convention of 1949, Article 49; Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 85(3)(a); Additional Protocol II of 1977 to the Geneva Conventions of 1949, Article 17.

[89] ICC Statute, Article 7(1)(d)

[90] *Ibid.*, Article 8(2)(a)(vii) and 8(2)(e)(viii).

[91] *Ibid.*, 8(2)b(ii).

[92] *Ibid.*, 8(2)b(v).

[93] See generally, J. Korner 'Criminal Justice and Forced Displacement in the Former Yugoslavia', International Centre for Transitional Justice, (July 2012).

[94] ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2012*, 22 November 2012, para. 30.

4.6 Education

The right to education is protected in Articles 13 and 14 of the IESCR.[95] In General Comment No. 13, this right is described as a right of empowerment for economically and socially marginalized people, and in particular also for women and children.[96] International humanitarian law offers some complementary protection during armed conflict for buildings of science and education, but these provisions are relatively sparse in their contents.[97] Given this sparseness, two defendants at the ICTY, Kordić and Čerkez, challenged their conviction for wilful damage to institutions dedicated to education as a war crime, claiming that normal education institutions were not protected as such.[98] After a lengthy and somewhat ambiguous reasoning, the ICTY Appeals Chamber decided that the war crime of destruction of educational buildings was part of customary international law.[99] This discussion was laid to rest with the ICC Statute, which expressly penalizes intentional attacks against education buildings as war crimes in both international and non-international armed conflict in Articles 8(2)(b)(ix) and (e)(iv). Again, these provisions may not add much in legal terms to the more general protective provisions of civilian objects,[100] but they do send a political message and may provide some guidance to the ICC Prosecutor as to which civilian objects merit particular attention. In fact, in the situation of Afghanistan, the preliminary investigations of the ICC Prosecutor also focused on unrelenting attacks on girls' schools by means of arson, armed attacks and bombs.[101]

In addition, much attention has been paid to the phenomenon of child soldiers, and charges have been brought on this matter in various cases.[102] Similar to the discussion on HIV/AIDS as a consequence of rape, the question arises in this context to what extent the ICC Prosecutor should focus on socio-economic consequences of the crime in terms of lack of education and housing. On the one hand, the argument could be voiced that more attention for consequences reinforces the expressive and preventative value of international criminal law. On the other hand, the question is whether the courtroom is the proper place for such reflections and exercises.

4.7 Culture

Cultural rights are protected in Article 15 of the ICESCR. The normative content of this right is bolstered by General Comment 21, which provides some further detail to notions such as

[95] The right is also protected in Article 26(2) of the UDHR, Article 5(1)(a) of the UNESCO Convention against Discrimination in Education, Article 28(1)(b) of the Convention on the Rights of the Child.

[96] The right to education, (Article 13 of the Convention), General Comment No. 13, CESCR, *UN Doc.* E/C.12/1999/10, 12 August 1999, para. 1.

[97] 1907 Regulations Concerning the Laws and Customs of War on Land, The Hague, Articles 27, 56.

[98] ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. T-95-14/2-A, Judgement, 17 December 2004, para. 85

[99] *Ibid.*, para. 92.

[100] According to Bothe, the provisions even carry the risk of creating unnecessary confusion, M. Bothe, 'War Crimes', in A. Cassese and others (eds.), *The Rome Statute for an International Criminal Court; A Commentary, Volume I,* OUP, 2002, p. 410.

[101] ICC Office of the Prosecutor, *Report on Preliminary Examination Activities*, 13 December 2011, para. 28 and ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2012*, 22 November 2012, para. 31.

[102] ICC, *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, 29 January 2007; ICC, *The Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, Decision on Confirmation of Charges, 30 September 2008; ICC, *The Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on Prosecutions' Application under Article 58, 18 July 2012; ICC, *The Situation in Uganda*, ICC-02/04, Warrant of Arrest for Okot Odhiambo, 8 July 2005; ICC, *The Situation in Uganda*, ICC-02/04, Warrant of Arrest for Vincent Otti, 8 July 2005; ICC, *The Situation in Uganda*, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005.

"cultural life".[103] Moreover, this General Comment stipulates express obligations for States to respect and protect cultural heritage during times of armed conflict.[104] Similar obligations are laid down in more concrete and legally binding ways in international humanitarian law, such as Articles 27 and 56 of the Hague Regulations and Article 16 of Additional Protocol II. Attacking "clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people" is a grave breach of Article 85(4)(d) of Additional Protocol I and a serious violation of Article 15 of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Article 3(d) of the ICTY Statute includes the war crime of seizure, destruction or willful damage to institutions dedicated to religion, charity, education, arts and sciences, historic monuments and works of arts and science, and several charges based on this provision were brought forward in a variety of cases.[105] The ICTY even found that willful damage or destruction of institutions dedicated to Muslim religion or education constituted persecution as a crime against humanity, since "all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects".[106]

The ICC pays equal tribute to the importance of culture for humanity. The opening paragraph to its preamble reflects a consciousness that "all peoples are united by common bonds, their culture pieced together in a shared heritage", and a concern that "this delicate mosaic may be shattered at any time". In the ICC architecture, the two relevant and concrete provisions are Articles 8(2)(b)(ix) and (e)(iv), which also expressly criminalize such attacks when committed in internal armed conflict. In these more internal settings, the destruction of cultural heritage may not in any way be linked to military purposes but rather be inspired by religious considerations.[107] In the situation of Mali, which was referred to the ICC on 13 July 2012 and in which the Prosecutor started investigations on 16 January 2013,[108] the intentional attack on protected objects was one of the crimes within the purview of the Prosecutor's investigations. On 1 July 2012, she made an express statement that the attacks on the religious shrines in Timbuktu could constitute a war crime.[109]

5. Conclusion

The preceding, admittedly extremely cursory, overview illustrates that there is ample opportunity to include socio-economic and cultural concerns in mainstream criminal justice modalities. Despite some modest efforts principally by the ICTY and the ICC to import such notions in the international criminal law architecture, scholarly critiques have exposed the neglect of the socio-

[103] CESCR, 'Right of everyone to take part in cultural life (art. 15. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)', General Comment No. 21, 21 December 2009, paras. 10-13.
[104] *Ibid* , para. 50(a).
[105] ICTY*, The Prosecutor v. Blaškić* Case No. IT-95-14, Judgment, 3 March 2000, para. 185; ICTY*, The Prosecutor v. Naletilić*, IT-98-34, Judgment, 31 March 2003, paras. 603-605; ICTY*, The Prosecutor v. Strugar*, IT-01-42, Judgement, 31 January 2005.
[106] ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. T-95-14/2-T, Judgement, 26 Feburary, para. 207.
[107] As was argued in relation to the destruction of the Bamiyan Buddhas by the Taliban in March 2001, F. Francioni and F. Lenzerini, 'The destruction of the Buddhas of Bamiyan and International Law', (20030 14(4) *European Journal of International Law*, pp. 619-651, p. 620.
[108] ICC Office of the Prosecutor, *Situation in Mali: Article 53(1) Report*, 16 January 2013, paras. 1, 175.
[109] ICC, 'Prosecutor's statement on Mali, News, OTP Briefing, Issue No. 126, 20 June - 3 July 2012 available at http://www.icc-cpi.int/NR/rdonlyres/B8B506C8-E2DE-4FF5-A843-B0687C28AA6C/284735/OTPBriefing20June3July2012.pdf

economic dimensions of conflict in transitional justice processes.[110] It is argued that socio-economic grievances, such as systematic discrimination or unequal access to land, work and housing, trigger conflict or exacerbate social tensions,[111] and that the current justice processes offer only a one-dimensional narrative that is focused on physical violence and in which economic structural root causes remain invisible.[112] In this vein, Mark Drumbl has observed that a greater emphasis on such dimensions in traditional criminal justice processes would serve in particular the expressive and preventative purposes of international criminal law.[113] However, he also noted the limitations of such processes,[114] which arise in part from international criminal law's individualized focus both in terms of perpetrators and victims. Indeed, other scholars also advocate integrating socio-economic concerns in broader transitional justice processes with perhaps slightly lesser focus on criminal law with its rigid legality requirements.[115] These processes include truth commissions,[116] human rights courts,[117] and a greater focus on housing, land reform and property restitution programmes in peace agreements,[118] also with a view to embedding socio-economic rights in constitutional processes. In this context, the role of international criminal law is rather marginal, but not necessarily redundant or inconsequential. Given the great social focus on international criminal processes and in particular the ICC, the attention paid to socio-economic abuses by the ICC Prosecutor can help to increase their visibility and to reduce the overall blind spot on socio-economic abuses. Without promoting a need for further convergence of the international criminal law and human rights law regimes, the argument can be made that there are no legal impediments to import certain socio-economic notions in the arena of international criminal law[119] and that there may be a policy argument to do so to some limited extent, with a view to shaping a more encompassing conflict discourse.[120] Such an argument depends on concrete perceptions and expectations that one has from

[110] L. Arbour, 'Economic and Social Justice for Societies in Transition', (2007) 40 *International Law and Politics*, pp. 1-27; E. Schmid, War Crimes Related to Violations of Economic, Social and Cultural Rights, (2011) 71(3) *Heidelberg Journal of International Law* pp. 523-540; S. C. Agbakwa, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa', (2003) 47 *Journal of African Law*, pp. 38-64; M. A. Drumbl, *Accountability for Property Crimes and Environmental War Crimes, Prosecution Litigation, and Development*, International Centre For Transitional Justice, 2009.

[111] L. Arbour, 'Economic and Social Justice for Societies in Transition', (2007) 40 *International Law and Politics*, pp. 1-27, pp. 8-9; S. C. Agbakwa, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa', (2003) 47 *Journal of African Law*, pp. 38-64, p. 40.

[112] Z. Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice', (2008) 2 *The International Journal of Transitional Justice*, pp. 266-291.

[113] M. A. Drumbl, *Accountability for Property Crimes and Environmental War Crimes, Prosecution Litigation, and Development*, International Centre For Transitional Justice, 2009, p. 21.

[114] *Ibid*., 22-25.

[115] L. Arbour, 'Economic and Social Justice for Societies in Transition', (2007) 40 *International Law and Politics*, pp. 1-27, pp. 14-16.

[116] L. J. Laplante, 'Note from the Field: Truth Commissions, Reparations and the Right to Development', (2007) 10 *Yale Human Rights and Development Law Journal*, pp. 141-177.

[117] For instance, the Inter-American Court of Human Rights has issued reparations for human rights violations occurring during conflict, see Plan de Sanchez Massacre v. Guatemala Case, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, at 101 (Nov. 19, 2004) as cited by L. Arbour, 'Economic and Social Justice for Societies in Transition', (2007) 40 *International Law and Politics*, pp. 1-27, p. 16, fn. 44.

[118] See generally, C. Bell, *Peace Agreements and Human Rights*, Oxford University Press, 2000.

[119] As also made by E. Schmid, War Crimes Related to Violations of Economic, Social and Cultural Rights, (2011) 71(3) *Heidelberg Journal of International Law* pp. 523-540, p. 540.

[120] See generally, Z. Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transnational Justice', (2008) 2 *International Journal of Transitional Justice*, pp. 266-291.

international criminal law, either as an area of criminal law elevated to the international level or as an international form of crisis management.[121] If international criminal law is viewed and appraised through the strict lenses of criminal law with a focus primarily on individual cases, the need to integrate socio-economic notions might be overtaken by other prosecutorial considerations. If the mechanism of international criminal justice is, however, situated within broader reflections on post-conflict justice and peace management, the argument to pay attention to socio-economic and cultural dimensions of conflict, be it only limited, gains weight. Even if international criminal law has matured and operates with greater respect to fundamental criminal law requirements than in its early years, a development to be applauded, it is argued here that a full analogy to the domestic level would underappreciate the precise role and function of international criminal law and the context in which it is applied. It may well be that at the international level, the expressive function of international criminal law carries more weight. It is also in this vein that the ICC Prosecutor has developed the concept of the "shadow of the law" to determine ICC impact beyond the actual cases it adjudicates.[122] It is within the confines of this concept, which acknowledge the great symbolic or educational function of the ICC, that attention to socio-economic abuses may be encouraged, but only to the extent that this does not trespass the boundaries set for a criminal court.

[121] For an analysis on the duality of the ICC, see G. P. Fletcher and J. D. Ohlin, 'The ICC – Two Courts in One?' (2006) 4 *Journal of International Criminal* Justice, pp. 428–433.
[122] See ICC Prosecutor, Address, Council on Foreign Relations, 4 February 2010, 10, as also discussed in C. Stahn, How is the Water? Light and Shadow in the First Years of the ICC, (2011) 22 *Criminal Law Forum*, pp. 175–197.