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## Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development

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# Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development

Mark A. Drumbl

Research Unit  
International Center for Transitional Justice

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### **Transitional Justice and Development Project**

This research project examines the relationship between transitional justice and development, fields that, academically and in practice, have proceeded largely isolated from one another. The project identifies and analyzes specific synergies between justice and development, and articulates how the two types of initiatives ought to be designed and implemented to reinforce the shared goals of citizenship, social integration, governance, and peacebuilding. The project is managed by Roger Duthie, Senior Associate in the Research Unit at ICTJ. For more, visit [www.ictj.org/en/research/projects/research5/index.html](http://www.ictj.org/en/research/projects/research5/index.html).

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### **About the Author**

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### **About ICTJ**

The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit [www.ictj.org](http://www.ictj.org).

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## Introduction

Judicialization efforts following atrocity tend toward: (1) criminal prosecution and punishment for violations of international criminal law, and (2) civil litigation for violations of international criminal law. By and large, the reach of international criminal law is limited to serious violations of core civil and political rights. Therefore, notwithstanding certain exceptions where violations of social, economic, and environmental rights have become implicated, the focus of judicialization efforts remains limited to core civil and political rights.

There is much to celebrate in the enforcement of international criminal law; there also is much to critique and improve upon. Part of the improvement project involves recognizing that criminal prosecutions and civil litigation concerning violations of core civil and political rights offer only a *partial print of justice*. Ever since the divide effected in international human rights law in the 1960s,<sup>1</sup> economic, social, cultural, and environmental rights have mixed quite uneasily with third-party criminal or civil enforcement strategies.<sup>2</sup> This tentativeness exists, in part, because these rights have been constructed as aspirational. Economic, social, cultural, and environmental rights have been defined as expecting behavior on the part of state actors, as opposed to—with some exceptions—obliging state actors to refrain from engaging in certain behavior. This classification, and the allocation of resources it necessarily engenders, is understandable in that gruesome violations of civil and political rights—mass murder, torture, sexual assault—present an immediacy to them that explains the consensus in favor of prosecuting and suing individuals who directly perpetrate such travesties. As a result, socioeconomic and environmental crimes or wrongs have become poorly articulated in judicial settings, prodding some experts to conclude that accountability for such crimes is compromised.<sup>3</sup>

This accountability gap is disappointing because atrocious infringements of civil and political rights tend to occur in societies that have neglected and often even trampled on socioeconomic rights and developmental opportunities. Violations of civil and political rights tend to be multi-causal in origin and, in many cases, are facilitated by systemic factors such as economic crimes, exploitation, and

organizational misfeasance. In Sierra Leone, for example, the Truth and Reconciliation Commission found that the internecine conflict was fueled by control over diamond resources.

This paper proceeds in two steps. The first part explores how enforcement of international criminal law currently addresses socioeconomic and environmental crimes. After surveying the field generally, I specifically examine current efforts to promote accountability, whether through criminal prosecutions or civil litigation, for: (1) environmental war crimes and (2) property crimes and expropriation.

I take these two crimes as examples for a number of reasons. First, although crimes of a socioeconomic and environmental nature are generally poorly articulated in international criminal law, these specific crimes are exceptions to the norm because they are reasonably developed in conventional and customary international criminal law and, hence, offer more than just a conjectural discussion. Although it remains true that the proscription of these crimes is subject to considerable ambiguity and vagueness, these crimes are among the more coalescent within the constellation of international crimes outside mainstream civil and political rights violations. Second, both of these crimes address conduct that can have a deleterious impact on development insofar as they are connected to security of markets and environmental support systems.

Third, environmental war crimes and property crimes/expropriation are inextricably intertwined with conflict and, consequently, arise amid broader collective questions of prevention and transition. Violations of property rights can serve as precursors to eliminationism. As the International Military Tribunal at Nuremberg (IMT) observed, the Holocaust began with property destruction, occupational discrimination, and expropriation of the assets of European Jews. Conflicts and atrocities inflict wanton damage on environmental supply networks that, unless remediated in the wake of atrocity and as part of postconflict transition, simply may reactivate competition over fragile resources that, in turn, may catalyze hatreds that then re-explode. Societies with ecosystem and socioeconomic insecurity remain prone to massive civil and political rights violations as well as forced refugee movements.

With this descriptive element as a basis, the second part of the paper engages in a normative discussion of whether increased judicialization of environmental war crimes and property crimes is a worthwhile pursuit for those committed to accountability, prevention, transition, and development. Although I provide some conclusions capable of generalization, my basic goal is to present a critical analysis of the use of international law for criminal prosecutions and civil litigation involving socioeconomic and environmental crimes that are reasonably well articulated, have a developmental impact, and are linked to other atrocities that are traditionally the focus of transitional justice measures. In the end, and of interest to transitional justice practitioners, the paper concludes that it is unclear whether increasing the number, scope, and reach of legal institutions necessarily leads to effective prevention of socioeconomic and environmental wrongdoing generally or to justice for those individuals who have engaged in such wrongdoing.

## How Does Enforcement of International Criminal Law Currently Address Violations of Socioeconomic and Environmental Rights?

International human rights law recognizes a number of social, economic, cultural, and environmental rights. However, few of these are justiciable in the sense that the law—whether criminal or civil—actively provides a remedy for a breach of the positive right or a firm obligation to satisfy that right.

The limited number of crimes that are social, economic, cultural, or environmental in nature and that attract international penal responsibility include: unlawful deportation or forcible transfer;<sup>4</sup> pillage;<sup>5</sup> plunder;<sup>6</sup> extensive or wanton destruction and appropriation of property;<sup>7</sup> devastation not justified by military necessity;<sup>8</sup> destruction of institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science;<sup>9</sup> persecution as a crime against humanity;<sup>10</sup> apartheid;<sup>11</sup> widespread, long-term, and severe damage to the natural environment;<sup>12</sup> arms smuggling, trading in weapons, and supplying key weapons materials;<sup>13</sup> and financing of terrorism, or atrocity generally, which can constitute an independent crime (for example, terrorist financing or conspiracy) or a theory of liability (for example, aiding and abetting).<sup>14</sup> Other socioeconomic crimes that facilitate atrocity and bear upon developmental issues include unlawful trafficking in drugs and related narcotics offenses, trafficking in persons and sex work, piracy, bribery, corruption, extortion, money laundering, recruitment of child soldiers,<sup>15</sup> and organized crime.

In actuality, however, there is little law-in-practice. Few socioeconomic crimes have been prosecuted. The International Criminal Court (ICC) encompasses a broad set of enumerated crimes that include a socioeconomic and environmental dimension, in particular under the rubric of war crimes. Thus, socioeconomic and environmental crimes may become more mainstreamed. For now, however, it is too early to tell. Moreover, given the reticence that has been demonstrated regarding criminal prosecutions or civil lawsuits for socioeconomic and environmental crimes in the past, it would be foolhardy to make any prediction that the ICC will be more fulsome in this regard. Chief Prosecutor Luis Moreno-Ocampo has expressed an ambition to implicate individuals who served as economic actors in natural resources exploitation and arms trade in East Africa. However, to date there has been limited investigatory or punitive activity in this regard.<sup>16</sup> In all likelihood, the ICC will focus only on a small number of the most provably direct perpetrators of, or commanders who ordered, multiple violations of core civil and political rights.

Scholars and jurists have inquired whether certain core international crimes could be committed by attrition. A number of scenarios present themselves. Genocide by attrition or famine crimes, for example, might involve a state or authority deliberately adopting policies that knowingly induce famine or starvation among a protected group.<sup>17</sup> In another example, a state or authority may restrict

a protected group's access to shelter, public health services, or water such that the population faces elimination, extermination, or persecution.<sup>18</sup> In this vein, article 8(2)(b)(xxv) of the Rome Statute proscribes as a war crime in international armed conflict "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions." Another scenario involves state negligence when official policies unknowingly induce humanitarian catastrophes. Yet another scenario involves a state's failure to take affirmative measures to meaningfully instantiate socioeconomic rights.

In light of the *mens rea* requirements that attach to extraordinary international crimes, it is unlikely that anything other than the first two presented scenarios could attract penal responsibility. In contrast, civil or declaratory relief might attach to a state's failure to meaningfully implement affirmative socioeconomic rights to food, shelter, or sustenance.<sup>19</sup> As the second part of this paper points out, however, it remains unclear whether criminalizing or judicializing such failures would better anchor the positive rights within the socio-legal fabric so as to promote developmental goals.

This paper discusses environmental war crimes and property crimes in greater depth in both the criminal context and the civil context. For environmental crimes, I limit the civil context discussion to the Alien Tort Claims Act (ATCA), a U.S. statute that creates a tort remedy for violations of the laws of nations. For property crimes, I focus on criminal culpability for destruction of homes in conflict situations and, in the civil context, liability for expropriation in the case of arbitrary evictions from public tenancies, once again in conflict situations, as adjudicated by the European Court of Human Rights. Although acts of expropriation without compensation generally do not trigger individual penal culpability, they certainly can attract civil responsibility as unlawful economic activity.

## Environmental War Crimes

Inflicting damage on the environment in times of war, and abusing the environment as a tool of war, has been commonplace throughout the history of armed conflict. The Romans salted the soil at Carthage, the United States defoliated Vietnamese forests with Agent Orange, and Saddam Hussein intentionally spilled and ignited Kuwaiti oil wells in the Persian Gulf. During conflicts in Rwanda and the former Yugoslavia, aggressors devastated the environment and used it as a tool of war.

### *Criminal Prosecution*

Article 8(2)(b)(iv) of the Rome Statute now criminalizes as a war crime in international armed conflict "[i]ntentionally launching an attack in the knowledge that such attack will cause . . . 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." Although this



prohibition emerges from the preexisting corpus of customary and conventional international humanitarian law,<sup>20</sup> Antonio Cassese posits that it is narrower in scope than preexisting law.<sup>21</sup> Nevertheless, the express inclusion of article 8(2)(b)(iv) in the Rome Statute breaks new ground by criminalizing violations and meting out individual penal responsibility, and doing so within an international sanctioning institution. Article 8(2)(b)(iv) is “ecocentric”—that is, no direct harm to humans has to be found in order for liability to be triggered.<sup>22</sup>

Assuredly, other war crimes in the Rome Statute could incidentally address environmental harms.<sup>23</sup> Examples include article 8(2)(a)(iv) (prohibiting extensive destruction and appropriation of property not justified by military necessity and carried out wantonly and unlawfully), article 8(2)(b)(xvii) (prohibiting the use of poison and poisoned weapons), and article 8(2)(b)(xviii) (prohibiting the employment of asphyxiating, poisonous, or other gases). These, however, are not environmental crimes *stricto sensu* but are “anthropocentric”—that is, they criminalize things or practices that principally are inhumane and only incidentally have devastating effects on the environment.

Notwithstanding Cassese’s aforementioned observation, article 8(2)(b)(iv) represents a step forward for those who favor judicialization and the individuation of penal responsibility at the international level. The preexisting law either triggered only state responsibility or merely encouraged states to criminalize the prohibited conduct in their national legal systems. As Kevin Jon Heller and Jessica Lawrence note, those international conventions concerned with environmental destruction at most give states the discretion to criminalize violations.<sup>24</sup> As the lone exceptions, Additional Protocol I and the Fourth Geneva Convention do require extradition or prosecution of individual perpetrators, but only in cases of grave breaches.<sup>25</sup>

The state responsibility approach undergirded the creation of the United Nations Compensation Commission (UNCC) in response to Iraq’s unlawful occupation of Kuwait. UN Security Council Resolution 687 made Iraq accountable for direct loss and damage, including environmental damage, resulting from Iraq’s unlawful invasion and occupation of Kuwait. Other than the UNCC, however, the record is sparse regarding holding states liable for environmental war crimes. In terms of individual penal responsibility, some individual prosecutions occurred at Nuremberg for pillage, scorched-earth tactics, and devastation. Results were mixed: Alfred Jodl was convicted by the IMT, and Lothar Rendulic was acquitted by an American Military Tribunal. Unlike article 8(2)(b)(iv), these alleged crimes were not strictly ecocentric.

Although breaking new ground, article 8(2)(b)(iv) also instructs on limitations to the effectiveness of criminalizing the infliction of environmental harms during armed conflict. First, it will be very difficult to actually find a violation. The three elements—“widespread, long-term, and severe”—must be proven conjunctively. Moreover, insofar as these terms are not defined in the Rome Statute or in the Elements of the Crimes, the *actus reus* of the crime is somewhat vague. I have elsewhere argued that the ICC, were it to adjudicate charges brought under article 8(2)(b)(iv), would likely turn to preexisting understandings, in particular the Convention on the Prohibition of Military or Any

Other Hostile Use of Environmental Modification Techniques (ENMOD) and Protocol I.<sup>26</sup> Whereas interpretative work under ENMOD accords fairly accessible definitions of widespread, long-lasting, or severe,<sup>27</sup> it is unclear whether these shall inform interpretation of the Rome Statute because ENMOD's requirements are disjunctive. The Additional Protocol I interpretive guidelines, which are conjunctive, are much more likely to apply.<sup>28</sup> According to Heller and Lawrence, if Protocol I's definitions are imported into article 8(2)(b)(iv), the prohibition will become "a virtual nullity."<sup>29</sup> The only term referenced in the background work to the Protocol is "long-term," which is contemplated to mean damage that lasts for decades. Moreover, for the purposes of Protocol I, widespread is understood to mean "several hundred square kilometers," and severe means "any act that prejudices the health or survival of the population."<sup>30</sup> The definition of "severe" portends a return to the same anthropocentrism that article 8(2)(b)(iv)'s language seems to eschew.

Furthermore, the standard of proof (that is, the scientific certainty of the harm) could make it very difficult to convict a defendant. This is not inherently inappropriate because a criminal defendant is entitled to a prosecution that has to discharge a very high burden of proof, but it militates against criminal prosecutions actually turning into convictions or even being brought in the first place. These concerns, Heller and Lawrence note, have already "played a critical role in the refusal of the Committee that reviewed NATO's bombing campaign against Yugoslavia to recommend investigating that campaign's environmental damage."<sup>31</sup>

The stringent *mens rea* requirement is yet another limitation to the reach of article 8(2)(b)(iv). The harm must be inflicted intentionally and with knowledge that the attack will create such damage. As a result, only the "most invidious offender" is captured—namely, "the individual who *knows* that his or her behavior *will cause* widespread, long-term, and severe damage to the environment and, notwithstanding proof of this knowledge, still commits the act with the full *intention* of causing such damage."<sup>32</sup> The *mens rea* is purely subjective and, consequently, there is no room to capture negligent, willfully blind, or reckless behavior.

A third limitation is article 8(2)(b)(iv)'s proportionality requirement. The proportionality between the *actus reus* and the *concrete* and *direct overall* military advantage anticipated seems vague. Moreover, in terms of a de facto defense, the threshold to establishing military advantage is quite low. The impugned conduct has to be *clearly excessive* in relation to the overall *military advantage anticipated* (as opposed to "*military necessity*" tests that are found elsewhere in customary and conventional international humanitarian law). The injection of modifiers such as "clearly," "concrete," and "direct overall" is also novel<sup>33</sup> and conspires to make the successful establishment of the requisite level of proportionality very difficult for the ICC Prosecutor.

In addition, article 8(2)(b)(iv) does not apply to internal armed conflicts.<sup>34</sup> This limitation is particularly problematic because most armed conflicts in the modern age are internal, and no evidence demonstrates that internal armed conflicts are per se less environmentally destructive than international armed conflicts. On the contrary:

Insurgency and counter-insurgency guerrilla civil wars have a particularly devastating effect on local environments. Insurgents often use tropical forests as home bases and hiding grounds; counter-insurgency forces often respond by slashing and burning forests and by polluting rivers, viewing both as legitimate theaters of operations.<sup>35</sup>

However, even if some of these limitations could be corrected<sup>36</sup> by the insertion of clearer language in the Rome Statute or the Elements of the Crimes thereto, or definitional thresholds less weighted against conviction, or expansion to internal conflict, or creation of an independent crime of “geocide” or “ecocide,”<sup>37</sup> other structural limitations are not so readily correctible. Such limitations include:

- Environmental concerns might get lost in the shuffle due to the ICC’s finite resources and the gravity of the other crimes brought to its attention.<sup>38</sup> The difficulty in convicting individuals of environmental war crimes might have a chilling effect on the Prosecutor. To some degree, this has been the experience at the International Criminal Tribunal for Rwanda (ICTR). The conflict in Rwanda “has seen two national parks landmined, endangered species poached, agricultural lands rendered barren . . . and systematic resettlement exhausting moderate lands—specifically in eastern Congo—of their agricultural capacities. The [ICTR] has made no mention of these issues in its proceedings or in any of the mandates it has authorized.”<sup>39</sup> Domestic prosecutions in Rwanda also have been reticent to examine this environmental desecration.
- Judges and prosecutors may not have sufficient expertise in environmental matters.
- Punishment and sentencing are problematic. Insofar as the ICC’s jurisdiction is limited to natural persons, no corporate, institutional, or state culpability is possible. Is sequestered imprisonment of guilty individuals an effective sanction for environmental war crimes? Will the distant threat thereof deter future commission of the offense in the “fog of war”? Will it help remediate the harm? Will incarceration provide justice for victims in postconflict zones? (These questions arise for violations of socioeconomic rights as well, and, as I have explored elsewhere, limitations to hegemonic correctional preferences also affect their effectiveness as responses to infringements of core civil and political rights).<sup>40</sup> To be sure, there may be some possibilities for restitution and access to the Victims Trust Fund. However, it remains unclear whether sufficient funds can be tapped to remediate desecrated and uninhabitable lands. Failure to remediate could create a basis for further conflict, competition over resources, and refugee movements.<sup>41</sup> Would the Trust Fund extend to a situation where “it is the natural environment directly, and humanity only indirectly, that bears the loss of the crime”?<sup>42</sup>

- The international response to environmental crimes needs to look beyond armed conflict. Many major environmental disasters occur in peace time (for example, the Chernobyl meltdown and negligence and subsequent delays in notification) or in processes of mobilization to armed conflict (for example, weapons testing) or demobilization (for example, decommissioning, destruction of weapons).<sup>43</sup>

In the end, stigmatizing environmental war crimes through the ICC has important expressive value, but this value may quickly dissipate if there are no prosecutions or if successful prosecutions fail to improve the lot of individuals living in the environmentally desecrated areas. Consequently, alternate remedies such as insurance schemes, state responsibility, collective sanctions, specific performance, remediation, mandated detoxification, restitution, and injunctions are pertinent. In fact, these remedies might be more suitable for environmental war crimes because they operate at a lower evidentiary threshold—perhaps at the level of willful blindness. Since prosecutions and civil lawsuits are essentially reactive, entirely political strategies such as providing ex ante technology and resources for the development of less environmentally destructive weaponry might hold promise. Many of these remedies and strategies fall entirely outside of the purview of the criminal law, thereby suggesting the important limitations of criminalizing intentional harm inflicted on the environment during armed conflict. Although criminal convictions generate considerable stigma, the reach of the criminal law, no matter how far it extends, can only accomplish so much. Assuredly, none of these alternate remedies is a panacea. In fact, as the next section demonstrates, the law-in-practice is not robust in the area of tortious civil liability either.

### *Civil Litigation*

The U.S. Alien Tort Claims Act<sup>44</sup> (ATCA, also known as the Alien Tort Statute [ATS]) reads as follows: “The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>45</sup> Conduct violates the law of the nations if it infringes upon “well-established, universally recognized norms of international law.”<sup>46</sup> Liability under the ATCA extends to both individual and corporate tortfeasors.

*In re “Agent Orange” Product Liability Litigation* is a case under the ATCA that involves allegations of, inter alia, environmental war crimes. The plaintiffs in *Agent Orange* were Vietnamese nationals who claimed against various chemical companies. Plaintiffs alleged property damage and personal injuries incurred from toxic defoliant herbicides that defendants manufactured and sold to the U.S., which were in turn used in Vietnam during the Vietnam War.<sup>47</sup> The Eastern District of New York found that liability was possible since “international law clearly and specifically defines aiding and abetting liability.”<sup>48</sup> The court asserted that recognized norms in international law provided a “‘specific, universal and obligatory’ norm against aiding and abetting that was well-established long before the Vietnam War.”<sup>49</sup> When it came to the claim that the use of Agent Orange in Vietnam

violated the laws of nations, however, the court was much more reticent. It held that “herbicide spraying . . . did not constitute a war crime pre-1975.”<sup>50</sup>

The plaintiffs mostly couched their arguments in an anthropocentric sense, focusing on the harms the herbicide spraying inflicted on the civilian population. The court rejected the claim that herbicide spraying was encompassed by the prohibition on poison or poisoned weapons. It opined that the prohibition (at least within the context of the 1925 Geneva Protocol) “extended only to gases deployed for their asphyxiating or toxic effects on man, not to herbicides designed to affect plants, that may have unintended harmful side-effects on people.”<sup>51</sup> The court also noted that “[n]o treaty or custom affecting environmental protection created a rule effective before 1975 making illegal the use of herbicides as used in Vietnam.”<sup>52</sup> Interestingly, the court considered Protocol I and ENMOD language regarding the prohibition of widespread, long-term, and/or severe damage to the natural environment (the ecocentric prohibition). It noted that the fact Protocol I’s prohibition came *after* the Vietnam War suggested that it was not a binding part of the law of nations at the time of the war.<sup>53</sup> Neither the U.S. nor Vietnam was a party to ENMOD when use of Agent Orange had stopped.<sup>54</sup> The District Court did not opine that these prohibitions formed part of customary international law, however, thereby underscoring the salience of article 8(2)(b)(iv) of the Rome Statute (which the court did not consider).

In 2008, the Second Circuit Court of Appeals affirmed the *Agent Orange* decision upon de novo review.<sup>55</sup> To determine whether the use of Agent Orange violated the law of nations, the appellate court characteristically defined sources of international law as international conventions, international customs, general principles of law recognized by civilized nations, and judicial decisions or the works of highly qualified publicists.<sup>56</sup> However, before a court can permit a claim under the ATCA, it “should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” of international law.<sup>57</sup> Thus, for a claim to succeed under the ATCA, the prohibited act must be specifically defined and universally accepted by the civilized world.<sup>58</sup> Like the District Court before it, the Second Circuit ruled that the prohibition against defoliation failed both elements.<sup>59</sup> So, *Agent Orange* leaves open the question whether ecocentric war crimes would be actionable under the ATCA, but the cases do not provide much in the way of dicta to support such a claim.

Another line of ATCA cases involves alleged environmental violations of the law of nations *outside* of the context of armed conflict. Few penal provisions exist in this area.<sup>60</sup> Consequently, this line of ATCA cases covers ground that exceeds the scope of international criminal law and the collateral civil liability for environmental war crimes as argued in *Agent Orange*. However, several courts called upon to adjudge whether violation of environmental rights can amount to an actionable violation of the laws of nations have been very reticent. Two cases are illustrative: *Beanal* and *Flores*.<sup>61</sup>

In *Beanal v. Freeport McMoran, Inc.*, plaintiffs sued an international mining company for human rights violations, environmental abuses, and cultural genocide allegedly occurring at its Indonesian mine.<sup>62</sup> The Fifth Circuit upheld Freeport McMoran's successful motion to dismiss on the basis that the alleged violations failed to state claims upon which relief could be granted. While plaintiffs' human rights allegations lacked the requisite specificity to put the defendant on notice,<sup>63</sup> the alleged environmental torts lacked cognizance under the law of nations because plaintiffs failed to demonstrate that the alleged activities violated internationally accepted norms or standards.<sup>64</sup> Beanal's reliance on the Rio Declaration and other alleged sources of international environmental law<sup>65</sup> did not meet the necessary standards of showing that the "treaties and agreements enjoy universal acceptance in the international community."<sup>66</sup> The court stated that the proffered sources "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts."<sup>67</sup> Assuredly, the Rio Declaration is a soft law document and, consequently, not an official source of international environmental law; however, some of its principles do reflect what has been elsewhere described as customary international environmental law or general principles of law.<sup>68</sup> In any event, the court also underscored the argument against interfering with a nation's alleged environmental torts and abuses when such actions exist within the nation without affecting neighboring states.<sup>69</sup>

The plaintiffs in *Flores v. Southern Peru Copper Corporation* were Peruvian residents and agents of deceased residents who brought suit against a U.S. copper mining corporation, claiming that sulfur dioxide pollution from defendant's operations in Ilo, Peru, resulted in fatal respiratory illnesses such as lung disease. The plaintiffs claimed that this intra-national pollution violated customary international law obligations such as "right to life," "right to health," and "right to sustainable development."<sup>70</sup> The district court dismissed the claims for failure to plead any violations of customary international law.<sup>71</sup> The Second Circuit affirmed the judgment, holding that plaintiffs failed to allege violations of customary international law. The ruling assessed the rights to life and health claims as well as the intra-national pollution claims, finding that none of the allegations implicated principles of customary international law.<sup>72</sup> While the ATCA requires that plaintiffs allege violations of "clear and unambiguous" prohibitions, the Second Circuit Court characterized the evidence on which plaintiffs relied to define rights to life and health as "vague and amorphous."<sup>73</sup> The Circuit Court described the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Rio Declaration principles as "boundless and indeterminate."<sup>74</sup> "They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them."<sup>75</sup> In one instance, the Second Circuit described the ICESCR language as "nebulous notions that are infinitely malleable."<sup>76</sup>

With respect to the intra-national pollution claims, the plaintiffs' reliance on various treaties, conventions, and covenants failed to demonstrate that any of the specified instruments actually established a prohibitive legal principle. Examples of General Assembly documents, multinational



declarations of principle, and multinational tribunal decisions did not support the existence of customary international law. At one point, the ICESCR was referred to as “vague and aspirational . . . [with] no evidence that the States parties have taken significant uniform steps to put it into practice.”<sup>77</sup> The Circuit Court held that there was no customary international rule against intra-national pollution. In the end, the Circuit Court affirmed the motion to dismiss. It did not consider transnational pollution since no allegations were made of harmful activity outside of Peru.

These ATCA cases are instructive because they demonstrate that civil remedies for infringement of environmental rights, or cognate rights to health (for example, in *Flores*), are poorly articulated and thinly justiciable. Underpinning many of these judgments is a concern that robust interpretation of the ATCA in the context of environmental harms allegedly committed by corporate actors would lead to an interference in the foreign relations of the United States and produce a possible chilling effect on foreign investment that would be injurious to host developing countries. An alternate narrative, however, suggests that a robust interpretation of the ATCA might improve regulatory supervision and ensure that these foreign investments do more to benefit people who actually live in the host country.

## Property Crimes and Expropriation

Property crimes such as destruction of homes, possessions, and farms are commonplace in armed conflict and atrocity. For many survivors, recovery is difficult when everything they owned has been destroyed. Restoration and restitution of real and personal property is, therefore, central to any process of reconciliation and justice. Whether criminal prosecutions are successful in this regard remains contested. Restitutionary claims have not been brought before the ad hoc international tribunals, and it is unclear what direction the ICC’s more purposive incorporation of restitutionary remedies shall lead. Lawsuits and declaratory requests in non-criminal law courts may also play a role. This is especially true for unlawful economic activities that may fall short of explicitly incurring penal responsibility, such as expropriation,<sup>78</sup> discriminatory denial of state benefits, or takings.

### *Criminal Prosecution*

Discussion regarding the kinds of conduct that the crime of persecution might encompass has included property crimes such as destruction of homes. However, unless such property destruction was part of a broader series or pattern of rights violations, which include violent denial of core civil and political rights, prosecution before an international tribunal appears doubtful.

The breadth of the crime against humanity of persecution was carefully considered by the International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber in *Prosecutor v. Kupreskić et al.*<sup>79</sup> All six accused were charged with the crime against humanity of persecution,

specifically on the grounds that from October 1993 to April 1993 they persecuted Bosnian Muslims by “planning, organizing and implementing an attack which was designed to remove all Bosnian Muslims from the village and surrounding areas.”<sup>80</sup> “As part of this persecution the accused participated in or aided and abetted the deliberate and systematic killing of Bosnian Muslim civilians, the comprehensive destruction of their homes and property, and their organized detention and expulsion.”<sup>81</sup> The ICTY Trial Chamber engaged in a lengthy discussion of the scope of the crime of persecution. It engaged with a number of sources, including refugee law<sup>82</sup> and human rights law,<sup>83</sup> but ultimately concluded that “[i]t would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law.”<sup>84</sup>

Turning to international criminal law as a source for the content of the crime of persecution, the Trial Chamber noted that the International Military Tribunal at Nuremberg “described the progression of infringement of rights, which started with the deprivation of rights and citizenship; rights to work and education; economic and property rights; and then led to arrest and confinement in concentration camps; beatings, mutilation and torture; deportations; slave labor and ‘finally over six million were murdered.’”<sup>85</sup> In this regard, the Trial Chamber underscored that massive violations of civil and political rights often begin with violations of socioeconomic rights. However, referring to the IMT judgment, the Trial Chamber went on to note:

The Judgement of the IMT included in the notion of persecution a variety of acts which, at present, may not fall under the Statute of the [ICTY], such as the passing of discriminatory laws, the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life, the imposition of a collective fine on them, the restriction of their movement and their seclusion in ghettos, and the requirement that they mark themselves out by wearing a yellow star. Moreover . . . several individual defendants were convicted of persecution in the form of discriminatory economic acts.<sup>86</sup>

After reviewing the IMT judgment, the judgments of the Nuremberg subsequent proceedings, and the judgments of national courts regarding Nazi atrocity, the ICTY Trial Chamber concluded that “persecution can consist of the deprivation of a wide variety of rights”<sup>87</sup> and that “[a] narrow definition of persecution is not supported in customary international law.”<sup>88</sup> The Trial Chamber additionally held that, in addition to “acts such as murder, extermination, torture, and other serious acts on the person . . . [p]ersecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights.”<sup>89</sup> The Trial Chamber attached importance to whether the acts occur in a series or pattern or, on the other hand, are comprised of a single act. Accordingly, “[a]cts of persecution will usually form part of a policy or at least of a patterned practice.”<sup>90</sup>



The Trial Chamber defined persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [of the ICTY Statute].”<sup>91</sup> Applying this definition to the case before it, the Trial Chamber found that “deliberate and systematic killing of Bosnian Muslim civilians” and their “organized detention and expulsion from Ahmici” could constitute persecution.<sup>92</sup> As to the question whether comprehensive destruction of Bosnian Muslim homes and property can constitute persecution, the Trial Chamber’s analysis is as follows:

The question here is whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution. The Trial Chamber notes that in the Judgement of the IMT, several defendants were convicted of economic discrimination.<sup>93</sup>

. . . .

The Trial Chamber finds that attacks on property can constitute persecution. To some extent this may depend on the type of property involved . . . . There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone’s car (unless the car constitutes an indispensable and vital asset to the owner). However, 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 consequence as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.<sup>94</sup>

Ultimately, for five of the six defendants, the Trial Chamber entered convictions for persecution based on the totality of the conduct against Bosnian Muslims. Some of these convictions were quashed on appeal,<sup>95</sup> but not on the basis of revisiting the definition of persecution adopted by the Trial Chamber. The Appeals Chamber found that the factual proof of three defendants’ involvement fell short of that required for conviction and, thereby, reversed the persecution convictions. In two other cases, the Appeals Chamber accepted certain of the defendants’ appeals and reduced the sentence without reversing all of the convictions. Again, this appellate review did not touch upon the substantive scope of the crime of persecution as defined by the Trial Chamber. Consequently, former UN High Commissioner for Human Rights Louise Arbour is correct to state that in the *Kupreskić* case the ICTY Trial Chamber recognized the comprehensive destruction of homes and

property as potentially constitutive of the crime against humanity of persecution when committed with the requisite intent.<sup>96</sup>

### *Civil Litigation*

On the topic of expropriation, confiscation, and takings, the jurisprudence of the European Court of Human Rights (ECHR) regarding claims for the restitution of property unlawfully taken during a period of conflict or under authoritarian rule is instructive. The ECHR has issued judgments in many cases involving restitution and expropriation. Many expropriation cases involve post-communist transition.<sup>97</sup> Others involve expropriation as a matter of course of governmental regulation. Most germane to this discussion, other applications brought to the ECHR involve the relationship between expropriation and postconflict transition.

Although the jurisprudence is not robust in the substantive discussion it offers, it is sufficiently developed to be distilled into two different schools—one that favors the present owner over the former owner, the other that favors the former owner over the present owner.<sup>98</sup> Tom Allen finds that cases that favor the present owner tend to rely on principles of rule of law and the value of stability of expectations; in other words, “restitution threatens to undermine the foundations of the new market economies.”<sup>99</sup> In contrast, judges who support restitutionary claims believe that the destabilizing threat thereof is overstated and, more proactively, “that the rule of law is strengthened by using past abuses of power as examples for future standards.”<sup>100</sup> Allen notes that “it is argued that restitution is needed to restore dignity and to reinstate victims as full participants in the social, political and economic life of the community.”<sup>101</sup> In this regard, restitution can ease victim and survivor reinsertion into society.

In practice, restitution for an historical wrong may require the displacement of the current occupant. Although a state decision to pass a law to this effect receives deference, in the absence of such a law the ECHR is diffident regarding whether human rights law requires such an outcome. Consequently, in terms of an overall pattern of jurisprudence, the ECHR “seems to take little interest in these [restitution for historical takings] matters, apparently in the name of the rule of law and the all-important value of maintaining the stability of property relations.”<sup>102</sup> The one major exception is the *Loizidou* case, decided by the Grand Chamber in 1996, which involved a claim against Turkey brought by Greek Cypriots for access to property where they had been living prior to the Turkish occupation in 1974 (the property had, following the occupation, been used to provide housing to Turkish Cypriot refugees).<sup>103</sup>

Litigation involving restitution for unlawful takings generally touches upon Article 1 of Protocol No. 1 to the European Convention on Human Rights. The Convention came into force in 1953 and Protocol No. 1 in 1954. Article 1 of Protocol No. 1 states that: “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the

general principles of international law.” The right of a state to enforce law in the general interest, however, is not impaired.

International law regarding expropriation is complex, but there is a general norm of compensation for the expropriation. In this vein, the ECHR has held as a general matter that “the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be considered justifiable under Article 1 of Protocol No. 1.”<sup>104</sup> In some cases, the ECHR has ruled that even when compensation has been offered by the state, this compensation was not adequate to satisfy this requirement.<sup>105</sup> That said, the ECHR has generally taken a cautious approach to restitutionary claims in the context of postconflict situations. Two cases from Croatia are instructive.

*Blečić v. Croatia*<sup>106</sup> involves Croatian laws that permit courts to terminate specially protected tenancies when the tenant has been absent for over six months without justified reason. In the early 1990s, many tenants fled due to armed conflict in Croatia (in Blečić’s case, in the town of Zadar). Blečić had challenged the termination of her tenancy within the Croatian court system. Her challenge ultimately was unsuccessful. She then alleged infringement of her right to respect for her home (a socioeconomic right found in Article 8 of the Convention) and also an expropriation claim under Article 1 of Protocol No. 1.

Evidence brought by a third-party intervener, the Organization for Security and Cooperation in Europe (OSCE), suggested that Croatian authorities tended to terminate, on the basis of absence for six months, the tenancies of a disproportionately larger number of ethnic Serbs than Croats:

The OSCE argued that the applicant’s specially protected tenancy could be appropriately viewed only in the overall context of actions by the judiciary and legislature that had resulted in the mass termination of such tenancies during and after the homeland war in Croatia. It submitted that, from 1991 onwards, 23,700 proceedings for the termination of specially protected tenancies had been initiated.

Most of these proceedings had been instituted against persons of Serbian origin, which had resulted in a significant decline in the minority population in Croatia. In the OSCE’s view, the termination of specially protected tenancies had had a strong negative effect on minority return.<sup>107</sup>

The OSCE also noted that individuals of minority ethnicity faced “harassment, threats, and in many cases, forcible eviction from their homes and property.”<sup>108</sup> The OSCE “found it difficult to view absence from flats owing to war activities as voluntary in nature.”<sup>109</sup>

The Chamber rejected the claim that Article 8 was violated, finding that the Croatian courts acted reasonably.<sup>110</sup> It also rejected the claim that Croatia violated Article 1 of Protocol No. 1, finding that

“the interference in question was neither an expropriation nor a measure to control the use of property.”<sup>111</sup> This left only the claim that the measure interfered with a right of property. The Chamber held, for the same reasons as applicable to the Article 8 discussion, that the measure was justifiable as serving a legitimate public or general interest.<sup>112</sup> Moreover, the Chamber found that the interference struck a “fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>113</sup> The Chamber, therefore, took a fairly cautious approach to both the socioeconomic right to home and also to the scope of impermissible expropriations. The Chamber avoided the much broader discussion of the purported ethnically motivated nature of the evictions.

The matter then was referred to the Grand Chamber. By a vote of 11:6, the Grand Chamber found a lack of jurisdiction based on temporal considerations (*ratione temporis*) and based its analysis on a number of factors, including the general rules of international law.<sup>114</sup> The Grand Chamber ruled that the allegedly interfering deprivation occurred at the moment the Supreme Court adjudged the matter—February 15, 1996—which pre-dated the entry into force of the Convention.<sup>115</sup> The Constitutional Court decision “only resulted in allowing the interference . . . to subsist.”<sup>116</sup> The Grand Chamber also held that “the deprivation of an individual’s home or property is in principle an instantaneous act and does not produce a continuing situation of ‘deprivation’ of these rights.”<sup>117</sup> Dissenting opinions were issued.<sup>118</sup> All in all, the Grand Chamber ducked the issue. As Allen observes:

[t]he Grand Chamber of the Court of Human Rights did not suggest that the application of the termination law was open to reproach. It therefore declined to consider the broader context in which this dispute occurred, and its reasoning does not disclose the slightest hint that terminations of this type were often part of a larger campaign of ethnic cleansing.<sup>119</sup>

Overall, as Allen remarks: “The general trend is against any re-opening of disputes arising from pre-transitional conduct . . . . The stability of present entitlements is preferred over the reinstatement of former titles.”<sup>120</sup> Doing justice for the past may involve violating the rights of present owners, which is disturbing if these owners acquired the property in question with clean hands.

## Conclusion

This part of the paper has surveyed the justiciability in both criminal and civil contexts of two sets of violations of socioeconomic and environmental rights: (1) widespread, long-term, and severe environmental harm during international armed conflict and environmental destruction independent of armed conflict, and (2) property crimes and expropriation. These case studies help illustrate that socioeconomic and environmental crimes are thinly articulated in extant international criminal law. Furthermore, the robustness with which socioeconomic and environmental rights are

articulated in civil courts (whether in suits for tort, restitution, or declaratory relief) is lower than that of core civil and political rights.

In sum, the modest way in which socioeconomic and environmental rights are articulated in criminal and civil contexts is traceable to a number of reasons:

- the aspirational, rather than mandatory, nature of the rights (for example, ATCA environmental litigation);
- the vagueness of the actual proscriptions, the onerous *actus reus* and *mens rea* requirements, or readily available defenses (for example, article 8(2)(b)(iv) of the Rome Statute and post-World War II environmental war crimes prosecutions);
- political pressures and resource limitations that push toward sanctioning only individual responsibility for the most severe civil and political rights violations (for example, property damage prosecuted at the ICTY as part of a much broader persecutory set of violence to persons);
- evidentiary difficulties in connecting individuals with systemic socioeconomic and environmental wrongdoing and concern that aggressive prosecutions might undermine defendants' rights, due process guarantees, and serve ulterior state purposes;
- lack of scientific and forensic expertise among international judges and investigators;
- concern over political questions such as interfering with a government's regulatory authority, comity among nations, and chilling effects on foreign investment (for example, ECHR cases); and
- concern with remedies—justice for past socioeconomic violations may create new violations to third parties (for example, ECHR jurisprudence on expropriation and restitution) or may be ineffective to deal with the nature of the harm (for example, criminal sanction for article 8(2)(b)(iv) and ecocentric war crimes).

Although there has been some jurisprudential movement toward structural and corporate liability for massive human rights abuses, this movement has by and large been limited to conspiracy and aiding and abetting core civil and political rights violations. The goals of fleshing out socioeconomic and environmental aspects of conflict, or the role that socioeconomic and environmental rights violations play in the subtext of mass atrocity, have not animated the limited progress made in extending accountability to organizations, corporations, or systemic elements. This is a shortfall, insofar as tools of socioeconomic and environmental rights violations often are central to the enterprise of atrocity.

Along with overt acts of personal violence, murder, and sexual torture, the narrative of atrocity—for example in Darfur—is underpinned by systemic destruction of food crops, starvation, burning of homes and villages, interference with humanitarian missions, endemic discrimination, and forced displacement. All these methods of oppression are used alongside murder and rape to achieve nefarious ends. When this conduct is not addressed, accountability remains underachieved.

That said, as I have argued elsewhere, accountability is not limited to criminal prosecutions and civil lawsuits.<sup>121</sup> Judicialization is only part of the picture. Consequently, the question remains whether augmenting individualized criminal prosecutions and civil lawsuits for socioeconomic and environmental rights violations will promote justice and accountability and, if so, whether it will do so in a manner more effective than investing time, resources, and energy in alternate forms of accountability, such as truth commissions, reparations, constitutional reform, memorialization, public inquiries, affirmative action, and instantiating pedagogy.

## Should Those Committed to Justice and Development Promote the Enforcement of Socioeconomic and Environmental Rights through Prosecutions and Litigation?

Arbour would say yes. She posits: “The use of statutes of existing international and national courts to adjudicate economic, social, and cultural violations as international crimes should thus be further explored. We should also consider . . . expanding the current scope of international criminal law to encompass other gross violations of economic, social and cultural rights.”<sup>122</sup> In this final part of the paper, I hope to examine this contention more closely. Is it worthwhile to extend resources in the direction of judicializing socioeconomic and environmental crimes through criminal responsibility? I would extend the debate beyond Arbour’s contention and inquire the same of civil liability. Assuredly, there are no clean or simple answers. To this end, I consider the potential benefits and limits to judicializing socioeconomic violations. The purpose of this discussion is to foster dialogue and further research, in particular on the linkages between expanded judicialization and development. How might expanded judicialization promote development? How might it inhibit it?

Many of the benefits and limits of criminal prosecutions for property and environmental rights violations parallel those of criminal prosecutions for core civil and political rights violations. I have written elsewhere that the most plausible goal for criminal prosecutions for core international crimes is *expressivism*:

Expressivists contend that trial, conviction, and punishment appreciate public respect for law. The expressivist punishes to strengthen faith in rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it. Expressivism [also] claim[s] as a central

goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.<sup>123</sup>

Criminal prosecutions for socioeconomic and environmental crimes can serve expressive goals. Such prosecutions can expose wrongdoing and stigmatize it as criminal. They can help bridge international human rights law and international criminal law, thereby girding connections between related yet disparate areas of law. Prosecutions can also help prospectively build a culture supportive of socioeconomic and environmental rights. Prosecuting socioeconomic and environmental wrongdoing that has facilitated mass atrocity can offer a more fulsome picture of justice for victim communities and narrate a story that is much more representative of the multi-causal origins of mass atrocity and its gradual, and often incremental, implementation. To the extent that prosecutions flesh out educational and economic inequities, and address matters of gender discrimination, they may well contribute to a more salutary postconflict socio-legal environment.

Prosecutions, whether for civil and political or socioeconomic crimes, can play a valuable role in normalizing rule of law values, building a new sense of community, and authenticating an authoritative historical record. Purposively injecting anti-discrimination norms into a society can mitigate the threat that renewed discrimination-based violence metastasizes into wide-scale atrocity. In addition to meting out justice, prosecutions can train personnel and help build civil society.<sup>124</sup> In each of these regards, effective and genuine outreach to local communities is key. International or internationalized prosecutions will be more effective in attaining these capacity-building goals if they are more deeply anchored within the postconflict society. International involvement without corresponding expansion of domestic capacity may continue to feed the need for more international involvement and eventually “undermin[e] long-term local confidence in the domestic legal system.”<sup>125</sup> When rooted within the postconflict society, internationalized prosecutions may help build local capacity for rights enforcement (for example, in Croatia and Bosnia); however, experience instructs that internationalized proceedings are not always so anchored (for example, in Iraq, Kosovo, and Sierra Leone). When international interventions operate parallel to, or extraneous from, the postconflict society, they become subject to what has been aptly called the “spaceship phenomenon.”<sup>126</sup> Similarly, extraterritorial litigation, whether criminal proceedings under universal jurisdiction or ATCA cases under specific statutory grants of power, may be located so far from the afflicted society that justice simply becomes externalized from that society.

Shortfalls to criminal prosecutions, again whether for civil and political or socioeconomic crimes, include: unrealistic expectations about the transformative potential of trials and sanctions; an inability to actualize retributive and deterrent aspirations; frustration among victim communities with the pace of trials; defendants’ ability to grandstand; the dehumanization of victims that can result from the defendants’ deployment of due process entitlements; transplants of Western adversarial legalism into socio-legal contexts where such adversarial legalism is alien; the historical narrative being more scripted by the laws of evidence than what actually happened; and competition instead of synergy with other justice initiatives. Criminal trials of a handful of invidious offenders



may obfuscate the reality that massive levels of atrocity result from the involvement of large numbers of perpetrators and the acquiescence and support of broad swaths of the community. Consequently, international criminal trials may collectivize innocence on social groups that really are not so innocent. Socioeconomic and environmental crimes may fit even more brusquely with the paradigm of individual penal responsibility that is the cornerstone of criminal prosecutions. Proceeding through adversarial litigation requires clear satisfaction of what Albie Sachs terms “microscopic” truths which, in turn, may become problematic for claims involving diffuse and multi-causal sources. Prosecutions may become frustrated and, in response to those frustrations, may be tempted to trample on due process protections.

Cost is also a relevant factor. Criminal prosecutions for environmental and socioeconomic crimes are expensive, especially when conducted at the international level. Although—in a purist sense—there cannot be a cost affixed to justice, in a context of limited resources it would be impractical not to make assessments regarding the cost of criminal prosecutions and compare those to the costs of other justice modalities or, even, other infrastructure projects.<sup>127</sup> Moreover, it is also fair to inquire whether the limited pot going to prosecutions will be divvied up to cover environmental and socioeconomic crimes, or whether it will be directed at what the public perceives as the more serious crimes of concern to humanity as a whole, which will traditionally gravitate to massive and brutal violations of civil and political rights. Too broad a swath of prosecutions for a variety of crimes may conflict with the ICC’s focus on a small number of perpetrators of the most notorious offenses. Carrying the weight of such prosecutions may, in turn, require the involvement of local actors with its attendant benefits and, assuredly, risks. If local communities are pressured into criminal prosecutions by the transplant effects of internationalized justice paradigms, then democratic deficits may arise insofar as local communities may prefer alternate non-adversarial modalities of justice.<sup>128</sup>

I have elsewhere underscored the importance of civil remedies and of horizontally expanding the sites where justice actors operate. I would apply this to the context of socioeconomic crimes as well. When a violation of international criminal law attracts civil liability, wrongdoing becomes addressed by diffuse layers of law. Accountability becomes available in multiple fora. Plaintiffs in ATCA litigation have expressed comfort with the lower thresholds of liability that are required for civil tort claims. While civil judgments are often uncollectible because the defendant is destitute or beyond the enforcement jurisdiction of the court, these judgments often serve important declaratory and pedagogical roles (for example, the *Kadić* judgment on sexual violence in Bosnia).

Paradoxically, however, too much judicialization—particularly in the context of corporate actors—might chill foreign investment and, thereby, inhibit economic development in certain developing states. Too much legalization might threaten a postconflict government and its policy choices (for example, South Africa, in its response to challenges to the Truth and Reconciliation Commission brought in ATCA litigation).<sup>129</sup> State responsibility (and other forms of collective responsibility) may bankrupt a postconflict state through damage awards of billions of dollars (for example, what could have been awarded against Serbia, were the International Court of Justice to have actually issued a



damages award).<sup>130</sup> State responsibility may make it impossible for a government seeking to transition a state past genocide to escape the shadow of its genocidal predecessor (for example, claims that the Rwandan state, which had been run by a genocidal government, committed genocide when such state liability would be passed onto a successor government). State responsibility might dehumanize an entire collectivity and thereby make transitional efforts all the more difficult. In a situation where a postconflict government is genuinely trying to move toward protection of human rights, democratization, and economic opportunity, such damage awards could be particularly deleterious to developmental and transitional goals.<sup>131</sup>

Alternatively, the prospect of collective responsibility might serve a gate-keeping function in that the public is incentivized to stamp out discriminatory conflict entrepreneurs early on, serve defendants up for prosecution (for example, Indonesia regarding Timor-Leste), or push postconflict governments toward greater respect for human rights in hopes that such good faith might augment political pressure in the international community (or within international courts) not to impose a damage award.

Lawsuits that pursue restitutionary ends can avoid some of the debates over collective responsibility and circumvent the chilling effects of civil tort liability and the possibility for punitive damages. Such lawsuits are often focused on specific property that has passed hands in times of conflict or in a postconflict period. The claims, therefore, are based on notions of corrective justice and compensation. Restitutionary claims may arise in situations where there are refugees. Individuals fleeing a conflict area because they are potential victims or individuals fleeing postconflict zones because they fear reprisals or denunciations may find that their property is occupied by others upon their return. Unless there is access to some sort of judicialized process to hear their grievances, reconciliation will be impeded. On the other hand, the following finding by Tom Allen is germane to any discussion of the normative value of judicialized restitutionary claims for expropriations:

[T]here is no general consensus on the desirability of restitution. For example, it is not clear that restitution either advances or retards economic growth. The effect of restitution on the rule of law is also disputed. It has been argued that restitution demonstrates a commitment to the rule of law, by distinguishing the present regime from its predecessor and by providing a positive signal that property rights will be respected in future, but this is countered by concerns that the rule of law would be undermined by restitution programs that upset titles that were acquired in good faith during the pre-transitional era.<sup>132</sup>

Retrospective application of the law, whether criminal or civil, after harms have occurred can only do so much, especially in the case of environmental damage. It is important to think preventatively as well, in a manner that goes well beyond what I believe to be the thin deterrent value of prosecutions and extant correctional preferences (that is, imprisonment). If a handful of retrospective

criminal prosecutions or civil lawsuits lull us into believing that we have effected justice, this is cause for concern. In the context of environmental war crimes, as I have argued elsewhere:

What is more important is to provide incentives not to act in environmentally threatening ways in the first place. Examples include the creation of economic disincentives to producing environmentally destructive weaponry, technology transfers to assist developing countries to pursue national security interests in a more environmentally friendly manner, and financial assistance mechanisms.<sup>133</sup>

Aggressive, preventative peacekeeping also may be effective in mitigating environmental damage and many socioeconomic rights violations.<sup>134</sup>

Any advantages that criminal prosecutions and civil lawsuits bring to the table in promoting justice, reconciliation, and development may be lost if these judicialized interventions squeeze out alternate forms of accountability. Justice modalities outside the strictures of adversarial tribunals hold considerable promise in promoting developmental aims. International insurance schemes may well be the only way to provide remediation funds for massive environmental harms. Their existence, however, may create the kind of moral hazard that criminal prosecutions seek to dispel. Reparations also are seen by many victims as a central element of the justice matrix. However, “development programs have a very low reparative capacity, for they do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims.”<sup>135</sup> Moreover, if implemented in a country where both oppressor and victim groups share the same public citizenship space—for example, Rwanda—reparations schemes may help both “sides” equally, despite the moral imbalance among “sides.”

Other mechanisms of transitional justice,<sup>136</sup> such as truth commissions, may be better suited than adversarial prosecution and litigation to address socioeconomic and environmental wrongs. There is cause, however, to question extant methods of measuring the effectiveness of truth commissions.<sup>137</sup> Lustration and vetting also are valuable tools in the postconflict tool-kit. Here, too, there is cause for concern with regard to establishing the appropriate level of administrative justice: for example, there was too much in Iraq, but too little in Afghanistan.<sup>138</sup> Embedding economic, social, and cultural rights in new national constitutional structures that arise from transitional political settlements may be easier to attain and more successful than retrospectively imposing punishment or liability for breach of such rights.<sup>139</sup> Declaratory and injunctive relief can promote enforcement of rights instead of punishing their historical violation. Peace agreements and international administration, such as the UN Mission in Kosovo, also may be effective locations in which to anchor discussion of socioeconomic and environmental rights.<sup>140</sup> Finally, any judicialization effort should not ride roughshod over local, and often restorative, forms of justice, such as *mato oput* in Uganda, *biti bot* in Timor-Leste, *jirga* (enforcing Pashtunwali) in Afghanistan,<sup>141</sup> or neo-traditional *gacaca* in Rwanda. Assuredly, though, each of these, in particular the Pashtunwali, triggers deep concerns.<sup>142</sup>

In conclusion, should those committed to promoting justice and development consider the enforcement of socioeconomic and environmental rights through prosecutions and litigation? Yes, but they should do so with considerable caution, modesty, and care—realizing all the while that judicialization is not synonymous with accountability. International criminal and human rights law, whether enforced through prosecutions or civil lawsuits, is only *part* of a more textured and composite picture of international justice.

<sup>1</sup> See Louise Arbour, “Economic and Social Justice for Societies in Transition,” Second Annual Transitional Justice Lecture hosted by the Center for Human Rights and Global Justice at New York University School of Law and by the ICTJ, October 25, 2006.

<sup>2</sup> See also Shadrack B. O. Gutto, “Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa,” *Buffalo Human Rights Law Review* 4 (1998): 82.

<sup>3</sup> See M. Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden, The Netherlands: Brill, 2003), 133 (“Economic interests are perceived as the least important of the international interests that ICL seeks to protect . . .”); Arbour, “Economic and Social Justice,” 4–13.

<sup>4</sup> See Rome Statute of the International Criminal Court, art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 93 [hereinafter Rome Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 3(d), November 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2(g), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]. Rome Statute article 7(2)(d) defines “deportation or forcible transfer of population” as 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. Rome Statute article 8(2)(b)(viii) also specifically proscribes as a matter of international occupation law the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. In cases of non-international armed conflict, Rome Statute article 8(2)(e)(viii) proscribes “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”

<sup>5</sup> See ICTR Statute, art. 4(f); Statute of the Special Court for Sierra Leone, art. 3(f), January 16, 2002, [www.scs-l.org/documents.html](http://www.scs-l.org/documents.html) [hereinafter SCSL Statute]; Rome Statute, art. 8(2)(b)(xvi) (in international armed conflict) and art. 8(2)(e)(v) (in non-international armed conflict).

<sup>6</sup> See ICTY Statute, art. 3(e).

<sup>7</sup> See *ibid.*, art. 2(d); Rome Statute, arts. 8(2)(a)(iv) and 8(2)(b)(xiii) (in cases of international armed conflict) and 8(2)(e)(xii) (in non-international armed conflict).

<sup>8</sup> See ICTY Statute, art. 3(b); SCSL Statute, art. 5(b).

<sup>9</sup> See ICTY Statute, art. 3(d). The Rome Statute provides differently formulated proscriptions in this area, including article 8(2)(b)(ix) (in international armed conflict) and article 8(2)(e)(iv) (in non-international armed conflict). The ICTY has convicted on charges of destruction of cultural property (i.e., the shelling of Dubrovnik). See *Prosecutor v. Jokić*, Case No. IT-01-42/1-S, Sentencing Judgment, ¶113 (March 18, 2004), affirmed ICTY Appeals Chamber (August 30, 2005); *Prosecutor v. Strugar*, Case No. IT-01-42, Judgment, ¶446 (January 31, 2005). See also generally Convention for the Protection of the World Cultural and Natural Heritage (1972), 11 I.L.M. 1358; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), 249 U.N.T.S. 240. One example of destruction of cultural property is the Taliban’s detonation of the Bamiyan Buddhas.

<sup>10</sup> See Rome Statute, art. 7(1)(h); ICTR Statute, art. 3(h); ICTY Statute, art. 5; SCSL Statute, art. 2(h). The Rome Statute defines persecution in article 7(2)(d) as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

<sup>11</sup> See Rome Statute, art. 7(1)(j). Art. 7(2)(h) defines the crime of apartheid as “inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.” At least as practiced in South Africa, apartheid had an important social, economic, and occupational dimension.

<sup>12</sup> See *ibid.*, art. 8(2)(b)(iv).

<sup>13</sup> In December 2005, the Hague District Court in The Netherlands convicted Dutch businessman Frans van Anraat of complicity in war crimes committed in Iraq. Van Anraat “had supplied raw materials to the Iraqi government that, in turn, were used for the development of mustard gas and chemical weapons. These chemical weapons were used to attack the Kurdish population of Halabja in 1998.” Mark A. Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 225, note 88. Another case in The Netherlands, brought against Guus van

Kouwenhoven, a Dutch arms dealer associated with Liberia's Charles Taylor, involved charges of war crimes and gun smuggling. *Ibid.*

<sup>14</sup> At this juncture, it is thematically important to separate financing and economic crimes (e.g., terrorist financing) as *independent crimes* from financing and economic activity that, by dint of application of *secondary liability theories* such as aiding and abetting or *modes of liability* such as conspiracy or *modes of imputed liability* such as joint criminal enterprise or command responsibility, implicate individuals in crimes such as genocide, war crimes, or crimes against humanity. For modes of imputed liability, see generally Shane Darcy, "Imputed Criminal Liability and the Goals of International Justice," *Leiden Journal of International Law* 20 (2007): 377.

<sup>15</sup> See SCSL Statute, art. 4(c); Rome Statute, art. 8(2)(b)(xxvi) (in international armed conflict) and art. 8(2)(e)(vii) (in non-international armed conflict). The ICC's first prosecution, involving Congolese rebel leader Thomas Lubanga, involves enlisting, recruitment, or conscription of child soldiers under the age of fifteen years. In 2007, a Trial Chamber of the Special Court for Sierra Leone returned convictions on these charges in the Armed Forces Revolutionary Council (AFRC) / Revolutionary United Front (RUF) case; see *Prosecutor v. Brima, Kamara and Kanu* (AFRC case), SCSL-2004-16-PT, Judgment (June 22, 2007). The three accused were found individually criminally responsible for, inter alia, recruitment and use of child soldiers and also pillage. Forced marriage was considered as part of the Trial Chamber's findings on the count of outrages on personal dignity (sexual slavery). Justice Teresa Doherty dissented on that matter, finding that forced marriage was a different crime than sexual slavery due to unique socioeconomic characteristics such as the conjugal status forced on implicated women and the social stigma associated with being a "bush wife" which inflicted significant mental suffering. In 2008, the Appeals Chamber of the Special Court for Sierra Leone found that acts of forced marriage amounted to the crime against humanity of "other inhumane acts," and thereby overturned the reasoning of the majority of the Trial Chamber on this point.

<sup>16</sup> Beginning with the cases of the Nazi industrialists, the question of implicating corporate actors in serious international crimes (in that case, aggression) has been an important one for international criminal law. Under the ICC (and other existing international tribunals), focus on corporate actors in their status as corporate actors is not possible insofar as the jurisdiction of these institutions is limited to natural persons.

<sup>17</sup> On the notion of famine crimes, see David Marcus, "Famine Crimes in International Law," *American Journal of International Law* 97 (2003): 245.

<sup>18</sup> See International Covenant on Economic, Social and Cultural Rights, art. 11, 1967, 6 I.L.M. 360 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

<sup>19</sup> Courts in South Africa have issued constitutional judgments on matters of housing and access to medications.

<sup>20</sup> In terms of conventional international law, see 1907 Convention with Respect to the Laws and Customs of War on Land, art. 23(g), 36 Stat. 2277 [hereinafter Hague IV] (prohibiting acts that "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"); see also art. 55 (requiring occupying state to act as "administrator and usufructuary of . . . real estate, forests and agricultural estates . . . in the occupied country"); 1949 Geneva Conventions for Civilians, art. 53, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (prohibiting destruction by the occupying power of real or personal property except when such destruction is rendered absolutely necessary by military operations); 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. I, 1108 U.N.T.S. 152 [hereinafter ENMOD Convention] (defining as impermissible means of warfare "military or other hostile use of environmental modification techniques having widespread, long-term, or severe effects;" ENMOD's major function is not the protection of the environment during times of war, but the prohibition of environmental modification techniques—i.e., forced earthquakes, tsunamis, climate modification); 1977 Additional Protocol I to the Geneva Conventions, art. 35(3), 16 I.L.M. 1391 [hereinafter Additional Protocol I] (specifically prohibiting "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the non-human environment), and *ibid.*, art. 55 (requiring countries to "protect the non-human environment"). Bassiouni, *Introduction to International Criminal Law*, at 155 lists 37 instruments on the topic of "unlawful acts against certain internationally protected elements of the environment" from 1911 to 1982. In terms of the work of publicists, see International Law Commission, Draft Code of Crimes Against the

Peace and Security of Mankind, GA Res. 97, UN Doc. A/33/45 (1978), as amended by GA Res. 151, UN Doc. A/42/49 (1987), article 20. In terms of “soft law,” see World Charter for Nature, GA Res. 37/7 (1982), principle 5 (“Nature shall be secured against degradation caused by warfare or other hostile activities”); Rio Declaration, 31 I.L.M. 874 (1992), principle 24 (“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”).

<sup>21</sup> See Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 60-61. See also *ibid.*, 61 (“Article 8 of the ICC Statute therefore takes a huge leap backwards by allowing the defence that ‘widespread, long-term, and severe damage to the natural environment’ caused by the perpetrator—not just damage, but widespread, long-term and severe damage, intentionally caused—was not ‘clearly excessive’ (perhaps it was excessive, but not ‘clearly excessive’) in relation to the concrete and direct overall military advantage anticipated.”).

<sup>22</sup> See generally Kevin Jon Heller and Jessica C. Lawrence, “The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute,” *Georgetown International Environmental Law Review* (Fall 2007): 61-96.

<sup>23</sup> See Mark A. Drumbl, “Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes,” in *The Environmental Consequences of War*, ed. Jay E. Austin and Carl E. Bruch (Cambridge: Cambridge University Press, 2000).

<sup>24</sup> See Heller and Lawrence, “The First Ecocentric Environmental War Crime.”

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

<sup>26</sup> See Drumbl, “Waging War.”

<sup>27</sup> See *ibid.*, 624 (citing to Understanding I of the Conference of the Committee on Disarmament, reprinted in Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: Oxford University Press, 2000), regarding the application of these terms in ENMOD, which defines “‘widespread’: encompassing an area on the scale of several hundred square kilometers; ‘long-term’: lasting for a period of months, or approximately a season; ‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.”).

<sup>28</sup> Additional Protocol I’s terminology, like that of Rome Statute’s article 8, is conjunctive instead of disjunctive. According to Heller and Lawrence, the Geneva Conventions and Additional Protocols thereto are a “natural exegetical source” for the Rome Statute. Heller and Lawrence, “The First Ecocentric Environmental War Crime.”

<sup>29</sup> *Ibid.*

<sup>30</sup> Sources cited and discussed *ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Drumbl, “Waging War,” 626 (emphasis in original).

<sup>33</sup> *Ibid.*, 629.

<sup>34</sup> See *ibid.*, 631.

<sup>35</sup> *Ibid.*

<sup>36</sup> See Heller and Lawrence, “The First Ecocentric Environmental War Crime” (proffering some insightful corrective suggestions).

<sup>37</sup> Drumbl, “Waging War,” 636.

<sup>38</sup> See *ibid.*, 632, 638.

<sup>39</sup> *Ibid.*, 638–39.

<sup>40</sup> See generally Drumbl, *Atrocity, Punishment, and International Law*.

<sup>41</sup> For more expansive treatment, see Drumbl, “Waging War,” 642.

<sup>42</sup> See *ibid.*, 643.

<sup>43</sup> See *ibid.*, 636-637.

<sup>44</sup> See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Kadić v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995).

<sup>47</sup> See *In re “Agent Orange” Product Liability Litigation*, 373 F.Supp. 2d 7, 15 (E.D.N.Y. 2005).

<sup>48</sup> *Ibid.*, 54.



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- <sup>49</sup> Ibid. See also *Bowoto v. Chevron*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209 \*14–15 (N.D. Cal.).
- <sup>50</sup> *In re “Agent Orange” Product Liability Litigation*, 373 F.Supp. 2d, 113.
- <sup>51</sup> Ibid., 120.
- <sup>52</sup> Ibid., 127.
- <sup>53</sup> See *ibid.*, 129–30.
- <sup>54</sup> See *ibid.*
- <sup>55</sup> See *In Re “Agent Orange” Product Liability Litigation*, 517 F.3d 104, 124 (2nd Cir. 2008).
- <sup>56</sup> Ibid., 116.
- <sup>57</sup> Ibid (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)).
- <sup>58</sup> See *ibid.*
- <sup>59</sup> See *ibid.*, 117–23.
- <sup>60</sup> See Bassiouni, *Introduction to International Criminal Law*, 155 (noting “modest results”).
- <sup>61</sup> Environmental issues have come up in other cases, as well, including *Aguinda* and *Rio Tinto*, but these cases have not (or in the case of *Rio Tinto* not yet) involved exhaustive substantive pronouncements regarding whether denial of environmental rights amount to violations of the law of nations. See also *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (permitting ATCA claim against defendants on the basis of their contract to spray pesticides in order to eradicate cocaine and heroine farms in Colombia to withstand a motion for dismissal and for summary judgment).
- <sup>62</sup> See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999).
- <sup>63</sup> See *ibid.*, 165–166.
- <sup>64</sup> See *ibid.*, 166–167.
- <sup>65</sup> See *ibid.*, 167. Plaintiffs also cited Philippe Sands, *Principles of International Environmental Law I: Frameworks, Standards and Implementation* (Manchester: Manchester University Press, 1995), which discusses the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle. *Ibid.*
- <sup>66</sup> Ibid.
- <sup>67</sup> Ibid.
- <sup>68</sup> See Mark A. Drumbl, “Actors and Law-Making in International Environmental Law,” in *Handbook of International Environmental Law*, ed. M. Fitzmaurice and D. Ong (forthcoming).
- <sup>69</sup> See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).
- <sup>70</sup> *Flores v. Southern Peru Copper Co.*, 414 F.3d 233, 237 (2nd Cir. 2003).
- <sup>71</sup> See *ibid.* The court asserted that in order to make a successful allegation of customary international law violations, “a plaintiff must demonstrate that a defendant’s alleged conduct violated ‘well-established, universally recognized norms of international law.’” *Ibid.*, 239.
- <sup>72</sup> *Ibid.*, 254-256.
- <sup>73</sup> *Ibid.*, 254.
- <sup>74</sup> *Ibid.*, 255.
- <sup>75</sup> *Ibid.*
- <sup>76</sup> *Ibid.*
- <sup>77</sup> *Ibid.*, 258.
- <sup>78</sup> Expropriation infringes customary international law. See, e.g., *Texaco v. Libya arbitration*, 17 I.L.M. 1 (1978); NAFTA Chapter 11 and litigation thereunder.
- <sup>79</sup> See *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-T, Judgment, ¶¶ 567–615 (January 14, 2000). *Kupreskić* also considered the scope of “all inhumane acts,” a “residual category” of crimes against humanity under article 5(i) of the ICTY Statute. *Ibid.*, ¶ 563. The Trial Chamber did not specifically enumerate the content of this category. It noted the Rome Statute definition of the crime as “other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.” *Ibid.*, ¶ 565. The ICTY Trial Chamber went on to note that “serious forms of cruel or degrading treatment” or “serious, widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity . . . .” *Ibid.*, ¶ 566. However, this discussion did not make reference to socioeconomic crimes. *Ibid.*, ¶ 566.

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<sup>80</sup> Ibid., ¶ 33.

<sup>81</sup> Ibid.

<sup>82</sup> See *ibid.*, ¶ 586.

<sup>83</sup> See *ibid.*, ¶ 588.

<sup>84</sup> Ibid., ¶ 589.

<sup>85</sup> Ibid., ¶ 599.

<sup>86</sup> Ibid., ¶ 610.

<sup>87</sup> Ibid., ¶ 614.

<sup>88</sup> Ibid., ¶ 615.

<sup>89</sup> Ibid. See also *ibid.*, n.897, where the Trial Chamber discussed the U.S. Military Tribunal judgment in the *Flick* case, which had held that compulsory taking of industrial property is not in the category of atrocities and offenses listed under Control Council Law No. 10 as crimes against humanity. These crimes were identified in *Flick* as all offenses against the person. A subsequent judgment, *Krauch*, took up this statement. However, the ICTY Trial Chamber then noted that the *Flick* case declared: “A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people and thus left open the question whether such offenses against personal property as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity.” See also *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 697, 710 (May 7, 1997) (holding that the crime of persecution encompasses a wide variety of acts, including those of a physical, economic, or judicial nature that violate basic or fundamental rights).

<sup>90</sup> *Prosecutor v. Kupreskić*, ¶ 615.

<sup>91</sup> Ibid., ¶ 621.

<sup>92</sup> Ibid., ¶ 629. Both the ICTR and ICTY Statutes stipulate that causing serious mental harm to members of a group can constitute genocide. See ICTY Statute, art. 4(2)(b); ICTR Statute, art. 2(2)(b). However, it is doubtful that denial of socioeconomic rights alone would amount to probative proof of the *actus reus* or *mens rea* of genocide.

<sup>93</sup> *Prosecutor v. Kupreskić*, ¶ 630.

<sup>94</sup> Ibid., ¶ 631.

<sup>95</sup> See *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-A, Appeals Judgment (October 23, 2001).

<sup>96</sup> Arbour, “Economic and Social Justice for Societies in Transition,” 16.

<sup>97</sup> See *Short Survey of Cases Examined by the Court in 2003*, 17 (document on file with author) (“[A] large number of applications lodged with the Court have involved infringements of property rights arising out of expropriations carried out by the former communist regimes in eastern Europe.”).

<sup>98</sup> Distinction posted by Tom Allen, “Restitution and Transitional Justice in the European Court of Human Rights,” *Columbia Journal of European Law* 13 (2006-2007): 1.

<sup>99</sup> Ibid., 6. “Accordingly, [judges] doubt the benefit of re-opening old disputes over the legality of confiscations or other takings.” Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid., 9.

<sup>102</sup> Ibid., 45.

<sup>103</sup> See *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216 (1996). *Loizidou* has been followed in other cases that involve property access in northern Cyprus.

<sup>104</sup> *The Holy Monasteries v. Greece*, Series A no. 301-A (1994), ¶ 71.

<sup>105</sup> See, e.g., *Yiltas Yildiz Turistik Tesisleri A.S. v. Turkey*, No. 300502/96 (April 24, 2003); *Platakou v. Greece*, No. 38460/97, ECHR 2001-I, (2001); *Lallement v. France*, No. 46044/99 (April 11, 2002).

<sup>106</sup> See *Blečić v. Croatia*, App. No. 59532/00, Chamber Judgment (July 29, 2004); referred to Grand Chamber, Grand Chamber Judgment (March 8, 2006), Eur. Ct. H.R. (2006), [www.echr.coe.int/echr](http://www.echr.coe.int/echr).

<sup>107</sup> *Blečić*, Chamber Judgment, ¶¶ 44–45 (July 29, 2004).

<sup>108</sup> Ibid., ¶ 48.



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<sup>109</sup> Ibid.

<sup>110</sup> See *ibid.*, ¶ 66.

<sup>111</sup> *Ibid.*, ¶ 74.

<sup>112</sup> See *ibid.*, ¶ 75.

<sup>113</sup> *Ibid.*, ¶ 76.

<sup>114</sup> See *Blečić*, Grand Chamber Judgment (March 8, 2006).

<sup>115</sup> See *ibid.*, ¶ 85.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, ¶ 86.

<sup>118</sup> By Judge Loukis Loucaides, joined by five others; and by Judge Boštjan Zupančič, joined by Judge Ireneu Cabral Barreto; and by Judge Cabral Barreto. Both Judges Zupančič and Cabral Barreto joined the dissent of Judge Loucaides. Judge Zupančič, at 30-31, inquired: “Will the import of [*Blečić v. Croatia*] be that the last decision of the national court, which does not reverse the penultimate decision—but merely permits it to ‘subsist’—may count as a required domestic remedy, but does not count as a real decision bringing the case within the temporal limits of the Convention? Apart from all that, I am convinced that as far as the merits of the case are concerned this is not the end of the matter. In the case file there are indications that there may be thousands of similar cases. Sooner or later they will reach this Court.”

<sup>119</sup> Allen, “Restitution and Transitional Justice,” 14.

<sup>120</sup> *Ibid.*, 23, 30.

<sup>121</sup> See Drumbl, *Atrocity, Punishment, and International Law*.

<sup>122</sup> Arbour, “Economic and Social Justice for Societies in Transition,” 17.

<sup>123</sup> Drumbl, *Atrocity, Punishment, and International Law*, 173.

<sup>124</sup> Victim outreach has been an important concern for the ICTJ. See, e.g., “ICTJ Launches First Report on ICC Outreach: Report Stresses Importance of Victim Outreach and Greater Visibility in the DRC,” ICTJ Press Release (March, 2007).

<sup>125</sup> Tom Perriello and Marieke Wierda, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo,” Prosecutions Case Study Series, ICTJ, New York (March 2006), 2.

<sup>126</sup> Tom Perriello and Marieke Wierda, “The Special Court for Sierra Leone Under Scrutiny,” Prosecutions Case Study Series, ICTJ, New York (March 2006), 2 (defining the spaceship phenomenon as “a Court that is perceived as a curiosity and an anomaly with little impact on citizens’ everyday lives.”)

<sup>127</sup> As Arbour notes, “In developing countries, or in countries emerging from devastating conflict, the construction of a free, universal primary education system, or of a basic universal health care infrastructure makes no more demands on the State than the establishment of an even rudimentary criminal justice system capable of providing legal aid, court interpretation, bail supervision, timely and fair trials and humane conditions of detention.” Arbour, “Economic and Social Justice for Societies in Transition,” 12.

<sup>128</sup> See Drumbl, *Atrocity, Punishment, and International Law*, ch. 5.

<sup>129</sup> See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2nd. Cir. 2008).

<sup>130</sup> On February 26, 2007, the International Court of Justice (ICJ) found that Serbia was not directly responsible for genocide in Bosnia, but was responsible for failing to prevent genocide at Srebrenica. Serbia thereby was found in breach of its obligations under the 1948 Genocide Convention. No monetary damages were awarded. The issuance of the judgment was deemed to constitute satisfaction for Bosnia’s claim. The ICJ elected not to rule that collective civil liability/state responsibility claims brought to its docket were extinguished or superseded by individual penal responsibility claims brought before the ICTY.

<sup>131</sup> Not all political transitions are towards stable democratic or representative government.

<sup>132</sup> Allen, “Restitution and Transitional Justice,” 4. One response to these concerns is to contemplate official policies of communal restitution orchestrated through the political or legislative branch of government, instead of proceeding through civil litigation. Arbour, “Economic and Social Justice for Societies in Transition,” 18-19.

<sup>133</sup> Drumbl, “Waging War,” 643.

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<sup>134</sup> See *ibid.*, 644 (noting that environmental peacekeeping could mitigate certain pernicious practices such as deforestation and poisoning water supplies—e.g., in Somalia).

<sup>135</sup> Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 470.

<sup>136</sup> I take as a definition of transitional justice that developed by Ruti Teitel: “that conception of justice associated with periods of political change.” Ruti Teitel, “The Law and Politics of Contemporary Transitional Justice,” *Cornell International Law Journal* 38 (2005): 837. According to Teitel, transitional justice is “characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69.

<sup>137</sup> See Eric Brahm, “Uncovering the Truth: Examining Truth Commission Success and Impact,” *International Studies Perspectives* 8 (2007): 16.

<sup>138</sup> In Iraq, it is widely acknowledged that the original De-Ba’athification Law may have gone too far in banning thousands of Ba’ath Party members from holding military or governmental positions and gone too far in disbanding the armed forces and, thereby, has some connection to the endemic instability in the country.

<sup>139</sup> For a discussion regarding South Africa, see Gutto, “Beyond Justiciability,” and Arbour, “Economic and Social Justice for Societies in Transition,” 21–22. See also discussion by Arbour of the Constitution of Bosnia and Herzegovina, one of many annexes to the Dayton Peace Agreement.

<sup>140</sup> But see Fionnuala Aolain, “Political Violence and Gender During Times of Transition,” *Columbia Journal of Gender and Law* 15 (2006): 831 (“Negotiators may leave untouched socio-economic 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.’”).

<sup>141</sup> “By one estimate, jirgas settle over 95% of Afghanistan’s disputes, civil and criminal.” “Honour Among Them,” *The Economist* (December 23, 2006): 36–40, 37.

<sup>142</sup> See generally Mark A. Drumbl, “Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan,” *Columbia Journal of Transnational Law* 42, no. 2 (2004): 349.