

Research Brief

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

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This paper explores how enforcement of international criminal law currently addresses socioeconomic and environmental crimes. It specifically examines current efforts to promote accountability, whether through criminal prosecutions or civil litigation, for: (1) environmental war crimes and (2) property crimes and expropriation.

These two crimes are chosen 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. 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, both crimes/expropriation are inextricably intertwined with conflict and, consequently, arise amid broader collective questions of prevention and transition.

The paper then 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.

International Criminal Law and Violations of Socioeconomic and Environmental Rights

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. Property crimes such as destruction of homes, possessions, and farms are also commonplace in armed conflict. 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.

Socioeconomic and environmental crimes, however, 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.

Research Project

Transitional Justice and Development

This project examines the relationship between transitional justice and development, two 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 in order 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.

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; the vagueness of the actual proscriptions, the onerous actus reus and mens rea requirements, or readily available defenses; political pressures and resource limitations; 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.

Additional reasons include: 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; and concern with remedies—justice for past socioeconomic violations may create new violations to third parties or may be ineffective to deal with the nature of the harm.

Although there has been some jurisprudential movement toward structural and corporate liability for massive human rights abuses, this 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. When this conduct is not addressed, accountability remains underachieved.

That said, accountability is not limited to criminal prosecutions and civil lawsuits. 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.

Prosecuting socioeconomic and environmental wrongdoing that has facilitated mass atrocity can offer a more fulsome picture of justice for victim communities.

Should Socioeconomic and Environmental Rights be Promoted through Prosecutions and Litigation?

Criminal prosecutions for socioeconomic and environmental crimes can serve expressive goals, exposing wrongdoing and stigmatizing it as criminal. 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, 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.

Shortfalls to criminal prosecutions 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 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. Socioeconomic and environmental crimes may fit even more brusquely with the paradigm of individual penal responsibility.

Criminal prosecutions for environmental and socioeconomic crimes are also expensive. 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. Moreover, it is 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 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. State responsibility may bankrupt a postconflict state through damage awards of billions of dollars. It may make it impossible for a government seeking to transition a state past genocide to escape the shadow of its genocidal predecessor, and 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

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toward protection of human rights, democratization, and economic opportunity, such damage awards could be particularly deleterious to developmental and transitional goals.

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, or push postconflict governments toward greater respect for human rights in hopes that it might augment political pressure in the international community (or within international courts) not to impose a damage award.

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 the thin deterrent value of prosecutions and 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.

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. Aggressive, preventative peacekeeping also may be effective in mitigating environmental damage and many socioeconomic rights violations.

Any advantages that criminal prosecutions and civil lawsuits bring to the table in promoting justice 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.

Those committed to promoting justice and development should consider the enforcement of socioeconomic and environmental rights through prosecutions and litigation, 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.

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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.

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