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Introduction

The Sustainability of International Criminal Justice

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1. INTRODUCTION

The spring of 1992 featured moments of both hope and horror that captured the world's attention and led to transformative developments in international law.

Hope was inspired by the Earth Summit held in Rio de Janeiro in June 1992, launching a new era of cooperation to both protect the environment and eradicate poverty for the benefit of present and future generations.[1] Since its recognition in the *Rio Declaration on Environment and Development*, the concept of sustainable development and its corollaries such as the principles of intergenerational equity, precaution, and common but differentiated responsibilities have been incorporated into hundreds of international economic, environment, and development-related treaties and instruments. In the next 20 years, the international community would seek, with varying, sometimes underwhelming results, to strengthen and integrate the economic, environmental, and social pillars of sustainable development in laws and policies at the national, regional, and international levels.[2]

The world reacted with horror to the brutal campaign of ethnic violence and cleansing led by Serb forces in that same spring of 1992, during the early stages of the Bosnian war. These acts shocked the global conscience and galvanised momentum toward to the creation by the UN Security Council of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the following year.[3] Although this ad hoc tribunal was established to try the perpetrators of international crimes committed during the wars of the former Yugoslavia, its significance has extended far beyond this particular context. Along with a similar tribunal established for the Rwandan

[1] *Rio Declaration on Environment and Development*, Annex 1 in *Report of the United Nations Conference on Environment and Development* (3–14 June 1992), UN Doc. A/CONF.151/26 (1999).

[2] See generally M. C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (2004).

[3] P. Hazan, *La justice face à la guerre: de Nuremberg à La Haye* (2000), ch. 2.

genocide one year later, the ICTY would revitalise the field of international criminal law and provide important political, institutional, and legal precedents for the establishment in 2002 of a permanent International Criminal Court (ICC).[4] As a result, an established set of rules and mechanisms could emerge at both national and international levels for holding individuals criminally accountable for breaches of fundamental rules of international law.[5]

Twenty years later, efforts aimed at buttressing the role of sustainability and accountability in international law remain dynamic and influential, if not always entirely successful. At the United Nations Conference on Sustainable Development held in Rio de Janeiro in June 2012, states adopted a nonbinding programme for policy change and implementation, focusing on effectuating a transition toward a green economy and confirming institutional reforms to make sustainable development more achievable.[6] Without denying the gains achieved at this conference, it is clear that the ambitions of current commitments for global sustainability fall far short of addressing the scale of economic, environmental, and social challenges currently confronting the world.

Meanwhile, the ICC entered its second decade of existence in July 2012, with 118 state parties, a new prosecutor from the African continent, and 15 cases in seven situations.[7] Other ad hoc and hybrid international criminal tribunals are coming to the end of their mandates, having tried hundreds of individuals involved in a wide variety of conflicts ranging from the genocide in Cambodia to the wars of the former Yugoslavia.[8] As a result of the expense and complexity of international tribunals, some of the energies in this field have been shifting away from the international context to focus on national-level investigations and prosecutions and are becoming increasingly entrenched in a renewed global agenda supporting peace building, the rule of law, and legal empowerment.[9] Nonetheless, the potential for political instability and violent conflict in numerous regions around the world, most notably in the Middle East and North Africa, and for ongoing conflicts in fractured regions such as the Democratic Republic of the Congo suggests that the demand and momentum for international criminal justice in some form are unlikely to decrease any time soon.

[4] Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/9, (1998) Arts. 15 and 17–19.

[5] See generally A. Cassese, *International Criminal Law* (2008).

[6] United Nations Conference on Sustainable Development, 'The Future We Want', 22 June 2012, UN Doc, A/CONF.216/L.1.

[7] S. Ford, 'The ICC Turns Ten: A Look at its Development', JURIST – Forum, July 6, 2012, http://jurist.org/forum/2012/07/stuart-ford-icc-ten.php.

[8] For an overview of recent and future developments in the field of international criminal law, see C. Stahn and L. van den Herik, eds., *Future Perspectives on International Criminal Justice* (2009).

[9] See M. Bergsmo, *Complementarity and the Challenges of Equality and Empowerment* (2011).

These milestones and the significant body of international law and practice that they represent have led to numerous academic and political stock-taking exercises over the last two years.[10] This volume does not duplicate this work, but rather focuses on providing a unique and timely perspective on international law and policy on sustainable development and international criminal justice – considering in theory and practice both the contribution of criminal law to the realisation of more sustainable development, and the potential of sustainable development law to prevent conditions driving criminal behaviour. Drawing on the practice and experience of a wide variety of international criminal tribunals and processes, the chapters in this book examine existing and prospective legal practices that bear on how the fields of sustainable development and international criminal law can contribute to one another's elaboration, interpretation, and implementation.

In what follows, we provide an introductory overview of the key themes addressed in this volume and the arguments developed in particular chapters. Part I situates this work within broader debates on the potential and the limitations of international criminalisation as a means for protecting and securing the basic foundations of sustainable development, while also noting the potential of sustainable development law to improve conditions of life and livelihoods that offer alternatives to criminal behaviour. Part II discusses how existing international crimes penalise or fail to penalise serious forms of economic, social, environmental, and cultural harm. Part III focuses on the indirect linkages that have developed between the principles and practices of sustainable development and various mechanisms of international criminal justice. Finally, Part IV addresses future directions in the interpenetration of these two fields and the integration of different forms of justice.

2. SUSTAINABILITY AND ACCOUNTABILITY IN INTERNATIONAL LAW

During the last several decades, the relative success of international courts and tribunals in investigating and prosecuting international crimes and in contributing to complex processes of truth, reconciliation, and accountability in states recovering from the damaging and fracturing effects of conflict has been one of the most remarkable achievements in the field of international law. Not only has the field of international criminal law contributed to the development of international humanitarian law and international human rights law but it has also established the principle that individuals *can and should* be held accountable for the most serious violations of international law – what the *Rome Statute* of the ICC defines as 'grave crimes that

[10] Indeed, both the Review Conference of the Rome Statute of the International Criminal Court held in Kampala, Uganda, in June 2010 and the aforementioned United Nations Conference on Sustainable Development held in Rio de Janeiro in June 2012 actively facilitated stock-taking exercises by policy makers and academic experts alike.

threaten the peace, security and well-being of the world' and 'atrocities that deeply shock the conscience of humanity'.[11]

This powerful recognition and application of the principle of individual criminal liability have sparked real enthusiasm for further criminalisation of activities covered by many areas of international law, with all of the contradictions and complications that this may imply.[12] The field of sustainable development has not been inimical to the siren song of criminalisation. Although (or perhaps because) the current global architecture for sustainable development lacks a set of effective compliance and redress mechanisms, policy makers, scholars, and activists have considered or proposed initiatives aimed at developing new regimes and forms of liability for serious forms of environmental harm[13] (and to a lesser extent, economic and social harm as well),[14] whether at the level of states, corporations, or individuals. Against this background, the chapters in Part I of the book discuss the opportunities and challenges of recognising serious forms of economic, social, or environmental harm as international crimes and their implications for the fields of international criminal justice and sustainable development.

Chapter 2, 'Criminal Justice, Sustainable Development, and International Law', by Marie-Claire Cordonier Segger sets the stage by briefly outlining the contours of international law on sustainable development and its relationship to international criminal law. This chapter opens with an explanation of the concept of sustainable development, demonstrating how international understanding of its meaning has evolved over time and characterising sustainable development as a global objective – a purpose of many international treaties that is supported by several key legal principles such as precaution and public participation. Then, the chapter briefly explores how severe degradation of the natural resources, social, and ecological systems upon which people depend for survival may make criminal behaviour more likely and more difficult to prevent. As such, the chapter also briefly discusses how international treaties on sustainable development and the principles of international law on

[11] Rome Statute, preamble.

[12] See F. Mégret, 'Three Dangers for the International Criminal Court: A Consensual Look at a Consensual Project', (2001) XII *Finnish Yearbook of International Law* 193.

[13] See, e.g., S. D. Murphy, 'Does the World Need a New International Environmental Court?', (2000) 32(2) *George Washington Journal of International Law & Economics* 325; M. A. Drumbl, 'International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?', (2000) 5(2) *ILSA Journal of International & Comparative Law* 363; B.- S. Cho, 'Emergence of an International Environmental Criminal Law?', (2000) 19(1) *UCLA Journal of Environmental Law and Policy* 11; T. Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?', (2005) 17 *Georgetown International Environmental Law Review* 697; D. Zaelke, D. Kaniaru, and E. Krucíkova (eds.), *Making Law Work – Environmental Compliance & Sustainable Development* (2005); P. Utting and J. Clapp (eds.), *Corporate Accountability and Sustainable Development* (2008); P. Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (2010).

[14] See, *e.g.*, S. I. Skogly, 'Crimes against Humanity – Revisited: Is There a Role for Economic and Social Rights?', (2001) 5(1) *International Journal of Human Rights* 58; J. G. Stewart, *Corporate War Crimes. Prosecuting the Pillage of Natural Resources* (2010).

sustainable development can and do themselves contribute to achieving the further important goals of a world with less crime. Finally, the chapter turns to a consideration of how international criminal law, particularly the Rome Statute, can and does support sustainable development.

Chapter 3, 'Crime, Structure, Harm', by Gerry Simpson considers proposals to criminalise new forms of serious harm in international law in light of international criminal law's successes and failures in expanding its scope of application and providing justice for existing crimes. At its best, he argues, the recognition of economic, social, cultural and ecological crimes would be founded on a sophisticated appreciation of the manifold processes 'that constitute the shadow global political economy'. This appreciation might, Simpson maintains, lead 'international criminal law to move in the direction of structural causes of mass atrocity or threats to international peace and security that result from economic and environmental choices rather than more obvious forms of violence'. Yet Simpson also identifies the challenges of applying international criminal law to forms of economic, social, cultural, or environmental harm. Such forms of harm are not easily or frequently reducible to the actions, and therefore responsibility, of identifiable individuals. They may also distract attention from other 'remediable structural and everyday cruelties'. In fact, either of these criticisms could be made of existing international crimes such as genocide and crimes against humanity, which straddle an uneasy line between individual and collectivist forms of guilt. In these ways, Simpson shows us that projects aimed at criminalising new forms of serious harm must, whatever their merits, grapple with both the potential and the serious contentions of our current system for international criminal justice.

Chapter 4, 'The Case for a General International Crime against the Environment', by Frédéric Mégret reviews the merits of criminalising one particular form of harm that falls within the ambit of sustainable development, namely environmental crime. Mégret examines, in turn, the arguments in favour of criminalisation (viewed in relation to other forms of regulation and remedies), those in favour of criminalisation *at the international level* (as opposed to the domestic level), and those that support both criminalisation and its internationalisation. Mégret builds a convincing case in all three respects, one that emphasises the deterrent potential and social value of recognising environmental crimes, the functional and normative advantages of providing for their repression at the international level, and the progressive recognition of environmental harm as a serious violation of international obligations and interests. Mégret thus argues that grave forms of environmental harm may be as deserving of the status of international crime as other serious breaches of international law because of their transnational character – they are 'global crimes *par excellence* because they are ubiquitous in their materialization and potentially absolute and irreversible in their impact'. Mégret closes his chapter with a forward-looking description of what might be some of the core features of a future international crime against the environment, including the need to ensure

that its elements provide a focus on conduct that is deserving of criminalisation at the international level.

The chapters in Part I of the book thus underscore the potential as well as the challenges of extending the scope of international criminal law to encompass serious forms of economic, environmental, social, and cultural harm. Part I suggests that, although we should not see international criminalisation as a panacea for addressing acts and conduct that strike at the very foundation of sustainable development, we should also recognise that this view is equally true of the traditional domains that have fallen within the scope of international criminal law. Whether one seeks to prevent and punish war crimes, environmental crimes, or even crimes against future generations, it must be recognised that the field of international criminal justice comes with its inherent strengths and weaknesses and its own history and character.

3. SUSTAINABLE DEVELOPMENT AND INTERNATIONAL CRIMES

To be sure, the criminalisation of new forms of harm is consistent with the development of international criminal law, which can be seen as the successive extension of the principle of individual criminal accountability to a constantly expanding list of serious violations of international law – piracy and war crimes to begin with; followed by crimes against humanity, aggression, and genocide in the postwar era; later extending to the other crimes of apartheid and torture; and potentially expanding to offences such as terrorism in the near term. What is more, the ad hoc international criminal tribunals have – not without some controversy – consistently expanded the scope of application of existing international crimes to cover a growing variety of acts and conduct, victims, and contexts.[15]

Whether through new interpretations of existing international criminal law or through the creation of new international crimes, the principle of individual criminal liability may come to apply to conduct that falls within the scope of sustainable development. The chapters in Part II of the book include detailed analyses of how existing international criminal law applies or could apply to sanction conduct that destroys the basic underlying conditions of sustainable development, including severe environmental damage, violations of social and economic rights, violations of international rules governing cultural heritage, and other large-scale threats to present and future generations.

Chapter 5, 'Environmental Damages and International Criminal Law', by Matthew Gillett examines how international criminal law has dealt or can deal with damages to the natural environment. As Gillett shows, there are a number of existing international crimes that directly address the issue of environmental harm through ecocentric or anthropocentric approaches. Gillett examines the war crime of causing long-term and severe damage to the environment and a few other provisions

[15] See G. Mettraux, *International Crimes and the ad hoc Tribunals* (2005).

in international humanitarian law – especially those laws relating to arms controls – to see whether they could form a basis for prosecution under international criminal law. There are also existing international crimes, including other war crimes, crimes against humanity, and genocide, that indirectly address environmental harm. Despite these promising options for prosecuting environmental harm, Gillett points out that international and national authorities have consistently failed to prosecute cases involving environmental destruction, contributing to a sense of impunity for these acts and conduct and leaving an important jurisprudential void. Through a review of existing international crimes and their application to historical examples of environmental damage, Gillett provides further context for understanding the role that international criminal law can play in preventing and punishing severe damages caused to the environment, as a pillar of sustainable development. Gillett concludes that, in addition to enforcement and application of existing crimes, a new crime covering environmental damage in peacetime may be required to ensure that the environment truly benefits from the protection of international criminal justice.

Chapter 6, 'Violations of Social and Economic Rights and International Crimes', by Salim Nakhjavani considers the possibility that such violations might be addressed, directly or indirectly, through international criminal justice. Nakhjavani situates his chapter within a broader discussion of the relationship between international criminal law and the field of international human rights law as a whole. One common way of conceptualising the relationship between these two fields is to focus on their commitment to the protection of common legal interests that 'uphold the oneness and wholeness of *humanity*, in its individual and collective dimensions'. The challenge remains that a straightforward pairing between human rights violations and international crimes is often not possible, especially in the case of socioeconomic rights. Although a number of existing international crimes, especially crimes against humanity, could be used to punish serious violations of social and economic rights, international criminal lawyers and judges have not taken advantage of these opportunities. Nakhjavani argues that a more fruitful view of this relationship would 'conceive of core international crimes and the suite of international human rights instruments, including those protecting socioeconomic rights, as co-evolving species within a complex adaptive system'. The greatest potential for co-evolution lies in the crime against humanity of persecution in light of the interpretative importance accorded to human rights by the Rome Statute. According to Nakhjavani, the sporadic use of international human rights law to inform the interpretation and application of international crimes may eventually catalyse new legal approaches that effectively protect economic and social rights through international criminal law.

Chapter 7, 'Cultural Heritage and International Criminal Law', by Roger O'Keefe addresses the protection of cultural heritage in international criminal law. O'Keefe reviews numerous statutory provisions and the extensive case law of various international criminal tribunals – including cases as early as those of the International

Military Tribunal at Nuremberg – to analyse the many ways in which existing war crimes and crimes against humanity afford protections to places and objects of cultural significance and the sentencing practices that have developed for these crimes. O'Keefe also discusses the rejection of the notion of 'cultural genocide' as an international legal concept. In so doing, O'Keefe provides perhaps the strongest set of examples of the use of international criminal law to protect an issue area of concern to sustainable development, demonstrating the role that international criminal prosecutions can play in protecting interests that have intergenerational and nonmaterial significance.

Chapter 8, 'The Crime of Aggression and Threats to the Future', by Alexandra Harrington examines the links between the crime of aggression and new threats to the future, with a specific focus on environmental and socioeconomic harms. Harrington begins by reviewing the history and nature of the crime of aggression, which is recognised as one of the four core crimes of international law, but that has not been prosecuted since the Second World War. Harrington then discusses various examples of environmental and socioeconomic harms, including climate change and the phenomenon of disappearing states, and whether they could rise to the level of seriousness captured by the crime of aggression. Looking at the various elements of the definition of this crime adopted at the Kampala Review Conference of the ICC in June 2010, Harrington highlights the challenges, especially in terms of *mens rea* requirements, of expanding the meaning of aggression to cover large-scale threats to the future that fall short of the traditional use of international force. Although drawing the line between which of these threats should or should not count as aggression is a complex enterprise, Harrington points out that the negotiations that eventually led to the definition of the crime of aggression were similarly tortuous.

By demonstrating how forms of economic, social, and environmental harm may already amount, whether directly or indirectly, to existing international crimes, the chapters in Part II highlight the many political and legal gaps that must be addressed before concerns relating to sustainable development may be fully woven into the scope of application of international criminal law. These chapters also suggest that the complexity of creating and applying economic, social, economic, and cultural crimes can actually be seen as contiguous with the definition and prosecution of other international crimes that are no less useful or potent for all their convolutions.

4. Sustainable Development and the Mechanisms of International Criminal Justice

Although existing international crimes may not fully or adequately capture acts and conduct that directly bear on the economic, social, and environmental pillars of sustainable development, a number of indirect linkages exist between the fields of international criminal justice and international law and policy on sustainable development. Scholars and policy makers have long recognised the roles of transitional

justice[16] and peace building[17] in development; however, the notion that the mechanisms and process of international criminal justice may themselves contribute to the realisation of more sustainable development is relatively novel.

Of course, to the extent that international criminal processes provide some measure of reconciliation, truth, accountability, and deterrence in the aftermath of conflicts,[18] they may address some of the underlying conditions that support human development in the long term. Of greater interest perhaps are the opportunities for using sustainable development principles and practices to inform the creation and application of international legal responses to international crimes. These linkages represent an important and underexplored area of international law and policy that is the focus of the chapters in Part III.

Chapter 9, 'Intergenerational Equity and Rights in International Criminal Law', by Jarrod Hepburn discusses the principle of intergenerational equity and the concept of the rights of future generations in international criminal law. After reviewing how intergenerational equity is featured in international law and policy on sustainable development, Hepburn turns to its role in international criminal justice. Given its objectives of addressing the lasting consequences of international crimes and conflicts, Hepburn avers that intergenerational equity and rights may be seen as being at the heart of the international criminal justice system. To begin with, international criminal law pursues a broad range of objectives beyond the prosecution of international crimes, including 'the development of a historical record of a conflict, support for peace and reconciliation of fractured societies, prevention of international crimes not only through deterrence but also through public memorialisation, capacity building in domestic judicial systems, and a sense of closure for victims'. In addition, a number of international crimes, most notably the crime of genocide, are specifically directed towards the protection of future generations. In all of these ways, Hepburn suggests that, although international criminal justice focuses on the crimes of the past, it has much to contribute to the protection of future generations.

[16] See, *e.g.*, P. de Grieff and R. Duthie (eds.), *Transitional Justice and Development – Making Connections* (2009); R. Duthie, 'Toward a Development-Sensitive Approach to Transitional Justice', (2008) 2(3) *International Journal of Transitional Justice* 292.

[17] See, e.g., Nicole Ball and Tammy Halevy, *Making Peace Work: The Role of the International Development Community* (1996); M. Brenk and H. van de Veen, 'Development: No Development without Peace, No Peace without Development', in Paul van Tongeren et al. (eds.), *People Building Peace, Successful Stories of Civil Society* (2005).

[18] See, e.g., Richard J. Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals', (1996) 28(3) *New York University Journal of International Law and Politics* 485; Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', (2001) 95(1) *American Journal of International Law* 7; International Center for Transitional Justice, and Human Rights at the University of California (Berkeley), *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (2005); International Center for Transitional Justice, and Human Rights at the University of California (Berkeley), *A Voice for Victims* (2005).

Chapter 10, 'Corporate Liability and Complicity in International Crimes', by Ken Roberts explores the different modes of liability in international criminal law that could be applied to hold the officers of corporations accountable for their involvement in the commission of international crimes. Roberts begins by explaining how the role and impacts of transnational corporations in developing countries, especially in the extraction of natural resources in conflict-affected or fragile states, have called attention to the complicity and responsibility of businesses in serious violations of international law. Roberts assesses, in turn, whether the three principal modes of liability in international criminal law – aiding and abetting, joint criminal enterprise, and superior responsibility – could be used to hold corporate officers accountable for international crimes. Roberts demonstrates that each of these modes of liability could be used to capture acts and conduct committed by corporate officers in relation to international crimes. He concludes therefore that international criminal law provides a promising framework for instilling some measure of accountability in the operations of transnational corporations.

Chapter 11, 'The Contribution of International Criminal Justice to Sustainable Peace and Development', by Fannie Lafontaine and Alain-Guy Tachou Sipowo provides a thorough review of the record of international criminal justice in contributing to peace-building and postconflict development and its potential for doing so. Lafontaine and Sipowo begin by examining the role that international criminal justice has played in promoting and building the rule of law at the international level by addressing threats or breaches of international peace and security in specific conflicts, as well as contributing to the development of the fields of international criminal law and international humanitarian law more broadly. Lafontaine and Sipowo then turn to discuss how a variety of processes of international criminal law in a variety of postconflict situations (in particular, the Balkans, Rwanda, Sierra Leone, Uganda, Cambodia, and Latin America) have strengthened the rule of law in domestic legal systems through the proactive practice of complementarity, judicial capacity building, and practices of restorative justice. On the whole, they argue that the success of international criminal justice in building peace and fostering development depends on whether or not its practices and processes are aligned with and complemented by other postconflict initiatives aimed at strengthening the rule of law, protecting human security, and promoting peace and reconciliation.

Chapter 12, 'Reparations for Victims and Sustainable Development', by Pubudu Sachithanandan provides an overview of the regimes for providing reparations to victims of international crimes and discusses how they could be used to promote sustainable development. Sachithanandan offers a comprehensive review of the different types of reparations (symbolic, monetary, and process-based) and the various mechanisms through which they may be provided, including truth commissions, expert commissions, trust funds, and national courts. To be sure, the author notes, reparations are first and foremost meant to act as a concrete recognition of the suffering