

ETOs and Situations of Conflict, Occupation and War: Applying the Maastricht Principles to ESC Rights



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ETOS and Transnational Corruption: Applying the Maastricht Principles to ESC Rights

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I. The main challenges and opportunities

Emblematic cases in treaty body country reviews have helped to advise the methodology for inquiry across borders, but adjudication of the range of human rights violations and obligations is underdeveloped and subject to political interventions and tremendous inconsistencies (i.e., double standards). Domestic, international and mixed judicial and/or administrative remedies for such violations have been the subject of transitional justice mechanisms and techniques as a function of conflict resolution.¹ The pattern of such measures indicates great unevenness in the pursuit of transitional justice for victims, particularly in cases of gross violations of ESC rights.² Most cases of some form of reparations have been achieved through administrative arrangements, rather than through adjudication.³ Where historically, adjudications have taken place, they rarely addressed victims' rights or interests.⁴

Prior to the codification of victims' right to remedy and repair in international law, the requirement for states or belligerent parties to pay compensation to victims was laid out in IHL by way of The Hague Convention IV of 1907, respecting the Laws and Customs of War on Land, and reiterated in the Additional Protocol I to the Geneva Conventions.⁵ The extent and meaning of reparations to victims and the articulation of reparations as a right, however, has since been borne out subsequently in various treaties and conventions of human rights law.⁶ Significantly, the notion of reparation as compensation, which, in its most-simplistic form, could be viewed as limited to a monetary form of redress, has been expanded to fulfill a more-holistic view of remedy for victims.⁷ This broader approach also seeks to promote reconciliation, build peace and deter further offenses.

International jurisprudence⁸ and the (draft) Articles on State Responsibility also have firmly established the reparations vis-à-vis states and affected persons. Since the establishment of the International Criminal Court (ICC), the international system has created two channels of reparation through the ICC: (1) a conviction-based and judge-ordered reparations, as well as (2) a Trust Fund for Victims that channels compensations and/or funds rehabilitation through a Board of Directors.

The application of transitional justice mechanisms, including adjudication and administrative arrangements, implies an end to the particular COW situation, or at least sufficient international will beyond the principal parties to pursue justice in any given case. That could manifest as pursuit of international justice through the ICC or Special Tribunal, including the issuance of international arrest warrants, and/or application of universal jurisdiction in domestic courts. In all cases, pursuing justice through domestic jurisdiction for locally committed gross violations is preferable, but not always realistic.

However, ambition to pursue justice should not be daunted by the complexity of cases and/or elusive political and judicial will.

II. A role for the ETO Consortium

The ETO Consortium could play a positive role in building awareness and pursuing justice in COW situations by continuing to address these and other cases of gross violations collectively and through mutual support. Among the actions that the ETO Consortium partners could undertake include:

- Collective and individual interventions in international legal and political forums;
- Campaigns calling for international legal action (via ICC, Special Tribunals, universal jurisdiction);

- Advocacy before WTO, urging measures against member states enabling and abetting gross violations in extraterritorial COW situations;
- Parallel reporting to treaty bodies on states enabling and/or abetting gross violations in extraterritorial COW situations.

The ETO Consortium and its members can develop needed understanding, recognition and ultimate application of ETO principles in COW situations through four measures:

1. Deepening the existing case profiles with further research and development of the legal arguments;
2. Engaging strategically in additional studies, with priority given to asserting ETOs in types of cases not previously covered (e.g., trafficking, forced labor, *nonrefoulement*, TPS, nonstate party obligations, UN peace-keeping, failure to apply humanitarian *erga omnes* obligations);
3. Posing solutions and applying research methods that invoke the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (A/RES/60/147). The reparations framework should form a common reference for ETO Consortium members in all situations of gross violations. That also recognizes and links integrally with the transitional justice, of which reparations forms an indispensable element;
4. Developing arguments and methods for determining all elements of reparations as an inextricable package⁹;
5. Strategic litigation for purposes of raising test cases and seeking remedy.

Since pursuing all options of applying ETOs to COW situations is beyond the capacity of any single Consortium partner, joint efforts and labor divisions would need to emerge from mutual agreements to select strategically important and realistic cases to research, publicize and, eventually, litigate cases. Such collective decisions should be a subject of the 6th ETO Consortium conference.

III. Conclusion

A field of potential ETOs that remains unexplored has emerged from various transitional justice processes, whether arising from postconflict or from regime change. This involves the recovery of assets previously acquired illicitly by military and/or civil officials of the deposed regime. Such asset recovery often requires international cooperation and the participation of States harboring the illicit assets (e.g., Swiss Banks) and, thus, links with the efforts to apply ETOs to corruption and fraud, adopted in the 5th ETO Consortium conference. The ETO principles applied in the COW context engages an arsenal of IHL and criminal law norms and instruments that complement ETO pursuits in other categories such as land grabbing and environmental destruction.

However, an ETO strategy on COW should not limit itself to cases involving regime change or postconflict situations. Urgency lies also in efforts to combat impunity, build accountability mechanisms and deter further violations due to conflict, occupation and war. The COW focus

ANNEX: Specific Cases

I. Current emblematic cases:

The Consortium already has undertaken to develop profiles of five cases:

1. Israeli Parastatal Institutions conducting population transfer through extraterritorial operations (HIC);
2. EU-Morocco Fisheries Agreement exploiting Western Sahara territorial waters (HIC);
3. Transborder consequences of the attack on Jiyva Power Plant during 2006 war on Lebanon (HIC);
4. Economic blockade of Gaza Strip by Middle East Quartet partners (FIDH & HIC);
5. Veolia and Alstom transport corporations providing infrastructure to settler colonies in occupied territory (HIC).

II. Potential other cases:

1. Trade in “blood diamonds” extracted from conflict situations;
2. Transnational corporations engaged in construction or maintenance of the “wall and its associated regime” in occupied Palestine;
3. Transnational corporations mining in occupied Tibet ;
4. Transnational corporations engaged in construction of the Chinese railway across Tibet;
5. Pursuing an ICJ advisory opinion on the legality of the wall across Western Sahara;
6. Corporations profiting from occupation of Western Sahara;
7. Extractive industries mining and deforesting Indonesia-occupied West Papua – New Guinea;
8. Nonrefoulement for refugees and/or “Temporary Protected Status” of non-nationals from countries of conflict;
9. Trade in offensive weapons with states and other parties in conflict and/or occupying other peoples/territories;
10. Corporate responsibility in cases of forced labor in COW situations;
11. Human trafficking from countries in conflict and/or postconflict;
12. Child soldiers transported across borders/regions;
13. The liability of states whose nationals serve in peace-keeping missions and engage in human rights abuses;
14. High Contracting Parties obligations under common Article 1 of the Fourth Geneva Convention relative to Civilian Persons in Time of War of 12 August 1949;
15. Test case to prosecute U.S. personnel for violating ESC rights in ICESCR State parties Iraq (1976) and/or Afghanistan (1983), establishing that a non-State party to a human rights treaty that occupies a State party assumes corresponding treaty obligations of the occupied State.

Endnotes

¹ Transitional justice generally refers to a range of approaches that States may use to address past human rights violations, including both judicial and nonjudicial approaches. TJ is composed of a series of actions or policies and their resulting institutions, which may be enacted at a point of political transition from violence and repression to social and political stability. Transitional justice is informed by a society's collective desire to rebuild social trust, repair a fractured justice system, and build a democratic system of governance. The core value of transitional justice is the notion of justice. This notion is not necessarily, nor limited to criminal justice, but may other forms of justice as well. This notion and the political transformation, such as regime change or transition from conflict, are thus linked toward a more peaceful, certain and democratic future.

TJ can feature a combination of five classic steps and measures categorized as:

1. Preservation of memory of the events, documentation and evidence;
2. Accountability of perpetrators;
3. Reparation of victims;
4. Institutional reform;
5. Reconciliation.

Some common strategies involve the formation and use of:

- Prosecutions before domestic, international or hybrid/mixed tribunals and/or special chambers;
- Compensations and various kinds of rehabilitation, resettlement, restitution, consistent with the definition of reparations.
- Truth-seeking and/or truth commissions, as nonjudicial bodies of inquiry that aim to discover and reveal past abuses;
- Memory and Memorials to preserve memories of events and honor the people who have suffered;
- Apologies (with or without prosecution and other forms of reparation for victims);
- Regulation of private or, especially, public bodies, including the police, military and/or judiciary, identified as having caused repression and other human rights violations. Such reforms could involve structural transformation, vetting or lustration of personnel, and/or legal reform. However, purges, collective punishment or generally assigning guilt by association are not considered effective practices achieving;
- Conflict resolution and management, including negotiation and dialogue techniques.

² See Joseph Schechla (OHCHR), "Reparation of Gross Violations of Economic, Social and Cultural Rights: A Work in Progress" paper presented at "Addressing the Past, Building the Future: Justice in Times of Transition" international conference, 14–16 April 2011.

³ See HIC-HLRN, *It's a Crime! Handbook for Prosecuting Gross Violations of Housing and Land Rights* [forthcoming]; also, Joseph Schechla, "Reparation of Gross Violations of Economic, Social and Cultural Rights," op. cit.

⁴ Interview with Benjamin Ferencz (2005), taken from Yael Danieli, "Reappraising the Nuremberg Trials and their Legacy: the Role of Victims in International Law," *Cardozo Law Review*, Vol. 27, No. 4 (February 2006).

⁵ "Action in damages" in the case of injury or illegality of capture is referred to in the Additional Protocol to the Convention relative to the Establishment of an International Prize Court. The Hague, 19 September 1910, Articles 1–5. The Final Protocol to the Naval Conference of London, 26 February 1909 refers to "claims for compensation." and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, refers to a liability to "pay compensation, Art 91, Responsibility.

⁶ Universal Declaration of Human Rights, Article 8; The International Covenant on Civil and Political Rights, Article 2); International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 14 and 22; International Convention for the Rights of the Child, Article 39.

⁷ "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," A/RES/60/147, 21 March 2006, at: <http://www2.ohchr.org/english/law/remedy.htm> and http://www.hlrn.org/img/documents/A_RES_60_147%20remedy%20reparation%20en.pdf.

⁸ N.B. : L'usine de Chorzów case (*Allemagne v. Pologne*), Permanent International Court of Justice (1928), and Advisory Opinion of the International Court of Justice on "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2004).

⁹ Restitution, return, resettlement, rehabilitation, compensation, guarantees of nonrepetition and satisfaction.