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Crimes against Future Generations: Implementing Intergenerational Justice through International Criminal Law

by Sébastien Jodoin

Intergenerational justice not only requires the adoption of best practices and policies, but also the prevention and repression of deleterious and morally blameworthy human behaviour which has severe impacts on the long-term health, safety and means of survival of groups of individuals. While many international crimes have indirect consequences on the well-being of present and future generations, it cannot be said that existing international criminal law is currently well-placed to directly and clearly protect intergenerational rights. As such, the development of a new type of international crime, crimes against future generations, may be a promising avenue for implementing intergenerational justice. Such a crime would penalise acts or conduct that amount to serious violations of existing international law regarding economic, social and cultural rights or the environment.[1]

Introduction

Intergenerational justice remains a largely abstract concept in international policy – it is not recognised in any binding instrument of international law. Although the notions of the rights or interests of future generations are referenced in a few non-binding international instruments, the legal means for directly enforcing or protecting these rights are non-existent. Given that international law tends to develop in an incremental and

progressive manner, I would argue that the indirect use of existing international legal obligations which are of relevance to future generations is probably the most viable way of effectively implementing intergenerational justice at the international level.

Although the development and application of a number of areas of international law could have beneficial impacts on the well-being of future generations, I consider that two such areas that are particularly critical for the rights of future generations: international economic, social and cultural rights and international environmental law. Indeed, there is little doubt that the urgent challenges experienced by vulnerable populations and communities living in conditions of squalor and denied the levels of nutrition, water, shelter, health, physical safety and livelihood required for basic survival as well as those associated with widespread environmental degradation have significant and lasting consequences for future generations.

A new approach is therefore required for addressing these threats to future generations. In this article, I discuss one such novel approach: the potential for protecting the rights of future generations through international criminal law.[2] My basic premise is that intergenerational justice not only requires the adoption of best practices and policies, but also the prevention and repression of deleterious and morally blameworthy human behaviour. I argue that certain acts or conduct which have severe impacts on the long-term health, safety and means of survival of groups of individuals are of such scale and gravity that they should be recognised as international crimes. To ensure consistency with existing international criminal law, I focus on acts or conduct that amount to serious violations of existing international law (regarding economic, social and cultural rights or the environment).

The idea of using international criminal law in this way thus seeks to build upon the considerable successes of the field of international criminal justice in the past fifteen years. Following the initial experience of setting up *ad hoc* international criminal tribunals for the conflicts in the former Yugoslavia and Rwanda in the mid-1990s, the international community established a permanent International Criminal Court (ICC) based on the Rome Statute of the International Criminal Court (Rome Treaty) which was negotiated in 1998, entered into force in 2002 and had 111 parties as of 2010.[3] There exists, as a result, an established set of rules and mechanisms at both the national and international levels for holding individuals criminally accountable for breaches of fundamental norms of international law, which form a promising avenue for implementing intergenerational justice. Of course, the success and effectiveness of the ICC should not be overstated, but as explained in the conclusion, the benefits of creating a new international crime are not by any means exclusively tied to its eventual prosecution by the ICC.

> Life can only be understood backwards; but it must be lived forwards.
> / Søren Kierkegaard /

I proceed as follows. I first review the potential for using existing international crimes to protect the rights of future generations. I then focus on the creation of a new category of international crime, crimes against future generations, which would prohibit acts and conduct that have severe impacts on the long-term health, safety and means of survival of human groups and collectivities. I conclude by discussing the advantages and prospects of implementing intergenerational justice through international criminal law.

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind.
> / Thomas Jefferson /

Existing international crimes and the rights of future generations

In many ways, most international crimes have long-term consequences for affected persons or populations. By punishing and deterring the commission of crimes against humanity, war crimes and genocide, international criminal courts and tribunals can help protect successive generations from the future occurrence of such atrocities. In addition, international criminal justice also seeks to contribute to the peace and reconciliation of divided nations and regions, punishing as well as memorialising past harms and wrong-doing.[4] However, as will be seen below, existing international crimes, namely war crimes, crimes against humanity and genocide,[5] are of limited application to violations of economic, social and cultural rights and severe environmental harm.

War Crimes

War crimes are serious violations of international law applicable in situations of armed conflict. There are, of course, a number of such violations which could infringe upon the rights of future generations, including violations of the principle of distinction, which protects civilians and civilian objects from attack,[6] and the principle of proportionality, which prohibits attacks which would have disproportionate effects on civilians or civilian objects in relation to the anticipated concrete and direct military advantage.[7]

Any number of the numerous provisions relating to war crimes in the *Rome Statute* could thus be used to prosecute conduct violating the rights of future generations.[8] One particular type of war crime is particularly relevant for the purposes of protecting the rights of future generations: the war crime of "[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."[9] This crime is the only crime in the *Rome Statute* which specifically and directly covers harm caused to the environment and is based on Articles 35(3) and 55(1) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*. The scope of this war crime is unfortunately rather restrictive as it excludes from criminalization judgements made within a reasonable margin of appreciation, in good faith, in difficult situations and often with incomplete information.[10] In addition, the crime requires the presence of all three elements of environmental damage which must be "widespread, long-term and severe."

In any case, while this war crime could conceivably be used to prosecute one type of conduct which violates the rights of future generations (military acts which cause widespread, long-term and severe damage to the natural environment), like all war crimes, it could only be prosecuted if it was committed in connection with an armed conflict and as such it does not apply in peace-time.

Crimes against Humanity

Article 7 of the *Rome Statute* defines crimes against humanity as a series of prohibited acts, such as murder, extermination or tor-

ture, "committed as part of a widespread or systematic attack directed against any civilian population." There are two prohibited acts in particular that could be used to prosecute acts or conduct that might also violate the rights of future generations: persecution[11] and other inhumane acts.[12]

The *Rome Statute* defines the offence as "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".[13] Other inhumane acts are defined in the *Rome Statute* as including any act which is of "a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". As such, whether a given act falls within the category of other inhumane acts is a question to be assessed on a case-by-case basis.[14] The elements of the act that should be 'comparable' to enumerated acts are severity, character, infliction of mental or physical harm in fact, intent to cause harm, and nexus between act and harm.[15]

Using these two crimes to prosecute violations of the rights of future generations would require interpreting the elements of these crimes to cover violations of economic, social, and cultural rights. There is limited case law that supports such an expansive approach to the interpretation of these crimes. With respect to persecution, the *Kupreskic* Trial Chamber has held that "the comprehensive destruction of homes and property" constitutes "a destruction of the livelihood of a certain population" and thus "may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution."[16] Most interpretations of the scope of persecution and other inhumane acts however have, in practice, been largely limited to violations of civil and political rights causing severe mental or physical harm.

Ultimately, the greatest impediment to prosecuting conduct harming the rights of future generations is the general legal requirement of crimes against humanity which requires that they be "committed as part of a widespread or systematic attack directed against any civilian population."[17] The requirement of an attack against any civilian population encompasses any mistreatment of the civilian population of the same gravity as crimes against humanity.[18] The term "attack" refers to "a course of conduct involving the multiple commission of acts" amounting to crimes against humanity. The attack against any civilian population must moreover either be widespread or systematic in nature. The *Rome Statute* also introduces a policy element to the attack requirement as the acts must be committed "in furtherance of a State or organizational policy".[19] As such, the *Rome Statute* requires for crimes against humanity that a State or organization, whether by its actions or exceptionally by its deliberate failure to take action, actively promote or encourage an attack against a civilian population.[20]

Genocide

Article 2 of the *Genocide Convention* defines genocide as a number of acts, such as killing or the forcible transfer of children, "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Three of the underlying acts amounting to genocide could be used to prosecute conduct harming the rights of future generations: causing serious bodily or mental harm to members of the group (*Rome Statute*, Article 2(b)); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Rome Statute, Article 2(c)); and imposing measures intended to prevent births within the group (*Rome Statute*, Article 2(b)).[21]

> It is the job of thinking people not to be on the side of the executioners.
> / Albert Camus /

In order to use these crimes for the purposes of protecting the rights of future generations, it would be necessary, as it was for the case for crimes against humanity, to expand the scope of these crimes to encompass violations of social, economic and cultural rights. The quintessential examples of acts causing serious bodily or mental harm include "torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs" and "the infliction of strong fear or terror, intimidation or threat."[22] Likewise, the *ICC Elements of Crime* provide that these acts "include, but are not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."[23] With respect to the deliberate infliction of conditions of life calculated to bring about a group's physical destruction, an ICTR Trial Chamber has held that it includes "circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion" as well as "rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodations for a reasonable period".[24] The *ICC Elements of Crime* largely reiterate the above definition, providing that conditions of life "may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes."[25] Finally, the offence of imposing measures intended to prevent births within the group has been defined as including sexual mutilation, sterilization, forced birth control, the separation of the sexes, the prohibition of marriages and rape.[26] Again, the possibilities of interpreting the material element of these crimes in a manner that would cover the types of human rights violations of concern to the rights of future generations are limited.

In any case, even if these crimes of genocide could be interpreted to cover acts that violate the rights of future generations, the general legal requirement of genocide would remain a serious barrier to its use for this purpose, requiring proof of "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Moreover, it should be noted that the definition of a group is limited to one of the enumerated grounds of nationality, ethnicity, race, or religion and does not encompass groups defined on other grounds.

Conclusion

The analysis above demonstrates that it might indeed be possible to use existing international criminal law to prosecute conduct having severe consequences on the rights of future generations. Most notably, the war crime of an attack which causes widespread, long-term and severe damage to the natural environment is of direct relevance to the rights of future generations. However, as this crime could only be used to prosecute acts which had been committed in connection with an armed conflict, it does not cover damage caused to the environment in peace-time. As for using crimes against humanity and genocide, this would require certain innovations in the applica-

tion of these crimes to cover the types of human rights violations and environmental harm which are of most concern to the rights of future generations. That said, the greatest impediments to the use of these two crimes are their general legal requirements which essentially restrict their application to situations involving mass violence or gross violations of civil and political rights.

In sum, while many international crimes have indirect consequences on the rights and interests of affected future generations, it cannot be said that existing international criminal law is currently well-placed to directly and clearly protect intergenerational rights.

Crimes against Future Generations

The Concept of Crimes against Future Generations

Given the limitations of using existing international criminal law for prosecuting conduct harmful to the rights of future generations, in 2006, the Expert Commission on Future Justice of the World Future Council tasked the Centre for International Sustainable Development Law to provide advice and research on the development of a new international crime against future generations.[27] The definition of this crime presented below was further refined during workshops, consultations and meetings held with leading international judges and lawyers working in international criminal law, international human rights law and international environmental law from 2007 to 2010.[28] It is important to note that the initiative of developing crimes against future generations sought to produce a definition which would be consistent with the language and principles of the *Rome Statute.* The analysis below does not therefore discuss issues relating to standards of proof, defences and modes of liability as these are all governed by existing provisions in the *Rome Statute.*

The definition of crimes against future generations developed through this initiative reads as follows:

1. Crimes against future generations means any of the following acts within any sphere of human activity, such as military, economic, cultural, or scientific activities, when committed with knowledge of the substantial likelihood of their severe consequences on the long-term health, safety, or means of survival of any identifiable group or collectivity:

(a) Forcing members of any identifiable group or collectivity to work or live in conditions that seriously endanger their health or safety, including forced labour, enforced prostitution and human trafficking;

(b) Unlawfully appropriating or acquiring the public and private resources and property of members of any identifiable group or collectivity, including the large scale embezzlement, misappropriation or other diversion of such resources or property by a public official;

(c) Deliberately depriving members of any identifiable group or collectivity of objects indispensable to their survival, including by impeding access to water and food sources, destroying water and food sources, or contaminating water and food sources by harmful organisms or pollution;

(d) Forcefully evicting members of any identifiable group or collectivity in a widespread or systematic manner;

(e) Imposing measures that seriously endanger the health of the members of any identifiable group or collectivity, including by impeding access to health services, facilities and treatments, withholding or misrepresenting information essential for the prevention or treatment of illness or disability, or subjecting them to medical or scientific experiments of any kind which are neither justified by their medical treatment, nor carried out in their interest;

(f) Preventing members of any identifiable group or collectivity from enjoying their culture, professing and practicing their religion, using their language, preserving their cultural practices and traditions, and maintaining their basic social and cultural institutions;

(g) Preventing members of any identifiable group or collectivity from accessing primary, secondary, technical, vocational and higher education;

(h) Causing widespread, long-term and severe damage to the natural environment, including by destroying an entire species or ecosystem;

(i) Unlawfully polluting air, water and soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity;

(j) Other acts of a similar character intentionally and gravely imperilling the health, safety, or means of survival of members of any identifiable group or collectivity.

2. The expression "any identifiable group or collectivity" means any civilian group or collectivity defined on the basis of geographic, political, racial, national, ethnic, cultural, religious or gender grounds or other grounds that are universally recognized as impermissible under international law.

As the definition makes clear, crimes against future generations are not future crimes, nor crimes committed in the future. They apply instead to acts or conduct undertaken in the present which have serous consequences in the present and which are substantially likely to have serious consequences in the future. For all but one of the crimes, the immediate victims would be individuals alive at the time of the commission of the crime. The only exception is sub-paragraph (h) which would penalise severe environmental harm, without requiring harm to individual victims in the present. Just as crimes against humanity are not directly committed against all of humanity, crimes against future generations would not be directly committed against future generations either. Rather, they would penalise conduct that is of such gravity that it can be characterized as injuring the rights of future generations belonging to an affected group or collectivity. Evidently, the requirement of harm to victims or the environment in the present does not capture other acts or conduct which affect future generations without affecting present generations.

Like other international crimes, crimes against future generations are comprised of two parts: an introductory paragraph which sets out a general legal requirement that serves to elevate certain prohibited acts to the status of an international crime and a list of prohibited acts. The establishment of a crime against future generations would thus require the commission of one of the prohibited acts listed at sub-paragraphs 1(a) to (j) of the definition with knowledge of "the substantial likelihood of their severe consequences on the long-term health, safety, or means of survival of any identifiable group or collectivity." This does not imply that the prohibited act must affect each and every member of the identifiable group or collectivity in question, but only that it must be committed against the members of the identifiable group or collectivity and be of such magnitude or scale that it is substantially likely to have the prohibited consequences on this identifiable group or collectivity in the long-term. Moreover, it is clear that a crime against future generations could be committed before these prohibited consequences listed in the general legal requirement materialised. This is similar to the crime of genocide, which does not require that each and every member of a group be eliminated

before an underlying act of genocide directed to this goal can be prosecuted.

That said, in the context of crimes against future generations, this requirement is a knowledge element, as for war crimes and crimes against humanity. It is not a special intent requirement, as for genocide, in order to avoid difficulties in proving that certain activities were undertaken with the intent to cause long-term harm to an identifiable group or collectivity. The knowledge element in the general legal requirement of the crime would be met if it were shown that a perpetrator knew of the substantial likelihood of the prohibited consequences listed in the general legal requirement or if they knowingly took the risk that these prohibited consequences would occur in the ordinary course of events.[29] Moreover, knowledge could be inferred from the relevant facts and circumstances of a given case,[30] such as, *inter alia*, the perpetrator's statements and actions, their functions and responsibilities, their knowledge or awareness of other facts and circumstances, the circumstances in which the acts or consequences occurred, the links between themselves and the acts and consequences, the scope and gravity of the acts or consequences and the nature of the acts and consequences and the degree to which these are common knowledge. The language of 'substantial likelihood' is drawn from the customary international law standard for the mental element of the mode of liability of ordering. It requires that the perpetrator knew that his or her acts would be substantially likely to have the prohibited consequences listed in the general legal requirement; the perpetrator need not know, therefore, that his acts or conduct are likely be the *only* cause or the *sine qua non* cause of the prohibited consequences.[31]

Crimes against future generations would have a fairly broad scope of application. The introductory paragraph explains that they are intended to cover a wide range of acts or conduct and can be committed in peacetime and in war-time. In addition, the second paragraph adopts a broad definition of "any identifiable group or collectivity." This definition, drawing on a similar expression included in article 7(1)(h) of the *Rome Statute*, means that crimes against future generations would apply to a wide variety of discrete or specific human populations defined on the basis of shared geographic, political, racial, national, ethnic, cultural, religious, gender or other grounds.

Acts prohibited as crimes against future generations

The table below sets out the purpose and sources for the prohibited acts listed in subparagraphs 1(a) to 1(j) of the definition of crimes against future generations. The table shows that crimes against future generations would penalise conduct that is already prohibited as a violation of international human rights law[32] or other international conventions or would extend the scope of application of conduct that is already prohibited as a crime against humanity and or a war crime.

Conclusion

Although there is some potential for using international criminal law to prosecute conduct having severe consequences for the rights of future generations, the limitations with the definitions of existing international crimes makes this option of limited utility. This is why the World Future Council initiated the project of creating crimes against future generations as the means for explicitly and clearly protecting the interests of future generations.

The creation of crimes against future generations would have two important benefits. First of all, it would make mechanisms and processes of individual criminal liability available at both the domestic and international levels for serious violations of eco-

Sub-paragraph	Purpose	Interpretative Sources
1(a)	Penalises serious violations of the rights to liberty and security of the person and to freedom of residence and movement (*International Covenant on Civil and Political Rights (ICCPR)*, arts. 9 and 12) and the rights to work of one's choosing and to work in safe and healthy conditions (*International Covenant on Economic, Social and Cultural Rights (ICESCR)*, arts. 6(1) and 7(1)).	Draws on the crimes of forced labour and human trafficking found in the crime against humanity of enslavement (*Rome Statute*, art. 7(1) (c)) and the crime against humanity of enforced prostitution (*Rome Statute*, art. 7(1) (g)).
1(b)	Penalises grave violations of the customary international law principle of permanent sovereignty over resources, which provides that the citizens of a state should benefit from the exploitation of resources and the resulting national development.[33]	Extends a similar war crime of pillaging to the context of peace-time (*Rome Statute*, art. 8(2) (b) (xvi)) and is also based on the crime of corruption as set out in article 17 of the *UN Convention against Corruption.*[34]
1(c)	Penalises serious violations of the right to life, referring in particular to the rights to food and water (*ICESCR*, art. 11).	Extends a similar war crime to the context of peace-time (*Rome Statute*, art. 8(2) (v) (xxv)) and draws on the underlying act of genocide (*Rome Statute*, art. 6(c)).
1(d)	Penalises one of the most serious violations of the right to housing (*ICESCR*, art. 11(1)).	Draws on the general comment of the U.N. Committee on the *ICESCR* relating to the right to housing (General Comment no. 7).
1(e)	Penalises one of the most serious violations of the right to health (*ICESCR*, art. 12).	Draws on the general comment of the U.N. Committee on the *ICESCR* relating to the right to health (General Comment no. 12) and extends a similarly worded war crime to the peace-time context (*Rome Statute*, art. 8(2)(b)(x)).
1(f)	Penalises serious violations of the right to culture (*ICCPR*, art. 27 and *ICESCR*, art. 15).	Draws on the previous drafts of the *Genocide Convention* which included the crime of cultural genocide.[35]
1(g)	Penalises one of the most serious violations of the right to education (*ICESCR*, art. 13).	Draws on the general comment of the U.N. Committee on the *ICESCR* relating to the right to education (General Comment no. 13).
1(h)	Penalises serious violations of the customary international law duty to prevent grave environmental harm and damages.[36]	Based on a similarly worded war crime (*Rome Statute*, Article 8(2) (b) (iv)).
1(i)	Penalises serious violations of the right to life, particularly the rights to health, housing, food, and water (*ICESCR*, arts. 11 and 12).	Draws on the general comments of the UN Committee on the *ICESCR* relating to the rights to health, housing, food, and water (General Comments no. 12, 14 and 15).
1(j)	Penalises serious violations of the rights protected by other sub-paragraphs.	Draws on a similar catch-all provision for crimes against humanity (*Rome Statute*, art. 7(1) (k)).

nomic, social and cultural rights and international environmental law. Indeed, an amendment to the *Rome Statute* of the ICC would impose an obligation on those States

> If there is no struggle, there is no progress.
> / Frederick Douglass /

that ratify the amendment to investigate, arrest and prosecute perpetrators under their domestic criminal legal systems. This is in fact the primary obligation of states under the *Rome Statute* and whatever criticisms can be made of the ICC's effectiveness thus far, the ICC is an institution which is meant to complement domestic efforts to end impunity for international crimes. Indeed, it is only if a state party was unwilling or unable to investigate crimes against future generations, that the ICC would be granted the power to do so in the place of domestic authorities. In this regard, it is important to note that the ICC has the power to sentence a convicted person to a term imprisonment, to impose a fine and the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime[37] as well as order an award of damages against a convicted person, entailing restitution, compensation, and rehabilitation.[38]

Second of all, beyond its immediate benefits in terms of potential prosecution at the national and international levels, the creation of crimes against future generations would give advocates and law-makers a new tool and concept for upholding the importance of certain norms and values and for criticising conduct in breach of these norms and values. The notion of an international crime is indeed one of the most important means through which the international community can condemn morally opprobrious behaviour. As such, whatever its faults may be, the fledging system of international criminal justice forms a stronger regime for penalising conduct harmful to the rights of future generations than what is currently available under international law.

The *Rome Statute* explicitly provides for the possibility of amending the provisions dealing with the crimes within the jurisdiction of the ICC.[39] Of course, there is no doubt that an effort to create a new international crime along the lines of crimes against future generations would have its detractors and critics. It is also obvious that this effort would likely take a number of years to bear fruit. Notwithstanding these serious obstacles, there are two reasons to be optimistic about the prospects of a campaign to create crimes against future generations in the long-term.

The first reason is that the features and history of the field of international criminal law are broadly encouraging. Existing international criminal law includes certain elements which are of conceptual significance to the notion of a crime against future generations. To begin with, the harm caused by international crimes can often be collective in scope, as is the case for groups in the crime of genocide and civilian populations in crimes against humanity. Moreover, the history of international criminal law, particularly the development of crimes against humanity, demonstrates that expanding the scope of the application of international criminal law is not without precedent. Crimes against humanity emerged in international law in the wake of the Second World War as a creation of the *Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter)*.[40] During the negotiations which led to the *Nuremberg Charter*, it became apparent that certain crimes committed by the Nazis did not fall within the purview of existing law, most notably those atrocities perpetrated by German forces against their own nationals. In order to resolve this lacuna, the Allies conceived of a third category of crimes, crimes against humanity, to fill the gap left by the provisions pertaining to crimes against peace and war crimes.[41] Initially, crimes against humanity were closely linked to other categories of international crimes as the *Nuremberg Charter* conferred jurisdiction over this category of crimes only to the extent that they were committed in execution of or in connection with war crimes and crimes against peace. Today, crimes against humanity consist of acts which can be committed in peace-time and which rise to the level of an international crime, not because of their connection with an armed conflict, but because of their level of gravity.[42] Just as crimes against humanity were developed in response to a gap in existing law, the creation of a crime against future generations seeks both to fill a gap in the law and to strengthen existing taboos regarding acceptable human conduct. As well, similarly to the evolution of crimes against humanity, many crimes against future generations also seek to criminalize in peace-time conduct which currently constitutes a war crime.

It is important to note that crimes against future generations can be distinguished from other potential candidates for inclusion in the *Rome Statute*, such as drug trafficking or terrorism. In Rome, a majority of states opposed the inclusion of the latter crimes for three principal reasons: the different character of these crimes, the danger of overloading the ICC with less important crimes and the existence of effective systems of international cooperation in repressing these crimes.[43] It is certainly the case that agenda overload will pose an obstacle to the creation of crimes against future generations. On the other hand, unlike these crimes, crimes against future generations are of a similar character to other international crimes (i.e. they are violations of customary or treaty norms that are intended to protect values considered important by the international community and for which there is a universal interest in repressing)[44] and existing mechanisms for sanctioning violations of economic, social, and cultural rights and serious environmental harm are clearly inadequate.

The second reason to be optimistic is that while the idea of creating a new crime for protecting the rights of future generations certainly seeks to move international law forward, it does so in the spirit of attaching the appropriate penal consequences for behaviour which the international community has already recognised as being reprehensible. Indeed, crimes against future generations build upon international law by seeking to extend the scope of application of existing international crimes from war-time to peace-time or establish criminal liability for existing prohibitions in international law. In this second regard, given the principle that all human rights should be treated equally,[45] there is little justification for restricting the scope of international criminal law to the category of serious violations of civil and political rights only. In other words, the very creation of crimes against future generations is consistent with a key principle of international human rights law: that all rights are equal, interrelated and indivisible. It should be noted moreover that crimes against future generations, in seeking to protect economic, social and cultural rights, avoids the principal criticism which states and corporations have made in relation to these rights, namely that they are vague and impose positive obligations (to adopt certain conduct) rather than negative obligations (to refrain from certain conduct). Indeed, by focusing on the deliberate

commission of serious violations of economic, social and cultural rights, crimes against future generations provide a clear and 'negative' approach to these rights.

In any case, there are good reasons to think the dissemination and use of the concept of crimes against future generations might be beneficial regardless of any success in amending the *Rome Statute*. The concept of crimes against future generations could play a crucial role in demonstrating that serious breaches of international law, including violations of economic, social, and cultural rights and severe environmental harm, are morally wrong and deserving of condemnation in the strongest possible terms. Ultimately, the idea of using international criminal law for the implementation of intergenerational justice is therefore as much about punishing and deterring morally wrong conduct as it is about strengthening existing taboos about appropriate behaviour. On the whole, advocates and policy-makers concerned with intergenerational justice may want to increasingly consider the role that criminalization of certain actions could play in deterring, punishing and condemning reprehensible conduct harmful to future generations.

Notes

1. The views presented are the author's and do not represent the views of any organisation with which he is affiliated. This article shares some thoughts with Sébastien Jodoin, 'Crimes against Future Generations: A New Approach to Ending Impunity for Serious Violations of Economic, Social, and Cultural Rights and Severe Environmental Harm,' WFC & CISDL Legal Working Paper (March 2010). This and other relevant materials will soon be available at : www.crimesagainstfuturegenerations.org.

2. I acknowledge the existence of other proposals for an international environmental court and or an international environmental criminal court. These are fundamentally different projects than the approach discussed here for a number of reasons. First of all, these projects focus on environmental crimes only while this article looks at violations of economic, social and cultural rights. Second, they are not consistent with existing international criminal law. For instance, while the project of Adolfo Perez Esquivel (Perez Esquivel / The Dalai Lama 2007) refers to new environmental crimes as crimes against humanity, the concept of crime against humanity has a specific definition in international criminal law, which does not in fact cover environmental crimes and could not, as explained below, be amended to do so in a manner that would in fact address the problem of environmental harm. Likewise, the project of the International Court for the Environment Foundation (see International Court for the Environment Foundation. http://www.icef-court.org/.) refers to both State and individual responsibility for international crimes. However, the concept of a State crime simply does not exist in international law and international criminal law includes individual criminal liability only.

3. United Nations General Assembly 1998: arts. 15 and 17-19.

4. See generally on these different objectives of international criminal law, Drumbl 2007.

5. Although the crime of aggression is also included in the *Rome Statute,* its elements have not been defined and is not yet in force.

6. International Committee of the Red Cross 1977: arts. 51-52.

7. International Committee of the Red Cross 1977: arts. 51(5)(b), 57(2)(a)(iii) and 57(2)(b).

8. United Nations General Assembly 1998: arts. 8(2)(a)(ii)-8(2)(a)(iv), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(x), 8(2)(b)(xx) and 8(2)(b)(xxv).

9. United Nations General Assembly 1998: art. 8(2)(b)(iv).

10. Pfirter 1999: 149-151.

11. United Nations General Assembly 1998: art. 7(1) (h).

12. United Nations General Assembly 1998: art. 7(1) (k)).

13. United Nations General Assembly 1998: art. 7(1)(h).

14. *Prosecutor v. Kordic and Cerkez* 2001: paras 271-272.

15. *Prosecutor v. Kayishema* 1999: paras. 148-51.

16. *Prosecutor v. Kupreskic et al.* 2000: para. 631.

17. In addition to the general legal requirement, the *Rome Statute* requires with respect to persecution that it be committed in connection with another international crime and that it be committed with specific discriminatory intent.

18. *Prosecutor v. Kunarac* 2002: para. 86.

19. United Nations General Assembly 1998: art. 7(2)(a).

20. United Nations Preparatory Commission for the International Criminal Court 2000: art. 7(3).

21. United Nations General Assembly 1998: article 2(b); United Nations General Assembly 1998: article 2(c); United Nations General Assembly 1998: art. 2(b).

22. *Prosecutor v. Seromba* 2008: para. 46.

23.United Nations Preparatory Commission for the International Criminal Court 2000: art. 6(b), fn. 3.

24.*Prosecutor v. Kayishema* 1999: paras. 115-16.

25. United Nations Preparatory Commission for the International Criminal Court 2000: art. 6(c), fn. 4.

26. *Prosecutor v. Akayesu* 2001: paras. 507-508.

27. The Expert Commission was set up by the World Future Council to develop new laws and policies in order to guarantee human security, ecological integrity and social equity in the interest of future generations (see www.worldfuturecouncil.org). The Centre for International Sustainable Development Law aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law (see www.cisdl.org).

28. For a complete analysis and commentary, see reference in introductory endnote to this article.

29. United Nations General Assembly 1998: art. 30(3) and *Prosecutor v. Kunarac* 2002: para. 102.

30. United Nations Preparatory Commission for the International Criminal Court 2000: para. 3.

31. *Prosecutor v. Blaskic* 2004: para. 42.

32. The references below are to United Nations General Assembly 1966 a or the United Nations General Assembly 1966 b.

33. Schrijver 1997: 390-392.

34. United Nations General Assembly 2003.

35. Economic and Social Council 1948: art. HI.

36. See United Nations Conference on the Human Environment 1972: principle 21. See also United Nations Yearbook of the International Law Commission1991: at 107.

37. United Nations General Assembly 1998: art. 77.

38. United Nations General Assembly 1998: art. 75.

39. United Nations General Assembly 1998: arts. 121(5) and 1231(1).

40. Cassese 2003: 70.

41. Bassiouni 1992: 17, 22-24; Cassese 2003: 68-69.

42. Cassese 2003: 64-65; Robinson 2001: 57.

43. Hebel and Robinson 1999: 81, 86.

44. Cassese 2003: 23.

45. World Conference on Human Rights 1993: para. 5: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

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