Crimes Against Future Generations:
Harnessing the Potential of Individual Criminal Accountability for Global Sustainability

Sébastien Jodoin* and Yolanda Saito**

The existing approach of states to the global objective of sustainable development evinces a clear failure to address acts and conduct that are unsustainable in fundamental ways. Populations around the world are experiencing the contamination of their freshwater sources and critical ecosystems, the embezzlement of state resources, the forced labour of children and women, and the discriminatory denial of access to food, shelter, medical care, education, and cultural freedoms without adequate legal recourse. This article argues that serious violations of the International Covenant of Economic, Social, and Cultural Rights and severe environmental damage can strike at the very foundations of the economic, social and environmental pillars of sustainable development. It outlines the legal foundations and possible legal pathways of a new crime under international law aimed at acts and conduct that have severe consequences on the long-term health, safety and means of survival of any identifiable group or collectivity of humans. Crimes against future generations recognizes the power of individual criminal liability to fill the current governance gap that provides the permissive environment for transnational corporations and states to deny populations the basic living and environmental conditions to take first steps towards their own sustainable development.

Devant l'objectif global de développement durable, l'approche actuelle des États est un échec manifeste qui ne permet pas de faire face aux actes et conduites s'avérant être fondamentalement non-durables du point de vue environnemental. À l'échelle mondiale, nombreuses sont les populations qui n'ont aucun recours juridique approprié alors qu'elles connaissent la pollution de leurs sources d'eau douce et de leurs écosystèmes, le détournement des ressources de l'État, le travail forcé d'enfants et de femmes, et subissent le refus discriminatoire d'accès à la nourriture, à un toit, aux soins médicaux, à l'éducation et à la liberté culturelle. Cet article soutient que les sévères violations du Pacte international relatif aux droits économiques, sociaux et culturels, ainsi que les graves dommages environnementaux, peuvent attaquer de plein fouet les fondements mêmes des piliers économiques, sociaux et environnementaux du développement durable. Il trace également les grandes lignes des fondements juridiques de même que les avenues juridiques possibles d'un nouveau type de crime en droit international visant les actes et conduites ayant de lourdes conséquences à long terme sur la santé, la sécurité et les moyens de survie de tout groupe identifiable ou de toute collectivité humaine. En effet, les crimes contre les générations futures reconnaissent le pouvoir de la responsabilité pénale individuelle afin de combler l'écart de gouvernance qui crée un climat laxiste, par lequel les entreprises transnationales et les États nient aux populations les conditions de vie et environnementales élémentaires susceptibles de les aider à faire un premier pas vers leur propre développement durable.

Sébastien Jodoin is a Trudeau Scholar at the Yale School of Forestry & Environmental Studies, a Lead Counsel with the Centre for International Sustainable Development Law, a Fellow with the Canadian Centre for International Justice, and an Associate Fellow with the McGill Centre for Human Rights and Legal Pluralism. He is also the Director of the One Justice Project. As explained below, this article builds on research that was supported by the World Future Council and the Centre for International Sustainable Development Law and the contribution of both organisations to this work is gratefully acknowledged.

Yolanda Saito is an Associate Fellow with the Centre for International Sustainable Development Law and Legal Specialist with the International Development Law Organization. She is also a Legal Officer with the One Justice Project.
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>THE PURSUIT OF SUSTAINABLE DEVELOPMENT</td>
<td>117</td>
</tr>
<tr>
<td>2.</td>
<td>INDIVIDUAL ACCOUNTABILITY AND GLOBAL SUSTAINABILITY</td>
<td>121</td>
</tr>
<tr>
<td>2.1</td>
<td>The Promise of International Criminal Justice and the Remaining</td>
<td>121</td>
</tr>
<tr>
<td></td>
<td>Challenge of impunity for Economic, Social, Cultural, and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Environmental Crimes</td>
<td></td>
</tr>
<tr>
<td>2.2</td>
<td>An Illustrative Case Study: The Chevron-Texaco Case in Ecuador</td>
<td>123</td>
</tr>
<tr>
<td>2.3</td>
<td>The Need for Individual Accountability</td>
<td>126</td>
</tr>
<tr>
<td>3.</td>
<td>CRIMES AGAINST FUTURE GENERATIONS</td>
<td>127</td>
</tr>
<tr>
<td>3.1</td>
<td>The Definition of Crimes against Future Generations</td>
<td>127</td>
</tr>
<tr>
<td>3.2</td>
<td>The Concept of Crimes against Future Generations</td>
<td>128</td>
</tr>
<tr>
<td>4.</td>
<td>A BRIEF LEGAL COMMENTARY ON CRIMES AGAINST FUTURE GENERATIONS</td>
<td>129</td>
</tr>
<tr>
<td>4.1</td>
<td>The Elements of Crimes against Future Generations</td>
<td>129</td>
</tr>
<tr>
<td>4.2</td>
<td>The Chapeau Element in Paragraph 1</td>
<td>130</td>
</tr>
<tr>
<td>4.3</td>
<td>The Elements of Prohibited Acts</td>
<td>134</td>
</tr>
<tr>
<td>4.4</td>
<td>The Definition of Identifiable Groups or Collectivities in Paragraph 2</td>
<td>147</td>
</tr>
<tr>
<td>5.</td>
<td>THE WAY FORWARD FOR CREATING CRIMES AGAINST FUTURE GENERATIONS</td>
<td>148</td>
</tr>
<tr>
<td>5.1</td>
<td>Pathways for Creating Crimes against Future Generations</td>
<td>148</td>
</tr>
<tr>
<td>5.2</td>
<td>Generating a Norm Cascade for Crimes against Future Generations</td>
<td>152</td>
</tr>
<tr>
<td>6.</td>
<td>OPENING A DIALOGUE FOR THE FUTURE</td>
<td>154</td>
</tr>
</tbody>
</table>
In the 25 years since the Brundtland Commission's urgent call to take action towards sustainable development, the international community has adopted commitments, principles, and initiatives aimed at advancing and strengthening "the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels." By and large, international law and policy on sustainable development has reflected a marked emphasis on the steps that states can adopt to move the world to a more sustainable path. At the forthcoming United Nations Conference on Sustainable Development, to be held in Rio de Janeiro in June 2012, States will likewise continue to focus on the adoption of a programme for policy change, focusing on the transition toward a green economy and institutional reforms aimed at the realisation of sustainable development.

Admittedly, the efforts of the last twenty-five years have achieved some positive gains for global sustainability. However, the existing approach of states to the global objective of sustainable development evinces a clear failure to address its opposite – acts and conduct that are unsustainable in fundamental ways because they strike at the very foundations of the economic, social, and environmental pillars that make sustainable development possible. The response of the international community to serious violations of economic, social, and cultural rights and severe environmental degradation has been particularly underwhelming. Populations around the world are experiencing the contamination of their freshwater sources and critical ecosystems, the embezzlement of state resources, the forced labour of children and women, and the discriminatory denial of access to food, shelter, medical care, education, and cultural freedoms.

Economic, social, and cultural rights are increasingly recognised as being central to the achievement of sustainable development. At the 2002 Johannesburg World Summit on Sustainable Development, the concept of sustainable development was broadly defined as including access to such basic requirements as clean water, sanitation, adequate shelter, health care, and food security. Other essential elements of sustainable development enumerated at


6 For example, in Ecuador, Texaco undertook deliberately substandard oil operations in the name of maintaining "efficient and profitable productions", permitting the dumping of more than 16 billion gallons of toxic wastewater, spillage of roughly 17 million gallons of crude oil, and the abandonment of hazardous waste in hundreds of open pits dug out of the forest floor, resulting in widespread and long-term health issues for the indigenous peoples of the Amazon. See Aguirre v. Chevron Texaco, (judgement of 14 February, 2011), Case no 2003-0002, Provincial Court of Sucumbios, Ecuador at 162 (Chevron Texaco). See also Amazon Watch, "About the Campaign", Chevron Toxico: The Campaign for Justice in Ecuador, online: Chevron Toxico <http://chevronxic.com/about/>.

7 For example, the Cambodian government has leased 45% of the country's land rich in timber, petroleum, and minerals to private investors. While this bounty presents an opportunity to lift the nearly 70% of its population who are living on less than $2 a day out of poverty, these riches have instead been diverted and squandered by corrupt officials. See Global Witness, "Cambodia", online: Global Witness <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/cambodia/.


9 For example, in Iran, the government has systematically persecuted the Iranian Baha'i communities who are restricted from openly practicing their faith and subject to arbitrary detentions and discriminatory charges of espionage and propaganda spreading, crimes that carry the death penalty. See Human Rights Watch, "Iran: End Persecution of Baha'is" (23 February 2010), online: Human Rights Watch <http://www.hrw.org/en/news/2010/02/23/iran-end-persecution-baha/.

10 Cordonier Segger & Khalfan, supra note 3 at 201-209.

11 Johannesburg Declaration, supra note 2 at art 18.
the Summit included access to education,\textsuperscript{12} the eradication of corruption,\textsuperscript{13} and respect for cultural diversity.\textsuperscript{14} These are all core components of the rights included in the \textit{International Covenant on Economic, Social, and Cultural Rights} \textsuperscript{15} (hereafter "the ICESCR") and serious violations of this treaty, as identified by the U.N. supervisory body tasked with its interpretation and supervision,\textsuperscript{16} undoubtedly hamper the achievement of sustainable development.

Severe environmental damage is perhaps the most serious violation of a customary rule of international environmental law.\textsuperscript{17} As most notably recognised in the \textit{Rio Declaration}, States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."\textsuperscript{18} Like serious violations of the ICESCR, severe environmental damage is completely incompatible with the objective of sustainable development.

Sustainable development requires not only the adoption of best practices and policies in the fields of development and environment, but also the identification, prevention, and repression of destructive acts that are harmful to human populations and their environment. Although sustainable development is closely associated with the principles of good governance and access to justice,\textsuperscript{19} none of the major international instruments dealing with sustainable development address the critical importance of holding governments, individuals or corporations accountable for serious violations of international law that are manifestly unsustainable.\textsuperscript{20} As a result, new accountability principles and mechanisms are sorely needed to address serious violations of economic, social, and cultural rights and severe environmental damage.

In this article, we argue that serious violations of the ICESCR and severe environmental damage should be recognised as crimes under international law. Our approach draws inspira-
tion from the field of green criminology, which examines the role that criminalization can play in the protection of the environment. In particular, we present the novel concept of crimes against future generations, defined as acts and conduct that have severe consequences on the long-term health, safety and means of survival of any identifiable group or collectivity of humans. The proposed concept of crimes against future generations would provide individual criminal accountability for serious violations of existing international legal obligations that affect all three pillars of sustainable development: economic development, social development and environmental protection. The definition of crimes against future generations thus includes serious violations of the international rights to work, food, water, shelter, health, culture, and education, corruption, and the duty not to cause severe environmental damage.

The concept of crimes against future generations presented in this article was developed by Sébastien Jodoin through a project established by the World Future Council and involving the collaboration of the Centre for International Sustainable Development Law. Through three years of research as well as workshops and consultations held with leading international judges and lawyers, this collaboration yielded the concept and definition of crime against future generations that is presented below.

21 For an overview of the field of green criminology, see Nigel South & Piers Beirne, eds., Green Criminology (London, UK: Ashgate Publishing, 2006).

22 The World Future Council brings the interests of future generations to the centre of policy making. Its fifty eminent members from around the globe have already successfully promoted change. The Council addresses challenges to our common future and provides decision-makers with effective policy solutions. In-depth research underpins advocacy work for international agreements, regional policy frameworks and national lawmakers. See The World Future Council, online: <http://www.worldfuturecouncil.org>.

23 The Centre for International Sustainable Development Law (CISDL) is an independent research centre that aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development, and implementation of international sustainable development law. Through legal research, teaching, conferences, and capacity-building, the centre contributes to ongoing policy processes and initiatives on the intersections of international law in the environment, human rights, human health, trade, and development. See CISDL, online: <http://www.cisdl.org>.

24 Meetings were held in Santa Barbara, The Hague, London, Arusha, Montréal, Bali, Kampala, and Ottawa. The members and advisors of the WFC Commission on Future Justice who actively fostered work on crimes against future generations included Hon. Christopher J. Weeramantry, Bianca Jagger, Prof. Marie-Claire Cordonier Segger, Hon. Arthur Robinson, Dr. Scilla Elworthy, Dr. Rama Mani, Count Hans von Sponeck, Dr. Ernst Ulrich von Weizsäcker, Dr. Hans Peter Dürr, David Krieger, Prof. Stephen Marglin, Jakob von Uexküll, Herbert Girardet, Alexandra Wandel, Neshan Gunaskera, Miguel Mendonca, and Milo Wagner. Many individuals assisted in this work and were generous with their time, advice and expertise. They most notably include: Hon. Fausto Pocar, former President, Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); Hon. Abdul G. Koroma, Judge, International Court of Justice (ICJ); Hon. Mohamed Shahabuddien, former Judge, Appeals Chambers of the ICTY and ICTR, former Judge, ICJ; Hon. Erik Mose, former President, ICTR; Hon. Catherine Marchi-Uhel, Judge, Extraordinary Chambers in the Courts of Cambodia (ECCC); Mr. Ken Roberts, Deputy Registrar, ICTY; Mr. Matthew Gillett, Legal Officer, Office of the Prosecutor, ICTY; Mr. Chris Gosnell, defence counsel before the ICTY; and, Pubuda Sachishandan, Associate Trial Attorney, Office of the Prosecutor, International Criminal Court (ICC). This article does not represent the views or positions of the above individuals or the organizations with which they are affiliated.
Although we include a detailed definition and description of crimes against future generations, what we seek first and foremost through this article is to engage in a dialogue towards a fundamental change in the way which the international community treats serious violations of economic, social and cultural rights and international environmental law. In doing so, we seek to move beyond the current, underwhelming resort to torts, corporate social responsibility, and governance that has characterised responses to economic, social, cultural, and environmental harm to the more potent concepts of crime, individual accountability, and justice. In sum, we argue that achieving global sustainability requires individual criminal liability for those acts and conduct that strike at the very basis of sustainable development and prevent populations from rising out of poverty and living in safe and healthy environments.

2. INDIIVIDUAL ACCOUNTABILITY AND GLOBAL SUSTAINABILITY

2.1 The Promise of International Criminal Justice and the Remaining Challenge of Impunity for Economic, Social, Cultural, and Environmental Crimes

The international community has made significant strides in ending impunity for serious violations of international law amounting to war crimes, crimes against humanity, and genocide – the core international crimes that have been prosecuted and tried by both domestic and international criminal courts in the second half of the twentieth century.25 The field emerged out of the international prosecutions of Axis war criminals in the aftermath of the Second World War and was revitalised with the creation by the U.N. Security Council of ad hoc international criminal tribunals to try the perpetrators of crimes committed during conflicts in the former Yugoslavia and Rwanda in the mid-1990s. This momentum led to the establishment of a permanent International Criminal Court based on the Rome Statute which was negotiated in 1998, entered into force in 2002, and had 118 parties as of September 2011.26

This current system of international criminal justice is founded on the principle that individuals should be held criminally accountable for the most serious violations of international law – what the Rome Statute of the International Criminal Court defines as “grave crimes that threaten the peace, security and well-being of the world” and “atrocities that deeply shock the conscience of humanity.”27

With few exceptions, international crimes encompass violations of civil and political rights and do not cover the serious violations of international economic, social, and cultural rights and international environmental law that are of direct relevance to sustainable development.28

---


27 Ibid at preamble.

28 These exceptions include the crimes against humanity through persecution (Rome Statute, supra note 26 at 7(1)(i)); other inhumane acts (Rome Statute, supra note 26 at art 7(1)(k)); and the crime of genocide of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Rome Statute, supra note 26 at 7(c)). It is important to note that there is little case law in support of their expansion to economic, social, and cultural rights. Relevant war crimes include starving civilians as a method of warfare (Rome Statute, supra note 26 at art 8(2)(b)(xxv)); subjecting individuals to medical or scientific experiments (Rome Statute, supra note 26 at art 8(2)(b)
More importantly, existing international crimes focus on behaviour that is essentially limited to situations involving physical violence on a large scale. War crimes are committed in the context of an armed conflict, crimes against humanity are committed as part of a widespread or systematic attack against any civilian population, genocide involves the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, and aggression involves the use of armed force against a State or other manner acts inconsistent with the U.N. Charter, including any of the acts set forth in U.N. General Assembly Resolution 3314.

Although there are understandable historical and political factors that explain this exclusive focus on armed conflicts and physical violence, the exclusion of other serious and equally grave violations of international law from the scope of international criminal law has troubling implications for the victims of these violations. For instance, while the commission of an attack that causes widespread, long-term and severe damage to the natural environment amounts to a war crime, the commission of acts causing environmental damage of equivalent gravity outside of an armed conflict is not a crime under international law. Likewise, as discussed below, although international law criminalises serious violations of the ICESCR such as the rights to health (the war crime of conducting non-consensual and harmful medical experiments on human populations) or food (the war crime of starvation), these very same acts committed outside of the context of an armed conflict do not amount to international crimes. As a result, the potential for existing international criminal law to address serious violations of economic, social and cultural rights and severe environmental damage is limited and impunity thus remains for a whole range of conduct that strikes at the fundamental pillars of sustainable development.

The impunity that subsists for serious violations of ICESCR and severe environmental damage in international law is all the more problematic given the overall weakness of enforcement mechanisms in these fields. The inadequacy of existing means for addressing serious

(x); and causing widespread, long-term and severe damage to the natural environment (Rome Statute, supra note 26 at art 8(2)(b)(iv)).


30 Rome Statute, supra note 26, art 8.

31 Ibid at art 7.

32 Ibid at art 6.

33 The Crime of Agression, RC/Res.6, ICCOR (Review Conference of the Rome Statute), 13th Plen Mtg, (16 June 2010) at annex 1, art 8 bis (2).

34 Rome Statute, supra note 26 at art 8(2)(b)(iv).


36 Ibid at art 8(2)(v)(xxv).

violations of ICESCR or instances of severe environmental damage is well recognized and need not be recounted here. These deficiencies in the international enforcement of economic, social, and cultural rights and international environmental law are further compounded by the challenges associated with the activities and presence of transnational corporations in developing countries. As noted by the U.N. Special Rapporteur for Business and Human Rights, a patchwork of weak, non-existent, or inadequately enforced laws in both developed and developing states has resulted in gaps in the governance of transnational corporations operating in developing countries. These governance gaps “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”

Faced with these governance gaps, civil society actors in developing and developed countries have had to resort to civil liability to obtain a measure of justice and compensation for serious violations of economic, social, and cultural rights and severe environmental damage. However, as the Chevron-Texaco case discussed below demonstrates, civil liability remains a costly, time-consuming, and ultimately unsatisfying alternative to the more rigorous process of criminal investigation and prosecution. Most importantly, civil liability does not capture the gravity, the moral blameworthiness, and the harmful consequences that can characterise conduct amounting to serious violations of ICESCR and severe environmental damage. The notion that such behaviour should merely give rise to civil liability, rather than criminal liability, feeds the perception that it not especially morally opprobrious and that it falls within the range of acceptable human conduct.

2.2 An Illustrative Case Study: The Chevron-Texaco Case in Ecuador

The civil court proceedings to address the massive pollution in the Ecuadorian Amazon due to Texaco’s operations from 1972-1992 have been characterized by multiple complications, lengthy delays and doubts about effectiveness. The story is all too familiar by now: a transnational corporation employing sub-standard business practices permitted due to a lack of regulation in a developing state and a sponsoring nation lacking full awareness of and arguably even complicit in the severe consequences of such practices. Texaco was the sole operator for 26 years of oil extraction in the Amazon in which it dumped nearly 17 billions of gallons of oil-drilling wastewater in unlined toxic waste pits and directly into soils and streams of the

---

38 See David P Forsythe, Human Rights in International Relations, 2d ed (Cambridge: Cambridge University Press, 2006) at 82-83.


Amazon rainforest.42 These practices were prohibited in the United States at the time due to known health risks.43 The decision to operate in a manner contrary to contemporary standards was a conscious act that saved Texaco closed to $3 USD per barrel produced.

In 1993, the indigenous Ecuadorian plaintiffs filed a class-action suit under the Alien Torts Claims Act,44 a matter that Texaco successfully deferred by petitioning the U.S. Federal Court in 2002 to declare itself forum non conveniens and require the transfer of the action to Ecuador.45 Importantly, the U.S. Federal Court granted this petition on Texaco’s commitment to comply with the final jurisdiction of the Ecuadorian courts on the matter. In 2003, the plaintiffs re-filed the claim in Ecuador under the 1999 Environmental Management Law.46 A court-appointed expert assessed the damages at $27 USD billion and estimated the number of cancer-related deaths at greater than 1,400. After several delays and several judges, and questionable litigation tactics by both sides in a matter charged with allegations of corruption and collusion, the Ecuadorian court fined Chevron-Texaco $8.6 billion USD, with a potential liability of $18.2 billion USD if the corporation refused to issue a formal apology to the plaintiffs.47 Chevron-Texaco immediately called the judgment non-recognizable and unenforceable48 despite their previous commitment to the Ecuadorian jurisdiction and continue with further court actions: an appeal of the decision in the Ecuadorian courts, a preliminary injunction banning enforcement of the judgment from a U.S. District Court, an anti-racketeering lawsuit in a Manhattan court and arbitrations on a bilateral agreement with the Ecuadorian government at the Permanent Court of Arbitration (hereafter "the PCA"). The plaintiffs allege that these actions are corporate bullying designed to intimidate lawyers and funders, and provide a fake cover story for shareholders.49 Chevron has been criticized for employing a strategy of litigation exhaustion to drain the resources of the plaintiffs while obfuscating the fundamental issue of the contamination from oil operations.50


43 Ibid.


47 Chevron Texaco, supra note 6 at 183-186.


50 See Amazon Watch, “Chevron’s Efforts to Undermine the Rule of Law” ChevronToxico.com, online: <http://chevronxicoto.com/about/historic-trial/chevrons-efforts-to-undermine-the-rule-of-law.html>; See also Amazon Watch, “Chevron’s Corruption of Ecuador Trial”, online: Chevron Toxico <http:// chevronxicoto.com/news-and-multimedia/chevrons-corruption.html>.
The arbitration before the PCA presents the greatest challenge to the plaintiffs in their objective to claim their civil compensation.\(^{51}\) The arbitration surrounds a 1998 agreement between Texaco and the Ecuadorean government that required a $40 million clean-up effort by Texaco in return for a release from further liability for environmental damage.\(^{52}\) The Ecuadorean government subsequently undertook studies that declared that the clean-up operations were botched and called for the criminal prosecution of the Ecuadorean officials who had signed off on Texaco's clean-up and fraud prosecutions of Chevron-Texaco executives. Chevron-Texaco is petitioning the PCA to declare that the agreement absolves it from liability from all claims and thus, the Ecuadorean Government itself is liable for any judgment held against it. Meanwhile, the plaintiffs of the Ecuador judgment assert that the agreement released Texaco from claims by the Ecuadorean government but not private parties. The arbitration decision has the potential to make the entire 18-year civil proceedings moot, if they decide that Chevron-Texaco successfully bargained away their liability to the victims through a government agreement made 13 years ago, and 5 years after litigation began.

Through it all, Chevron-Texaco has taken the stance that they will fight until the end, employing a litigation strategy that assumes that there is no chance that they will lose. If a judgment comes down against Chevron-Texaco the ultimate losers will be the company's shareholders, as the company could potentially revive itself after judgment by reincorporating under a new banner. A coalition of shareholders have become wise to this, criticizing Chevron Texaco for displaying poor judgment in failing to negotiate a reasonable settlement prior to the Ecuadorean judgment, and calling on the company to re-evaluate whether endless litigation is the best strategy and to take a more productive approach including settlement to protect shareholder interests and prevent further reputational damage.\(^{53}\) Chevron-Texaco has ignored its shareholders' calls for settlement, both in 2008 and in 2011, and has maintained that its operation was not illegal and in fact, was mandated by the Ecuadorean government and carried no liability.\(^{54}\)

Throughout this case, there has been no denial that substandard practices were used in the oil drilling operations and that severe environmental pollution has occurred. The litigation has focused on whether these operations were mandated under national law, who carries the ultimate liability for the consequences, and the extent of the contamination and its effects on the health and safety of local indigenous communities. The Chevron-Texaco demonstrates the limitations of the mechanism of civil responsibility for addressing this sort of destructive behaviour – close to forty years after Texaco first began to destroy this portion of the


\(^{52}\) See Chevron-Texaco v Ecuador, "Claimant's Memorial on the Merits in the matter of an Arbitration under the Rules of the United Nations Commission on International Trade Law" (6 September 2010), (PCA Case No 34877) at 30-57 [Claimant's Memorial].


\(^{54}\) Claimant's Memorial, supra note 52 at paras 31-34.
Ecuadorian rainforest, the victims are still waiting for the recognition of harm and reparations that they deserve and the perpetrators have yet to have been brought to justice.

2.3 The Need for Individual Accountability

Serious abuses of economic, social, and cultural rights and acts of environmental degradation committed by governments and corporations remain all too common around the world. These acts deny populations the basic levels of livelihood, education, nutrition, water, shelter, health, physical safety, and environmental well-being and prevent them from securing the basic conditions for achieving sustainable development.55

Communities affected by these depletions have few effective recourses to protect their health, safety and means of subsistence, other than undertaking lengthy, costly, and unproductive civil proceedings. At the level of international law, transnational corporations benefit from their lack of legal status and ambiguities in the scope of application of international legal norms to their conduct and activities.56 While a number of voluntary codes of conduct or sets of norms applicable to corporations have been developed to fill this gap, such voluntary initiatives, lacking effective means to monitor and sanction non-compliance, have proved to be ineffective and insufficient. At the level of national law, transnational corporations take advantage of the unwillingness or inability of developed and developing states to effectively regulate their activities. Developed states, where many transnational corporations are headquartered, are often reluctant to hold corporations accountable for their conduct abroad due to concerns that they may relocate elsewhere. Developing states are equally disinclined to sanction abuses committed by corporations on their territories. Their governments benefit from the economic growth and resources (as well as from bribes and patronage) that come with transnational corporate activities or may be directly implicated in abuses committed by or on behalf of corporations.57

Yet, the serious violations of international law with which we are concerned here are not the result of a lack of resources or of structural factors beyond human control. Rather, these violations are the product of behaviour by individuals that is sufficiently deliberate and morally opprobrious to be condemned as criminal by the international community. They contravene two core principles of sustainable development, namely the principle of good governance (in its emphasis on the rule of law) and the principle of public participation and access to justice (in the importance it accords to access to courts for addressing unlawful actions).58

Operations like those undertaken by Chevron-Texaco should be the subject of criminal, rather than civil, prosecution. The large-scale dumping of oil wastewater has severely damaged the quality of soil and water such that large tracts of Amazon forest are uninhabitable and its critical ecosystems destroyed. The actions of any culpable individuals within the company, as well as potentially within the Ecuadorian government, who knew of the substantial risks to


57 See sources cited in supra, note 40.

58 See ILA, "New Delhi Declaration", supra note 19 at 215.
human health and the environment, and consciously commissioned or supported the decision to use substandard practices in dumping oil drilling waste into unlined pits and the soils and waters of the Amazon rainforest in order to save operating costs, should be investigated and prosecuted. Using the criminal law in an appropriate manner to address such actions would ensure that individuals in corporations and governments are held accountable for their actions, and that others are deterred from acting in a similar fashion.

A normative shift is needed to ensure that the international community considers all remaining gaps and emerging challenges to sustainable development, including the impunity that remains for serious violations of economic, social, and cultural rights and severe environmental harm. The idea of creating crimes against future generations, as explained in the next section, is one way of moving forward to address this important obstacle to the pursuit of sustainable development.

3. CRIMES AGAINST FUTURE GENERATIONS

3.1 The Definition of Crimes against future generations

1. Crimes against future generations means any of the following acts within any sphere of human activity, such as political, 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 or 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 or 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 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.

3.2 The Concept of Crimes against Future Generations

The concept of crimes against future generations draws inspiration from the current conception of international crimes. Crimes against future generations are acts "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." As is explained in section 4, each of the specific underlying acts listed in 1(a) to 1(j) amount to a serious violation of an existing obligation under international law.

Moreover, crimes against future generations would apply to the behaviour of individuals as opposed to that of states and corporations. While many notable instances of acts falling within the definition of crimes against future generations have involved states and corporations, this has also been the case for other international crimes. The commission of genocide and crimes against humanity has typically involved individuals acting or through the apparatus of a state. In addition, a number of cases before the International Criminal Tribunal for Rwanda (hereafter "ICTY") have involved the prosecution of individuals serving as company directors.\(^{59}\) As well, in 2003, the Prosecutor for the International Criminal Court (hereafter "ICC") warned extractive companies operating in the eastern Democratic Republic of Congo that "[t]hose who direct mining operations, sell diamonds or gold extracted in these conditions, launder the dirty money or provide weapons could also be authors of the crimes, even if they are based in other countries."\(^{60}\) To paraphrase a famous dictum of the Nuremberg War Tribunal, crimes

\(^{59}\) Accused persons before the ICTR have included the director of a tea company (Prosecutor v Michel Bagaragaza, ICTR-05-86, Amended Indictment (1 December 2006) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.ictr.org> and directors of a radio station and a newspaper (Prosecutor v Ferdinand Nahimana et al, ICTR-96-11, Amended Indictment (15 November 1999) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR < http://www.ictr.org>.

against future generations are committed by individuals (such as state officials and corporate officers), rather than abstract entities (such as states and corporations). 61

Finally, as the definition makes clear, crimes against future generations address situations involving serious harm, potentially of concern to the international community as a whole. Crimes against future generations would not be crimes committed in the future. They would apply instead to acts or conduct undertaken in the present that have serious consequences in the present and that 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 characterised as injuring the rights of future generations belonging to an affected group or collectivity. As such, the term “future generations,” like the term “humanity” in crimes against humanity, is of conceptual, rather than legal, importance.

4. A BRIEF LEGAL COMMENTARY ON CRIMES AGAINST FUTURE GENERATIONS

The draft definition of crimes against future generations was drafted to attach appropriate penal consequences to behaviour that is already prohibited by international human rights and international criminal law principles. It calls for no new duties on states, nor creates an experimental new mechanism for enforcement. As such, it provides a principled approach to deter, condemn and punish threats to sustainable development and poverty eradication efforts grounded in principles of existing international law.

4.1 The Elements of Crimes against Future Generations

Like other international crimes, crimes against future generations are comprised of two parts: an introductory chapeau paragraph which serves to elevate certain prohibited acts to the serious and morally opprobrious 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 draft 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.” The legal elements of these two parts are discussed in further detail below.

61 Trial of the Major War Criminals before the International Military Tribunal (14 November 1945- 1 October 1946), Library of Congress and the Advocate General’s Legal Centre & School Library, US Army, Charlottesville, Virginia (Library of Congress Call Number KZ.1176.T748 1947: OCLC Number 300473195), vol 1 (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” at 223).
4.2 The Chapeau Element in Paragraph 1

4.2.1 Origins and Purpose

The chapeau element of crimes against future generations is met by threats to "long-term health, safety, or means of survival", drawing on the principle of intergenerational equity. This principle constitutes a vital component of international law and policy on sustainable development as defined by the Brundtland Commission. The principle of intergenerational equity holds that present generations have no right to act in ways that could "deprive future generations of environmental, social and economic opportunities of well-being." The principle of intergenerational equity has been recognised in decisions of international bodies and courts. For instance, in the Nuclear Weapons Advisory Opinion, the International Court of Justice acknowledged the catastrophic implications for future generations of the environmental harm from nuclear weapons. In a separate opinion, Judge Weeramantry found that:

At any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations. [...] This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law [...] must, in its jurisprudence, pay due recognition to the rights of future generations. [...] The rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.


63 Brundtland Commission, supra note 1 at 43.
64 Cordonier Segger & Khalfan, supra note 3 at 124.
65 General Comment 12: The Right to Adequate Food (Art 11), UNESCORS, 20th Sess, Agenda Item 7, UN Doc. E/C.12/1999/5, (1999) (holding that the right to food requires that food must be made "accessible for both present and future generations" at para 7) [General Comment No 12]; General Comment No 15: The Right to Water (Arts 11 & 12), UNESCORS, 29th Sess, UN Doc. E/C.12/2002/11 (2002) (holding that the right to water must be realized for both present and future generations at para 11) [General Comment No 15].
66 Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), [1993] ICJ Rep 38, Separate Opinion of Judge Weeramantry (discussing the historical and cultural framework for inter-generational equity in global legal traditions at paras 211-279); see also ibid (referring to "the concept of wise stewardship of natural resources...and their conservation for the benefit of future generations" at para 235 ss).
68 Ibid at 455.
Inter-generational equity also appears in numerous international instruments, both in treaties and recent agreements, non-binding international agreements, resolutions, declarations and reports. These references most often take the form of a guiding or preambular concept in

69 See Charter of the United Nations, 26 June 1945, Can TS 1945 No 7, (the preamble of which provides that the people of the United Nations aims "to save succeeding generations from the scourge of war"); United Nations Framework Convention on Climate Change, 21 March 1994, Can TS 1994 No 7, 31 ILM 848 ([p]arties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities" at art 3(1)); International Protocol for the Regulation of Whaling, 2 December 1946, 161 UNTS 72, 62 Stat 1716, Can TS 1946 No 54 (states that the "interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks" at preamble); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, 1936 UNTS 269, 31 ILM 1312 (states that "water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs" at art 2 para 5(c)); Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, BTS 1985 No 2, Can TS 1976 No 45 (providing that States have "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage [...] situated on its territory [...]" at art 4); Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, Can TS 1993 No 24 (declaring the determination of States Parties to "conserve and sustainably use biological diversity for the benefit of present and future generations" at preamble); African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, 1001 UNTS 3 (stating that one of its purposes is "the conservation, utilization and development of [natural resources] by establishing and maintaining their rational utilization for the present and future welfare of mankind" at preamble).

70 See e.g. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243, 12 ILM 1085 (recognising that wild flora and fauna must be protected "for this and the generations to come" at preamble); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 14 October 1994, 1954 UNTS 3, Can TS 1996 No 51 (expressing determination of State Parties "to take appropriate action in combating desertification and mitigating the effects of drought for the benefit of present and future generations" at preamble); Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, 14 February 1982, 22 ILM 219 (declaring that the eight parties to the Jeddah Convention aim to protect the marine environment of the Red Sea and Gulf of Aden "for the benefit of all concerned, including future generations" at preamble); see also ibid (defining "conservation" as allowing "optimum benefit for the present generation while maintaining the potential of [the] environment to satisfy the needs and aspirations of future generations" at art 1); Convention on Conservation of Nature in the South Pacific, 12 June 1976, online: ECOLEX <http://www.ecolex.org> (stating the desire of State Parties to take action "for the conservation, utilization and development of these resources through careful planning and management for the benefit of present and future generations" at preamble); Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333, 19 ILM 15 (declaring that State Parties are "aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved" at preamble); Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, 21 June 1985, online: ECOLEX < http://www.ecolex.org> (stating that States Parties are "conscious of their responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations" at preamble).

71 See e.g. Declaration of the United Nations Conference on the Human Environment, UNEP/CONF.48/14/Rev.1 (1973), reprinted in 11 ILM 1416, (1972) (declaring mankind’s "solemn responsibility to protect and improve the environment for present and future generations" at principle 1); ibid (requiring that mankind "guard against the danger of [the] future exhaustion" of the non-renewable resources of the earth, ensuring that the benefits of these resources are shared by all humans
international instruments, generally calling for States to ensure a just and fair allocation in the utilisation of resources between past, present and future generations. Intergenerational equity is similarly reflected in the constitutions of numerous states.\textsuperscript{72} A few sources in international law and domestic law refer directly to the rights of future generations.\textsuperscript{73}

Although the principle of intergenerational equity has not yet achieved the status of customary international law, the protection of the interests of future generations undoubtedly forms an important value and concern of the international community, informing developments in contemporary international law. By according protection to the long-term health, safety, or means of survival of groups or collectivities, crimes against future generations is essentially a means of giving effect to this principle in the sphere of international criminal law.

4.2.2 Interpretative Sources and Legal Analysis

The first part of the chapeau element provides a general description of the scope of crimes against future generations. The broad expression included in the chapeau element, “acts within any sphere of human activity, such as political, military, economic, cultural or scientific activities”, evinces that crimes against future generations are intended to cover a wide range of acts or conduct. This non-exhaustive list clearly indicates that crimes against future generations do not merely apply to murder-type or persecution-type acts, but to a broad range of human activities, provided that they have the prohibited consequences listed in the chapeau requirement and sub-paragraphs 1(a) to (j).

---


\textsuperscript{73} Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, \textit{Review of Further Developments in Fields with which the Sub-Commission has been concerned: Human Rights and the Environment}, UNESCOR, 46th Sess, Item Four, UN Doc E/ CN.4/ Sub.2/1994/9, (1994) (recognising a right to an environment “adequate to meet equitably the needs of present generations ... that does not impair the rights of future generations to meet equitably their needs” at principle 4); \textit{Minor v Oposa vs Secretary of the Department of Environment and Natural Resources}, (1994) 33 ILM 173, (SC Ct., Philippines) (in a case involving children as representatives of themselves and future generations to protect their right to a healthy environment, the Philippines Supreme Court held that “their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned” at 185).
The chapeau element also implies that crimes against future generations can be committed in peace-time and in war-time. This is most evident from the references to "political, military, economic, cultural and scientific activities." Of course, in situations of armed conflict, the legality of any particular conduct would be interpreted by reference to the lex specialis of international humanitarian law. However, the wording and thresholds of the draft definition reduces the likelihood of conflicts between the legal elements of crimes against future generations and the norms of international humanitarian law. Indeed, acts or conduct that would be prohibited as crimes against future generations would normally run afoul of international humanitarian law principles governing the protection of civilian populations and the principles of military proportionality and necessity. In addition, paragraph 2 of the draft definition limits its scope of application to civilian populations, as discussed in section 4.4 below.

The second part of the chapeau element requires an additional level of moral blameworthiness and gravity, which justifies the prosecution of an individual for an international crime. In the context of crimes against future generations, as in the context of war crimes and crimes against humanity, this requirement is a knowledge requirement. This knowledge requirement is appropriate given the nature of crimes against future generations, which would commonly be committed by individuals with intent to achieve certain economic or political advantages and knowledge that serious harm to long-term health, safety or means of survival of others will result. A special intent requirement, as for genocide, would be unnecessarily burdensome as it would require proof that the activities were undertaken with the intent to cause long-term harm to an identifiable group or collectivity and may permit individuals to evade liability by claiming other intentions directed their actions.

The knowledge requirement in the chapeau 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 chapeau or if they knowingly took the risk that these prohibited consequences would occur in the ordinary course of events. Moreover, knowledge could be inferred from the relevant facts and circumstances of a given case, 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 the perpetrators and the acts and consequences, the scope and gravity of the acts or consequences, 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 *mens rea* element in ordering. It implies that the perpetrator’s underlying acts would be substantially likely to have the prohibited consequences listed in the chapeau element; the perpetrator need not know therefore that his acts or conduct are likely to be the *only* cause or the *sine qua non* cause of the prohibited consequences.

As with references to civilian populations in international criminal law generally, the use of the term group or collectivity indicates that a perpetrator must know that his acts are substantially likely to have the prohibited consequences on a collection of individuals rather than “against a limited and randomly selected number of individuals.” While the terms “group or collectivity” refer to acts that necessarily affect an identifiable group or collectivity as a whole, they do not imply that the prohibited act must affect each and every member of the identifiable group or collectivity in question, nor do they imply a specific numeric threshold. In effect, the only requirement is that the acts committed against the members of the identifiable group or collectivity be of such magnitude or scale that they are substantially likely to have the prohibited consequences on this identifiable group or collectivity.

4.3 The Elements of Prohibited Acts

The draft definition lists nine prohibited acts and one catch-all provision to provide for analogous crimes. The origins and legal foundation for each proposed crimes is discussed below.

4.3.1 Forced Labour, Enforced Prostitution and Human Trafficking Crimes

*Sub-paragraph 1(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*

4.3.1.1 Origins and Purpose

Sub-paragraph 1(a) would penalise egregious violations of two sets of rights: the rights to liberty and security of the person, including freedom of residence and movement and the rights to work of one’s choosing and to work in safe and healthy conditions.

---


77 It is important to note that this *mens rea* requirement departs from the standard employed before the International Criminal Court: see *Rome Statute*, *supra* note 26 at art 30 (requires both intention and knowledge). This provision applies unless it is specified otherwise by another provision: see Cryer et al, *supra* note 29 at 318–320.

78 *Kunarac*, *supra* note 74 at para 90; Blaskic Appeal Judgment, *supra* note 76 at para 105.

79 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, 6 ILM 368, (entered into force 23 March 1976) at art 9, 12 [*ICCPR*].

80 *ICESCR*, *supra* note 15 at arts 6(1), 7(b).
4.3.1.2 Interpretative Sources and Legal Analysis

In specifically proscribing the crimes of forced labour, enforced prostitution and human trafficking, this provision draws on and refers to two existing international crimes. The crimes of forced labour and human trafficking should be interpreted, first and foremost, by reference to the crime against humanity of enslavement (Article 7(1)(c) of the Rome Statute). Indeed, a footnote in the ICC Elements of Crimes defines enslavement as including “exact[ing] forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956” and as “trafficking in persons, in particular women and children”.81 The crimes of forced labour and human trafficking would thus adopt the definition set out in the ICC Elements of Crimes for the crime of enslavement: “The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”.82 Other relevant interpretive sources for forced labour include the definition in Convention concerning Forced or Compulsory Labour83 and for human trafficking, the definition in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplem[en]ting the UN Convention Against Transnational Organized Crime.84

The crime of enforced prostitution should be interpreted by reference to the crime against humanity of the same name.85 The ICC Elements of Crimes define enforced prostitution as follows: “The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.”86 Another relevant source would be the 1951 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, under which state parties are obliged to punish those who lured persons into prostitution or exploited persons for prostitution.87

---

81 ICC Elements of Crime, supra note 75 at art 7(1)(c) element 1 footnote 11.
82 Ibid, at art 7(1)(c) element 1.
83 28 June 1930, ILO No 29, 39 UNTS 55 (entered into force 1 May 1932) (“all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” at art 2(1)). See also Convention concerning the Abolition of Forced Labour, 25 June 1957, ILO No 105, 320 UNTS 291, Can TS 1960 No 21 (entered into force 17 January 1959) at para 2.
84 15 November 2000, 2237 UNTS 319, 40 ILM 335 (entered into force 25 December 2003) (“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation” at art 3(a)). See also the Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, Eur TS No 197, 45 ILM 12 (entered into force 1 February 2008).
85 Rome Statute, supra note 26 at art 7(1)(g).
86 ICC Elements of Crime, supra note 75 at art 7(1)(g)-3(1).
Although sub-paragraph 1(a) specifically refers to the crimes of forced labour, enforced prostitution and human trafficking, it also covers other acts or conduct that compel individuals to work in conditions that endanger their health or safety. Guidance for the interpretation of conditions endangering the health and safety of individuals should thus be sought from sources and materials bearing on the scope of the rights to life, to physical safety, to health, and to work in safe and healthy conditions.

4.3.2 Embezzlement and Corruption Crimes

Sub-paragraph 1(b): Unlawfully appropriating or acquiring the public or 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

4.3.2.1 Origins and Purpose

Sub-paragraph 1(b) would penalise grave violations of the 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. In doing so, sub-paragraph 1(b) penalises the pillaging of public or private resources, including through the corrupt behaviour of a public official, of what has often been called the crime of spoliation.

4.3.2.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(b) draws on two existing crimes in international law. The first part of the sub-paragraph is essentially an extension of the war crime of pillaging to the context of peace-time. The prohibition upon pillage is one of the more fundamental and long-standing of the rules relating to the protection of property rights in times of war and was held by the ICTY in Kordic to form part of customary international law. It has been taken up by numerous treaties relating to the law of armed conflict. The 1907 Hague Regulations flatly prohibit pillage in Article 28 (“The pillage of a town or place, even when taken by assault, is prohibited”) and in Article 47 (“Pillage is formally forbidden”). The prohibition of pillage was also later incorporated in Article 33 of the Convention Relative to the Protection of Civilian Persons in Time of War and in

---


91 Hague Convention (IV), Respecting the Laws and Customs of War on Land, and its annex: Regulations concerning the Laws and Customs of War on Land, Second Hague Peace Conference, 18 October 1907, 205 Cons TS 277, 2 UST 2269 at arts 28, 47.

Article 4(2)(g) of the Additional Protocol II.93 The Rome Statute includes the crime of pillaging as a war crime at Article 8(2)(b)(xvi).94 As such, the ICC Elements of Crimes for the crime of pillaging are relevant to the interpretation of the scope of sub-paragraph 1(b): "1. The perpetrator appropriated certain property. 2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use. 3. The appropriation was without the consent of the owner."

The second part of sub-paragraph 1(b) is based on the crime of corruption as set out in Article 17 of the UN Convention against Corruption95:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

4.3.3 Crimes of Denials of Access to Essential Food and Water Sources

Sub-paragraph 1(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

4.3.3.1 Origins and Purpose

Sub-paragraph 1(c) would penalise grave violations of the right to life, referring in particular to the rights to food and water. The right to food is protected by virtue of two provisions in the ICESCR: Article 11(1), in the context of the right to an adequate standard of living, and Article 11(2), in the context of the right to freedom from hunger and malnutrition.96 Freedom from hunger implies a right to freedom from starvation, that is, to the fulfilment of the needs basic for survival. In this way, it is intimately connected to the right to life and is for this reason the only right in the ICESCR to be termed "fundamental". Under ICESCR, States are bound to ensure "for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."97

The right to water has been held to be implicitly recognized by Article 11: "The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."98 The Committee on Economic, Social and Cultural Rights (hereafter "the CESCR") has concluded

---

94 Rome Statute, supra note 26 at art 8(2)(b)(xvi).
95 31 October 2003, 2349 UNTS 41, 43 ILM 37 (entered into force 14 December 2005).
96 ICESCR, supra note 15 at arts 11(1) and 11(2).
97 General Comment No 12, supra note 65 at para 14.
98 General Comment No 15, supra note 65 at para 3.
that the right to water is closely related to other Covenant rights, finding that water “is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health)” and “is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life).” 99 According to the CESCR, the right to water encompasses freedoms, including “the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.” 100

Sub-paragraph 1(c) is framed in much narrower terms however than the broad scope given to these rights in international human rights law. It is focused on penalising clear and egregious violations of the ICESCR, namely deliberate conduct that seeks to prevent individuals from accessing existing sources of food or water. 101

4.3.3.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(c) is based on two existing crimes in international criminal law. By and large, it represents a peace-time extension of the war crime of starvation of civilians as a method of warfare. This crime is defined at Article 8(2)(v)(xxv) of the Rome Statute as “depriving [civilians] of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.” 102 Another crime of relevance to sub-paragraph 1(c) is the underlying act of genocide, which is the deliberate infliction on a protected group of “conditions of life calculated to bring about its physical destruction in whole or in part.” 103 The ICC Elements of Crimes provide that such 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.” 104

4.3.4 Forceful Eviction Crimes

Sub-paragraph 1(d): Forcefully evicting members of any identifiable group or collectivity in a widespread or systematic manner

4.3.4.1 Origins and Purpose

Sub-paragraph 1(d) would penalise one of the most serious violations of the right to housing, which is guaranteed under the ICESCR. 105 In defining the scope of the right to housing, the CESCR has paid particular attention to the practice of forced evictions. 106

99 See ibid at para 6.
100 See ibid at para 10.
101 General Comment No 12, supra note 65 at para 15; General Comment No 15, supra note 65 at paras 21, 37.
102 Rome Statute, supra note 26 at art 8(2)(v)(xxv).
103 Rome Statute, supra note 26 at art 6(c).
104 ICC Elements of Crime, supra note 75 at art 6(c)(4) footnote 4.
105 ICESCR, supra note 15 at art 111(1).
4.3.4.2 Interpretative Sources and Legal Analysis

The CESCR defines forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” It has emphasized that forced evictions constitute a violation of the Covenant and may also breach “civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.” It also noteworthy that the ICC Elements of Crimes lists “systematic expulsion from homes” as conditions of life calculated to bring about the physical destruction of a group under the crime of genocide, defined in Article 6(c) of the Rome Statute.

4.3.5 Crimes of Denial of Access to Essential Health Care

Sub-paragraph 1(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.

4.3.5.1 Origins and Purpose

Sub-paragraph 1(e) would penalise some of the most serious violations of the right to health, which is guaranteed under Article 12 of ICESCR. The right to health is closely connected to the notion of human dignity and “related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information and the freedoms of association, assembly and movement.”

According to the CESCR, the right to health encompasses the right to a number of freedoms, including “the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation” and a number of entitlements, including “include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health”.

---

107 Ibid at para 3.
109 ICC Elements of Crime, supra note 75 at art 6(c)(4) footnote 4.
110 General Comment No 14: The right to the highest attainable standard of health, UNESCOR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 3 [General Comment No 14].
111 Ibid at para 8.
The scope of sub-paragraph 1(e) is focused on clear and egregious violations of the right to health as guaranteed in ICESCR – deliberate conduct that seeks to prevent individuals from exercising their right to health.112

4.3.5.2 Interpretative Sources and Legal Analysis

The first part of sub-paragraph 1(e) is based on the findings of CESCR on the most serious violations of the right to health.113 The final part of sub-paragraph 1(e) is an extension to peace-time of the war crime of "subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons".114

4.3.6 Crimes of Denial of Fundamental Cultural Rights

Sub-paragraph 1(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

4.3.6.1 Origins and Purpose

Sub-paragraph 1(f) would penalise some of the most serious violations of the right to culture as guaranteed by Article 27 of the ICCPR and Article 15 of the ICESCR. Article 27 of the ICCPR provides that "minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"115 while Article 15 of the ICESCR provides guarantees the right of everyone "to take part in cultural life".116 The right to manifest one's culture is a fundamental element of human dignity and is closely related to the freedom of expression as well as the right to the full development of the human personality. The meaning of the term 'culture' in Article 15 is a broad one:

Its elements would be language, non-verbal communication, oral and written literature, song, religion or belief systems which included rites and ceremonies, material culture, including methods of production or technology, livelihood, the natural and manmade environment, food, clothing, shelter, the arts, customs and traditions, plus a world view representing the totality of a person's encounter with the external forces affecting his life and that of his community. Culture mirrored and shaped the economic, social and political life of a community.117

---

112 Ibid at paras 34-36, 43-44.
113 Ibid.
114 Rome Statute, supra note 26 at art 2(b)(x).
115 ICCPR, supra note 79 at art 27.
116 Ibid at art 15.
4.3.6.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(f) is based on the notion of cultural genocide. Raphael Lemkin’s original concept of the crime of genocide\footnote{Raphael Lemkin, \textit{Axis Rule in Occupied Europe} (Washington, DC: Carnegie Endowment for Peace, 1944) at pp xi-xii. Lemkin’s earlier proposal of the crime of vandalism in 1933 also included a cultural component; see Raphael Lemkin, “Genocide as a Crime under International Law” (1947) 41: Am J Int’l Law 145 at p 146.} and early drafts of the \textit{Genocide Convention} contained provisions on cultural genocide.\footnote{Report of the Ad Hoc Committee on Genocide, UNESCORS, 7th Sess, Supp No 6, UN Doc E/794 (1948) at art 3.} The latter provisions covered any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in everyday use or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.\footnote{Ibid.} While the definition of genocide included in the \textit{Genocide Convention} is limited to physical or material destruction, evidence of cultural genocide has been relied upon by international criminal tribunals as relevant to establishing the intent to perpetrate physical genocide.\footnote{William A Schabas, \textit{An Introduction to the International Criminal Court}, 3d ed (Cambridge: Cambridge University Press, 2007) at 94.}

4.3.7 Crimes of Denial of Access to Education

\textit{Sub-paragraph 1(g): Preventing members of any identifiable group or collectivity from accessing primary, secondary, technical, vocational and higher education}

4.3.7.1 Origins and Purpose

Sub-paragraph 1(g) would penalise one of the most serious violations of the right to education, guaranteed in Article 13 of \textit{ICESCR}. The CESC\textit{R} has held that the right to education is indispensable to the realization of other Covenant rights:

As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.\footnote{General Comment No 13: The Right to Education (Art 13), UNESCORS, 21st Sess, UN Doc E/C.12/1999/10 (1999) at para 1.}

Sub-paragraph 1(g) would penalise conduct that seeks to intentionally prevent members of any identifiable group or collectivity from accessing existing institutions providing primary, secondary, technical, vocational or higher education. At its core, it would penalise unjustified discriminatory interference with the right of individuals to education.\footnote{Ibid at para 57.}
4.3.7.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(g) is based on the findings of the CESC on the most serious violations of the right to education.\footnote{Ibid.}

4.3.8 Crimes of Severe and Widespread Environmental Damage

Sub-paragraph 1(h): Causing widespread, long-term and severe damage to the natural environment, including by destroying an entire species or ecosystem

4.3.8.1 Origins and Purpose

Sub-paragraph 1(h) would penalise some of the most serious violations of the duty of States to ensure that activities within their control or jurisdiction do not damage the environment of other States or any areas beyond national jurisdiction. This duty may be found in numerous international treaties\footnote{See e.g. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994) at Part XII; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 28 ILM 649 at art 2(8); Convention on Long-Range Transboundary Air Pollution, 13 November 1979, 1302 UNTS 217, 18 ILM 1442 (entered into force 16 March 1983) at art 1(b); Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 309, 30 ILM 800 (entered into force 10 September 1997) at art 2(2); United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994) at Preamble. See generally Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, 24 April 1978, 1140 UNTS 133, 17 ILM 511 (entered into force 1 July 1979); Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, 14 February 1982 (entered into force 20 August 1985); Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 30 January 1991, 2102 UNTS 177, 30 ILM 773 (entered into force 22 April 1998); Charter establishing Gulf Cooperation Council, Including Rules of Procedure and Unified Economic Agreement, 25 May 1981, 26 ILM 1131.} and instruments\footnote{Declaration of the United Nations Conference on the Human Environment, 16 June 1972, 11 ILM 1416, [Stockholm Declaration] (stating that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction” at principle 21). See also Rio Declaration, supra note 18 at principle 2.} and has been recognized as having achieved customary status by the International Court of Justice.\footnote{Nuclear Weapons Advisory Opinion, supra note 67 at para 29.} The importance of this duty is that its breach can give rise to State responsibility for transboundary environmental harm caused by activities within a state’s control or jurisdiction.\footnote{See the landmark case of Trail Smelter Arbitration (United States v. Canada) (1938), 3 R Incl Arb Awards 1911, reprinted in 33 AJIL 182 (Arbitrators: Charles Warren, Robert A E Greenshields, Jan Frans Hostie).}

In its Commentary on the Draft Articles on State Responsibility, the International Law Commission (hereafter “the ILC”) makes numerous references to the duty to prevent
transboundary environmental harm and environmental damage generally.\textsuperscript{129} Previously, the Commission had seriously considered creating an international crime prohibiting environmental harm. It included a provision to this effect in Article 19 on international crimes and delicts, a provision which was later dropped in the final Draft Articles, as was the notion of international state crimes altogether.\textsuperscript{130} The ILC considered two principal formulations of the international state crime on environmental harm. The first such formulation defined it in the following terms: "the serious breach by a State of an international obligation established by a norm of general international law accepted and recognized as essential by the international community as a whole and having as its purpose: [...] (c) the conservation and free enjoyment for everyone of a resource common to all mankind."\textsuperscript{131} The second such formulation was included in the ILC's 1976 Report and provided that an international state crime could result from "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."\textsuperscript{132} The ILC notes in its report that its members, while expressing reservations regarding the choice of pollution as an example of this crime, nevertheless "expressed full agreement with the general provision."\textsuperscript{133} The report includes a lengthy discussion of the notion of international environmental crime, which specifically refers to the rights of future generations.\textsuperscript{134}

Most importantly, in its 1991 Draft Code of Crimes against Peace and Mankind, the ILC included, in Article 26, an international crime of "willful and severe damage to the environment."\textsuperscript{135} The ILC defined this crime as "[a]n individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to ...]."\textsuperscript{136} In many ways, sub-paragraph 1(h) is a revival of this proposed international crime and the ILC commentary on this draft article is therefore instructive.


\textsuperscript{131} Ibid at 1 at 54.

\textsuperscript{132} Ibid at 95-96.

\textsuperscript{133} Ibid at 121.

\textsuperscript{134} Ibid at 101 and 108-109.


\textsuperscript{136} Ibid at art 26.
4.3.8.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(h) is essentially an extension to peace-time of the war crime of causing "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."137

This is the only crime in the Rome Statute which specifically and directly covers harm caused to the environment. It 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 (hereafter "Additional Protocol I").138 Article 35(3) provides that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". Article 55(1) reads as follows:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

The scope of this war crime is rather restrictive. Indeed, Article 8(2)(b)(iv) of the Rome Statute differs from the latter two articles through its introduction of a disproportionality element, which essentially serves to exclude from criminalization judgements made within a reasonable margin of appreciation, in good faith, in difficult situations and often with incomplete information.139

Sub-paragraph 1(h) differs from the war crime on which it is based by not including a disproportionality requirement in light of the chapeau requirement of crimes against future generations. That said, acts or conduct which are 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 would, in all but the most extreme circumstances, violate the principle of military proportionality. It preserves the requirement that environmental damage must be "widespread, long-term and severe."

4.3.9 Serious and Unlawful Pollution Crimes

Sub-paragraph 1(i): Unlawfully polluting air, water or soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity

4.3.9.1 Origins and Purpose

Sub-paragraph 1(i) would penalise serious violations of the right to life, particularly the rights to health, housing, food and water which are also found in the ICESCR.140

137 Rome Statute, supra note 26 at art 8(2)(b)(iv).
138 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).
140 ICESCR, supra note 15 at arts11 and 12.
At another level, sub-paragraph 1(i) penalises serious violations of the right to a healthy environment. The right to a healthy environment is an important and influential aspect of international policy as well as an emerging norm of customary international law. This right flows from the recognition that environmental damage can have potentially negative effects on human rights and the enjoyment of life, health and a satisfactory standard of living. There are a number of different formulations of this right in international law and policy: it has found expression as a civil and political right (for example, the right to judicial review of decisions affecting the environment), an economic, social and cultural right (for example, the right to a healthy environment) and as a solidarity right (for example, a people's right to a healthy environment). The proposed crime focuses on its formulation as an economic, social, and cultural right. It recognizes the right of every person to live in a healthy or healthful environment and, in particular, emphasizes the need to protect and preserve the natural environment with a view to safeguarding the health, safety and well-being of humans. It has been referred to in regional treaties, international instruments, and national law.

141 See e.g. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447, 38 ILM 517 (entered into force 30 October 2001) ("Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being," in the preamble and that "[t]o order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention" at art 1); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, 17 November 1988, OASTS No 69, 28 ILM 156 (entered into force 16 November 1999) ("Protocol of San Salvador") ("[e]veryone shall have the right to live in a healthy environment and to have access to basic public services" at art 11); African Charter on Human and Peoples Rights, 27 June 1981, 21 ILM 58 (OAUC Doc CAB/LEG/67/3/Rev. 5) (entered into force 21 October 1986), ("[a]ll peoples shall have the right to a general satisfactory environment favorable to their development" at art 24).

142 See e.g. Stockholm Declaration, supra note 126 at ("in an environment of a quality that permits a life of dignity and well-being" at principle 1); Rio Declaration, supra note 18 ("[t]hey are entitled to a healthy and productive life in harmony with nature" at principle 1); Need to ensure a healthy environment for the well-being of individuals, GA Res 45/94, UNGAOR, 45th Sess, Supp No 49A, UN Doc A/RES/45/40 (1991) 78 at 1; United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR, 61st Sess, Annex, Agenda Item 68, UN Doc A/Res/61/295 (2007) at art 29(1); Declaration of Santa Cruz de la Sierra, 7-8 December 1996, OAS GT/CCDS-S/5196 rev.2 (reaffirming that "human beings are entitled to a healthy and productive life in harmony with nature" at para 2); Hague Declaration on the Environment, (1989) 28 ILM 1308 ("[t]he right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world. Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected" at preamble); The Dublin Declaration on the Environmental Imperative, Council of Europe, 7 July 1990, (1990) Eur Comm Bull, No 6, 17 (stating that objective of the development of higher levels of knowledge and understanding of environmental issues and effective action to protect the environment "must be to guarantee citizens the right to a clean and healthy environment" at para 19); ECE Charter on Environmental Rights and Obligations, December 1990, UN Doc. ENWA/R.38, ("[e]veryone has the right to an environment that is adequate for his general health and well being" at art 1); World Health Organization, Draft European Charter on Environment and Health (1989), online: World Health Organization <www.euro.who.int> at art 1; Council of Europe, PA, 28 September 1990, 11th sitting, Formulation of European Charter and European Convention on Environmental Protection and Sustainable Development, Texts Adopted, Rec 1130 (1990), online: Council of Europe <http://assembly.coe.int>
resolutions and reports and the decisions of international bodies.

4.3.9.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(i) specifically draws on the general comments issued by the CESCR on these rights, focusing on the release of substances or organisms in the air, water or soil. Indeed, the CESCR has emphasized the obligation on states to prevent adverse substances or organisms from interfering with the enjoyment of these rights. The CESCR has interpreted the right to health as entailing "the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health." Commenting on the right to housing, the CESCR held that "housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants." Commenting on the right to water, the CESCR has held that "[t]he water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical sub-

(providing for a human right to an environment "conducive to […] good health, well-being and full development of the human personality" at art 1); Commission on Human Rights, Sub-committee on Prevention of Discrimination and Protection of Minorities, Draft Principles on Human Rights and the Environment, UNESCOR, 46th Sess, UN Doc E/CN.4/Sub.2/1994/19 (1994) 74 ("[a]ll persons have the right to a secure, healthy and ecologically sound environment" at art 2; "[a]ll persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs" at art 4; "[a]ll persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries" at art 5); UNESCO General Conference, Declaration of Bizkaia on the Right to the Environment, UNESCOR, 30th Sess, UN Doc 30C/INF.11, (1999) 4 at art 1(1);


See e.g. Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia), [1997] ICJ Rep 3 at 109 ("[t]he people of both Hungary and Slovakia […] are entitled to the preservation of their human right to the protection of their environment"; "[t]he protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments" at 111).

General Comment No 14, supra note 110 at para 15.

stances and radiological hazards that constitute a threat to a person's health."\textsuperscript{147} It has also held that respecting the right to water entails refraining, \textit{inter alia}, from “unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons”.\textsuperscript{148} Thus protecting the right to water entails preventing third parties from “polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.”\textsuperscript{149} Commenting on the right to food, the CESC\textit{R} has held that states are obliged to set “requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain.”\textsuperscript{150}

4.3.10 Other Acts Gravely Imperilling Health, Safety or Means of Survival

\textit{Sub-paragraph 1(j): Other acts of a similar character gravely imperilling the health, safety, or means of survival of members of any identifiable group or collectivity}

4.3.10.1 Origins and Purpose

Sub-paragraph (j) is a catch-all provision and would penalise serious violations of many of the economic, social, and cultural rights protected by other sub-paragraphs and which are of comparable gravity.

4.3.10.2 Interpretative Sources and Legal Analysis

Sub-paragraph (j) is based on a similar catch-all provision for crimes against humanity.\textsuperscript{151}

4.4 The Definition of Identifiable Groups or Collectivities in Paragraph 2

In the context of crimes against future generations, the expression “any identifiable group or collectivity” should be interpreted in accordance with the same sources and principles as those used in the interpretation of this expression in the context of Article 7(1)(h) of the \textit{Rome Statute}. This article lists the following as a crime against humanity: “[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”.\textsuperscript{152} The principal difference between the two provisions is the inclusion of geography as a prohibited-ground in the new crime. This inclusion reflects the fact that populations can be targeted simply due to their geographic proximity or linkage to natural resource-rich areas in light of the growing scarcity of these resources. The term “any identifiable group or collectivity” for the purposes of crimes against future generations is thus

\textsuperscript{147} General Comment No 15, supra note 65 at para 12(b).

\textsuperscript{148} \textit{Ibid} at para 21.

\textsuperscript{149} \textit{Ibid} at para 23.

\textsuperscript{150} General Comment No 12, supra note 65 at para 10.

\textsuperscript{151} \textit{Rome Statute}, supra note 26 at art 7(1)(k).

\textsuperscript{152} \textit{Rome Statute}, supra note 26 at art 7(1)(h).
a broad term that 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.

The expression "civilian group or collectivity" should also be interpreted in accordance with the approach adopted for the interpretation of "any civilian population" used in the context of crimes against humanity.153 The expression "civilian group or collectivity" would exclude acts primarily committed against a population comprised of combatants in armed conflict. On the other hand, as crimes against future generations would not be limited to the existence of a situation of armed conflict, its application does not depend on the affiliation, nationality or location of the group or collectivity that it seeks to protect from harm.

5. THE WAY FORWARD FOR CREATING CRIMES AGAINST FUTURE GENERATIONS

5.1 Pathways for Creating Crimes against Future Generations

We envisage two main pathways for creating crimes against future generations in international law. The first, more ambitious pathway would involve amending the Rome Statute to include crimes against future generations within the jurisdiction of the International Criminal Court. This would have the principal advantage of inserting crimes against future generations into an existing system and institutional machinery that enjoys broad support from a majority of states hailing from all regions of the world. Following the adoption and ratification of an amendment of the Rome Statute, State Parties would be given the primary responsibility of investigating and trying the perpetrators of crimes against future generations within their jurisdiction. The International Criminal Court could take jurisdiction over a case involving such crimes in two restricted cases: if a State party with a special interest in the matter takes no action, or if State party action is taken but reflects unwillingness or genuinely inability to carry out a meaningful, timely and effective investigation or prosecution.154

There are obvious limitations to this approach, perhaps the most important of which is that the International Criminal Court remains a comparatively fragile institution.155 A number of major states have not become State Parties, including the United States, China, India, and Russia.156 Meanwhile, numerous African states have criticised the ICC for what they

154 Rome Statute, supra note 26 at art 17(1).
155 Another limitation relates to the complications occasioned by the Rome Statute's amendment provisions. These complications were exposed when the Assembly of State Parties adopted an amendment to include the crime of aggression within the jurisdiction of the ICC at a review conference held in Kampala in June 2010. See Jennifer Trahan, "The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference" (2011) 11 International Criminal Law Review 49. One particular challenge is that any amendment to add crimes against future generations within the jurisdiction of the Rome Statute would only apply to those states that have ratified or accepted the amendment, whether through article 121(5) of the statute or the combined effect of articles 121(4) and (6): see Rome Statute, supra note 26, at art 121.
156 Cryer et al, supra note 29 at 139-148.
see as its Western bias towards the prosecution of crimes on the African continent.\textsuperscript{157} Even its most enthusiastic supporters would acknowledge that the ICC's performance in terms of the efficiency of investigations and trials has been underwhelming.\textsuperscript{158} In this context, it may ultimately prove counter-productive to provide a fledging and under-resourced institution like the ICC the mandate to prosecute a whole new category of international crimes, especially when it is already struggling to provide justice for existing international crimes.\textsuperscript{159} To be sure, the issue of institutional overload and capacity is one that must be addressed if the creation of crimes against future generations is going to make a difference to the victims of the serious violations of international law that it seeks to address. Accordingly, whether or not the ICC forms a suitable institutional vehicle for addressing conduct similar to crimes against future generations, there is little doubt that an amendment to the Rome Statute along the lines presented in this article is not a reasonable option at the present time.

The second, more feasible pathway would entail the adoption of a stand-alone international convention that would require state parties to exercise jurisdiction over crimes against future generations. This follows the model employed for crimes of international concern, such as the theft of nuclear materials, terrorist bombings, or torture.\textsuperscript{160} A convention on crimes against future generations could commit States to enacting or amending crimes in their national legislation, investigating and prosecuting cases falling within their jurisdiction, and cooperating with other States in investigations and prosecutions. The ultimate utility of such a convention would depend on whether it provided states with the authority to investigate and prosecute crimes committed in other countries through extra-territorial forms of jurisdiction such as active and passive personal jurisdiction.\textsuperscript{161}

A stand-alone convention would avoid the controversial charge of potentially weakening the Rome Statute system. It also presents a less intrusive and less costly means of creating crimes against future generations, by forsaking a complementary international mechanism for prosecuting crimes against future generations. As a result, the idea of a stand-alone convention on crimes against future generations is likely to attract greater support from the states


\textsuperscript{161} Active personality jurisdiction provides states with jurisdiction over crimes committed by their nationals. Passive personality jurisdiction provides states with jurisdiction over crimes committed against their national. Active personality jurisdiction provides states with jurisdiction over crimes committed by their nationals. Passive personality jurisdiction provides states with jurisdiction over crimes committed against their nationals. See Cassese, \textit{supra} note 25 at 282-284.
and mainstream human rights constituencies that may want to protect the ICC from agenda overload as well as from those states that may be concerned about the sovereignty and costs implications of adding to the ICC's jurisdiction. Without a doubt, a stand-alone convention is a much more realistic pathway for creating crimes against generations than an amendment to the Rome Statute.

The question that remains, with either pathway, is whether the concept of crimes against future generations could ever generate enough support among States to become binding international law. There are reasons to be optimistic that the creation of crimes against future generations in international law is a reasonable possibility in the long-term.

While the concept of crimes against future generations presented in this article certainly seeks to move international law forward, it does so in the spirit of attaching the appropriate penal consequences to behaviour which the international community has already recognised as being reprehensible. As is extensively detailed in section 4, 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 to establish criminal liability for existing prohibitions in international law. Moreover, the wording of many of the specific crimes against future generations presented above is based on the definition of existing international crimes as expressed in the Rome Statute or customary international criminal law as well as language derived from international treaties or the general comments of the U.N. Committee on Economic, Social, and Cultural Rights. In other words, the concept of crimes against future generations is about the criminalisation of existing violations of international law, as opposed to the creation of new substantive standards of international law. Accordingly, the creation of crimes against future generations would amount to an exercise in the codification of serious violations of international law deserving the status of international crimes.

It is important to note that crimes against future generations can be distinguished from other potential candidates for the status of international crimes, 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. Unlike these crimes, crimes against future generations are of a similar character to other international crimes in that they are violations of customary or treaty norms that are intended to protect values considered important by the international community and existing mechanisms for sanctioning violations of economic, social, and cultural rights and serious environmental harm are clearly inadequate.

Moreover, the very concept of crimes against future generations builds upon the well-established principle of international human rights law that all human rights are equal, interrelated and indivisible. As explained above, international criminal law is currently directed

162 See Herman Von Hebel & Darryl Robinson, "Crimes within the Jurisdiction of the Court," in Lee, Elements of Crimes, supra note 139, 79 at 81, 86.

163 See Cassese, supra note 25 at 23.

164 The equality of rights vision has been reaffirmed repeatedly by the international community in instruments including the Proclamation of Tehran in The Final Act of the International Conference on Human Rights, UNGAOR, 1968, UN Doc A/CONF.32/41(1968) 3 ("since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social
at serious violations of international law, but has thus far essentially focused on conduct that violates civil and political rights such as the rights to life, personal liberty and freedom from torture. This is yet another example of the difference in the treatment accorded to the protection of civil and political rights, as compared to economic, social, and cultural rights in international law. As noted by the U.N. Committee on Economic, Social and Cultural Rights, "despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights."

To be sure, the principal objections put forth by States against the enforcement of economic, social, and cultural rights is that they are vague, subject to progressive realization, and non-justiciable as they impose positive obligations (to adopt certain conduct) rather than negative obligations (to refrain from certain conduct). However, evidence shows that the adjudication of economic, social, and cultural rights in jurisdictions around the world has been widespread. The U.N. Committee on Economic, Social and Cultural Rights has concluded that State obligations to secure a minimum core of obligations for each right cannot be excused by a lack of resources. Crimes against future generations avoids the principal objections against the enforcement of economic, social, and cultural rights by specifically focusing on criminalizing the deliberate denials of the minimum essential levels of economic; social and cultural rights. As such, the definition of crimes against future generations include in this article provides a clear 'negative' approach to these rights appropriate for judicial adjudication.

Although all human rights are indivisible and deserving of equal status, this does not mean that the form of protection must be exactly the same for all human rights. In particular, the principle of proportionality between crime and penalty requires that a criminalisation be employed only so far as it is required, appropriate, and suitable. The formulation of crimes against future generations recognizes the importance of proportionality and appropriately expands the set of international crimes in recognition of the fact that violations of life occur


not only as a result of the scenarios of physical violence envisioned by the existing set of international crimes. The U.N. Committee on Civil and Political Rights has noted that the right to life has been too often narrowly interpreted and cannot be properly understood in a restrictive manner. In fact, regional and domestic courts have interpreted the right to life broadly to be implicated by denials of access to water, food and health services, livelihood and education, and by exposure to life-threatening environmental hazards. Crimes against future generations respects the principle of proportionality by focusing on conduct causing harm that is equivalent in its gravity to what is currently criminalised under international law.

5.2 Generating a Norm Cascade for Crimes against Future Generations

The creation of crimes against future generations, or some other similar international crime, will likely take many years to bear fruit. It may seem like an impossibly ambitious project, but the history of international law is replete with examples of initiatives that beat the odds stacked against them.

The development of crimes against humanity demonstrates that the progressive expansion of 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 (hereafter the "Nuremberg Charter"). During the negotiations which led to the adoption of 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. Crimes against humanity underwent further changes after Nuremberg. 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

---


170 See General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhelum v Director, Industries and Mineral Development, Punjab, Lahore, (Human Rights Case No 120 of 1993), 1994 SCMR 2061 (Supreme Court of Pakistan) at 2070.


174 Cassese, supra note 25 at 68-69, 331.

175 M Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (The Hague: Martinus Nijhoff, 1999) at 17, 22-24; Cassese, supra note 25 at 69-70, 331.
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.176

The point is not that crimes against future generations are similar to crimes against human-
ity or that they should apply retroactively as was the case after the Second World War. Rather
the point is that crimes against humanity were developed in response to a clearly recognised
gap in existing law at a moment that provided a critical opportunity for normative change.
Their scope of application was further expanded as the distinction between the commission of
similar acts in peace-time or war-time was seen as irrelevant in light of their overall humanitar-
ian objectives. Like crimes against humanity before them, the creation of crimes against future
generations seeks to fill a gap in the law and seeks to erase increasingly immaterial distinctions
between harm committed in war-time and peace-time or harm committed through physical
violence and other less violent, but equally morally blameworthy actions.

In the end, the creation of crimes against future generations will require efforts aimed at
generating a norm cascade among key States, constituencies, and institutions. Norm cascades
involve four main stages: the emergence of a new norm, its early adoption and diffusion, a
tipping point where it has gained a foothold among influential actors and institutions, and
critical mass where it has gained widespread support. A key focus of a campaign aiming at gen-
erating a norm cascade is to ensure that it is targeted at constituencies and institutions that are
vulnerable to normative persuasion.177 Norm cascades also benefit from the dynamic interplay
of policy advocacy at the national and international levels. Initiatives at the international level
can be used by national actors to focus efforts around a common objective at the national level.
At the same time, initiatives and results at the national level can build momentum for further
work at the international level.178

As a starting point, initiatives for normative change generally possess three principal fea-
tures that make their early emergence likely. They focus on ideas about "right" and "wrong",
they identify causes that can be assigned to the deliberate actions of identifiable individuals,
and they graft new norms on existing norms that have resonance and influence in particular
constituencies.179 By demonstrating that crimes against future generations focus on deliber-
ately harmful actions undertaken by individuals that violate existing standards of international
law, we believe that we have made a strong case that these crimes bear the hallmarks of other
successful norms in international law. Whether crimes against future generations ever become
something more than an academic idea will depend on the willingness of energetic and com-
mitted individuals, organisations, and states to commit to the many years that will be required
to lay the groundwork for its take-off as a new norm in international law and policy.

176 Ibid at 64-65; Darryl Robinson "The Context of Crimes Against Humanity," in Lee, Elements of Crimes,
supra note 139, 61 at 62-64.
177 See Martha Finnemore & Kathryn Sikkink "International Norm Dynamics and Political Change,"
178 See Margaret Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International
52 Int'l Organization 613 at 617.
6. OPENING A DIALOGUE FOR THE FUTURE

The creation of crimes against future generations could fill an important gap and play a crucial role in the repression of serious violations of economic, social, and cultural rights and severe environmental harm. As described above, we believe that the most feasible means of creating crimes against future generations would be through the adoption of a stand-alone convention that would impose upon states a duty to investigate, arrest, and prosecute perpetrators and cooperate with other states in these investigations and prosecutions.

A number of criticisms may be levelled at the concept and definition of crimes against future generations presented here. Presenting this definition and the associated commentaries that follow in this issue of the McGill Journal of Sustainable Development Law and Policy is meant to be the start - not the end - to an urgent and necessary policy dialogue on developing innovative accountability-based solutions for addressing current challenges to human security and development. The growing adoption of domestic environmental crime legislation around the world and the multiplication of other proposals for the creation of new international crimes suggest that the time is ripe for this sort of dialogue.

In the end, what matters most is the need for new thinking dedicated to ending impunity for serious violations of economic, social, and cultural rights, severe environmental damage and other forms of conduct that are manifestly unsustainable. Beyond its immediate benefits in terms of potential prosecution, the creation of crimes against future generations would give advocates, policy-makers, stakeholders and corporations a new tool for understanding the basic obligations in the areas of international economic, social, and cultural rights and international environmental law and for assessing human conduct in light of these obligations. The notion of an international crime is indeed one of the most important means through which the international community can condemn morally opprobrious behaviour and the creation of crimes against future generations ultimately seeks to bring about attitudinal changes.

The promise of a concept like crimes against future generations may lie in urging us to recognise that meeting the needs of both present and future generations requires not only

180 See e.g., Criminal Code of the Russian Federation, Federal Law No 64-FZ (1996) (Russia) at arts 246-262 (ecological crimes) and art 358 (ecocide); Environmental Crimes Law, Law No 9605 (1998) (Brazil).

181 Other initiatives exist for related normative change to create new international environmental crimes. However, these are fundamentally different from the approach discussed in this article since they focus on environmental crime rather than the approach proposed in this article addressing all three pillars of sustainable development: see e.g. Polly Higgins, Endicating Ecocide: Laws and Governance to Stop the Destruction of the Planet (London: Shephard-Walwyn, 2010).

182 A similar point was made by Amnesty International in relation to the adoption of the Rome Statute. See William R Pace & Mark Thieroff, "Participation of Non-Governmental Organisations," in Roy S Lee, ed., The International Criminal Court: The Making of the Rome Statute (Boston: Kluwer Law International, 1999) 391 where the authors quote Amnesty International ("[t]he true significance of the adoption of the Statute may well lie, not in the actual institution in its early years, which will face enormous obstacles, but in the revolution in moral and political attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves, or, if they fail to fulfil this duty, by the international community in accordance with the rule of law" at 396).
positive actions focusing on linkages between economic development, social development and environmental protection, but also serious efforts at preventing and punishing conduct that is unsustainable and unjust in fundamental ways. By further clarifying the boundaries of acceptable human conduct, international criminal law can play a critical role in moving the world towards a more sustainable path and securing our common future.