Offences against Future Generations: A Critical Look at the Jodoin/Saito Proposal and a Suggestion for Future Thought

Frédéric Mégret

Jodoin and Saito’s proposals for Offences Against Future Generations is an interesting prospective exercise and a welcome effort to work on the intersection of international criminal law with environmental, economic and social issues. However, the way in which the notion is constructed is somewhat misleading in that the idea of offences against future generations is really a shorthand for grave environmental, economic or social crimes occurring today that happen to have potentially long term impacts. As such it is not clear, for example, why the proposal could not (except for tactical rather than principled reasons) be subsumed under an extended understanding of the notion of crimes against humanity. In other words, the proposal does not take seriously the idea of crimes against future generations and in particular fails to incorporate much current thinking on duties towards such generations. The article proposes some thoughts on what taking the idea of crimes against future generations seriously might involve. At this stage, such an exercise certainly seems to create quite novel issues for criminal law, although none seem insurmountable as long as one circumscribes the idea of crimes against future generations to the most clear cut cases of deliberate harm to future interests.

La proposition de Jodoin et Saito de créer un « crime contre les générations futures » est un exercice prospectif intéressant et une tentative bien venue d’explorer l’intersection entre droit pénal international et problématiques environnementales, économiques et sociales. Cependant, la notion proposée peut induire en erreur dans la mesure où il s’agit en réalité de réprimer des atteintes graves à l’environnement ou au bien-être économique et social qui se manifestent déjà largement aujourd’hui, même si elles comportent un impact à long terme. Il n’est donc pas clair (sauf raisons purement tactiques) en quoi une telle notion ne pourrait pas être incorporée dans la notion existante de « crimes contre l’humanité ». En d’autres termes, la proposition ne prend pas suffisamment au sérieux l’idée de crimes « contre les générations futures » et ne s’inspire guère des courants de pensée réfléchissant à la nature des obligations dues à de telles générations. Il s’agit donc de proposer dans cet article quelques pistes de réflexion sur ce que prendre la notion de « crime contre les générations futures » au sérieux pourrait impliquer. Une telle proposition crée des problèmes sans précédent pour le droit pénal international, mais qui ne sont pas nécessairement insurmontables dès lors que l’on circonscrit la notion de crimes contre les générations futures aux atteintes les plus manifestes et délibérées à des intérêts futurs.

Canada Research Chair in the Law of Human Rights and Legal Pluralism, Assistant-Professor, Faculty of Law, McGill University.
1. INTRODUCTION

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The effort undertaken by Sébastien Jodoin and Yolanda Saito under the auspices of the World Future Council and the CISDL to think of grave harms to the environmental, economic and cultural well-being of populations in terms of crimes against future generations is interesting and novel. There is little doubt that international criminalization is quickly becoming one of the preferred routes to enforce certain international norms. While one may occasionally have reservations about particular features of international criminal repression, the excessive focus on criminalization or even with international criminalization itself, international criminal law is helping to redefine international law and is increasingly associated with various worthy causes. Simultaneously, grave threats to the economic, social and environmental well-being of populations continue to emerge in ways that international law seems to have trouble addressing. In this context one might hope that the rise of international criminal law would contribute to the resolution of these grave threats to some degree. Jodoin and Saito’s proposal is at the forefront of that trend.

This article certainly shares the authors’ view of the fundamental plasticity of international criminal law, and the idea that nothing is cast in stone despite strong attempts to channel the discipline in certain directions. There is no doubt that the structure of international crimes is in fact quite contingent. This is cause for exploring, in a more dynamic normative way, where international criminal law might be headed in the future, even if by doing so one largely anticipates on real world developments. This is perhaps the single most praiseworthy achievement of proposals such as the one discussed here, i.e.: to keep the debate alive about what should be “in” and “out” of international criminal law as a legal project. The proposal is all the more interesting in that, as will be seen, it both takes its cue from and challenges the mainstream of international criminal law.

The argument in this article will, therefore, not be about the potential feasibility of international offences against future generations, an argument which at this stage is secondary to the task of assessing its fundamental normative merits. Rather, it will explore in more detail the idea of crimes against future generations: What exactly do Jodoin and Saito envisaged as fitting within their proposal, and what might be problematic about the idea? The article begins by highlighting that the proposal is based on a slightly misleading use of the label of crimes against future generations, although this does not detract from its fundamental usefulness (2). It then tries to go beyond Jodoin and Saito’s proposal by envisaging what crimes against future generations, strictly understood, that is as crimes whose harm will primarily be felt in the future, might look like (3).

2. THE PROPOSAL AS IT STANDS: LIMITS AND MERITS

Overall, Jodoin and Saito’s use of the term “crimes against future generations” borders on the misleading. It suggests offences that have a remote temporal horizon and evokes a vast body of thought on intergenerational justice to which the proposed offences hardly do justice. This does not mean that the proposal in its broad contours is not helpful, but rather that an otherwise praiseworthy proposal is passed off as something quite different than what it really is.

2.1 Offences Against Future Generations: A Misleading Term?

The one element that unmistakably relates to the future in Jodoin and Saito’s proposal is the idea of “consequences on the long-term health, safety, and means of survival of any identifiable group or collectivity.” This is not an element of the actus reus and for understandable reasons: it would presumably defeat the purpose pursued by Jodoin if one had to wait for the long-term consequences of an act or conduct to have actually occurred. By that time the perpetrators would have disappeared and would no longer be able to shoulder the blame. The long-term consequences here are virtual. In fact, it is quite clear that the actus reus of Jodoin and Saito’s proposal occurs in the present and that no further future condition is required for the act to be committed. Few, if any, of the ways of committing “crimes against future generations” (the list included below the chapeau) that constitute the core of the actus reus require an element of future prolongation. In that respect, at least, “crimes against future generations” are not really crimes against future generations, something that Jodoin and Saito, anticipating the possible confusion, are keen to emphasize that “[c]rimes against future generations would not be crimes committed in the future. They would apply instead to acts or conduct undertaken

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2 Jodoin & Saito, supra note 1 at §1.
in the present that have serious consequences in the present and that are substantially likely to have serious consequences in the future.\textsuperscript{3} The reference to longer-term consequences is best described as a component of the mens rea since what is required is not that these consequences actually take place in the long-term but rather that they be subjectively known by the perpetrator to be substantially likely to take place in the long term. Thus understood, the "future character" of crimes against future generations is quite relative since the mens rea of course arises symmetrically to the actus reus, in the present.

As a result, it is not very clear why the future generations element is made so central to the proposal. One possibility is that Jodoin and Saito are mostly interested in bypassing the onerous chapeau requirements typical of existing international crimes, which often focus on armed conflict or the existence of an attack. As Jodoin and Saito argue quite rightly, such chapeau requirements are excessively limiting and are characteristic of an era during which international criminal law was very narrowly restricted to issues of war or political violence. But the proposed chapeau has significant limitations of its own. The idea that they should be committed against "members of any identifiable group or collectivity" is an attempt to find a middle ground between the narrow target of genocide ("national, ethnical, racial or religious group") and the broader category captured in crimes against humanity ("civilian population"), but the requirement seems either obvious (the group of victims will always be identifiable in some way or other, if only geographically) or too restrictive (the act would be just as criminal if its impact were randomly distributed among a population). More importantly for our purposes, most of the listed components of the actus rea would potentially seem to have sufficient considerable gravity in the present to warrant their criminalization, even if they have no long-term consequences. This makes the case for focusing on their long-term consequences as an element of the actus reus less than compelling.

Knowledge of long-term consequences might be seen as an indication of the gravity of the acts in the present\textsuperscript{4} but the fact that a perpetrator is aware of long-term harm seems rather secondary in cases where he or she is also aware of short-term harm. In fact the requirement of the foreseeability of long-term harm might be counterproductive and run against the sort of goal that I think Jodoin and Saito seek to promote (see §2.2 below). On a practical level, it only adds an extra substantive and evidentiary hurdle, and proving knowledge is difficult enough in ordinary circumstances.\textsuperscript{5} If anything, foreseeability of grave harm to future generations should be an aggravating circumstance rather than a defining element. Consideration of the actual gravity of the harm (expressed by an order of magnitude that would need to

\textsuperscript{3} Ibid at §3.2. The one exception is article 1(b) of the draft definition of crimes against future generations (ibid at §3.1) which specifically anticipates that damage to the natural environment should be "long-term," although that may be in reference to a present quality of irreversibility. In fact, the "long-term" character of harm to the environment is "long term" as projected into the future, not as evaluated retrospectively in the future.

\textsuperscript{4} That this is Jodoin's intention is evident from his remark that the second part of the chapeau "requires an additional level of moral blameworthiness and gravity, which justifies the prosecution of an individual for an international crime." (Ibid at §4.2.2).

\textsuperscript{5} In fact, it is not particularly plausible to think that individuals engaging in crimes in the present will be significantly aware of their long-term consequences. The knowledge that one's acts may have consequences on future generations may be little more than a passing thought in the mind of one who is committed to some nefarious act in the present.
be defined) rather than the foreseeability of its long-term effect would be more appropriate. Needless to say, it is quite possible to imagine many of the crimes that Jodoin and Saito have in mind as having a particularly harmful impact in the present and short- to mid-term, but no harm on the long-term, without it being clear criminologically why the focus on long-term harm is foregrounded.

One might argue that the reference to “future generations” is a more general characterization of the crimes involved, and that the reference should not be understood literally. This is in the same way the notion of “crimes against humanity” should not be understood strictly as entailing consequences in terms of actus reus and mens rea but as a convenient criminological and quasi-philosophical heading. Indeed although Jodoin understandably wants to exclude future consequences from the actus reus, he does hint that crimes against generations “are substantially likely to have serious consequences in the future.” In that respect, the “against future generations” label could be seen as a reference to the fact that grave environmental, economic and social harm takes longer to occur or tends to last longer than the type of consequences flowing from the sort of political violence typically associated with other international crimes. That, however, is a dubious proposition. First, many economic, social and environmental harms have massive effects here and now—certainly the sort envisaged by Jodoin—and some do not necessarily have any significant long-term consequences. For example the infliction of grave harm on the environment might have enormous consequences for a few years, perhaps a generation, but be absorbed by the next generation. To say that next generations are affected by this previous harm might simply be a truism, in the sense that all future generations are by definition affected by all crimes, especially grave crimes, that have preceded them. Indeed, the emphasis on long-term consequences as the defining marker of the gravity of attacks on the economic, social and environmental well-being of populations might do a disservice to the agenda of establishing the gravity of these crimes in the present.

Moreover, it is also far from clear that economic, social and cultural crimes are radically different from existing core international crimes. It is trite to say that genocide, as inflicted on the Armenians, Jews or Rwandans, has had deep intergenerational, social and even psychoanalytical ramifications for descendants, and even that such an effect was desired. For the “crime against future generation” label to be truly useful, the element of future harm should be central, not incidental to the crime’s normative structure. Finally, even if the temporality of the consequences of core international crimes and crimes against environmental, economic or social welfare differed significantly, it is not clear why that fact should necessarily move them into an entirely different category. Various ways of committing genocide, for example, (extermination or the prevention of births in a group) can take different varying lengths of time to take effect, yet all are clearly treated under the same rubric of “genocide” because their similarities are greater than their differences.

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6 Jodoin & Saito, supra note 1 at §3.2.
7 See e.g. Bruce Edward Auerbach, *Unto the Thousandth Generation: Conceptualizing Intergenerational Justice* (New York: Peter Lang, 1995).
2.2 The Real Goal: Dealing with Grave Harm to the Environmental, Economic and Cultural Well-Being of Populations

Upon closer inspection, the real inspiration for this proposal is to address grave economic, social, cultural and environmental harms. This makes Jodoin’s proposal less novel, but certainly no less commendable. It can be seen as part of an effort to orient international criminal law in a direction that is more responsive to broad economic, social and environmental concerns, away from its traditional focus on political violence and what has been described as the “crisis mentality” of international criminal law. As Jodoin and Saito emphasize, the current international criminal law regime is based on “situations involving physical violence,” such as the association of war crimes with “armed conflict” or the requirement in crimes against humanity’s of a “generalized or systematic attack.” In fact, as it stands, international criminal law can more broadly be criticized for an almost extreme emphasis on political and military violence, seen through the paradigm of “atrocities crimes”—in essence, the killing of large numbers of people without any legal justification. This emphasis on political and military violence is reminiscent of the tendency in international human rights law to take violations of civil and political rights more seriously than violations of economic or social rights. It is rich with implicit prioritization and, arguably, a certain ideological sensitivity.

There is some notable political theorizing on how the sheer magnitude of economic and social man-made misery in the world dwarfs political violence in ways that make it almost incomprehensible that the former is almost entirely neglected by international criminal law whilst the latter monopolizes reformist energies. Thomas Pogge is perhaps the thinker who is most associated with this line of thinking. Much of his work is based on a fundamental questioning of the differences in treatment between political violence such as genocide, and what

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8 See for example Jodoin & Saito, supra note 1 at § 6 (“[t]he 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”).


11 Jodoin & Saito, supra note 1, at § 2.1.

12 States have often gone out of their way to establish a strong hierarchy of international criminal law and institutions, resulting in only crimes of political and military violence being susceptible to international jurisdiction. For example, although some states had expressed early interest in drug trafficking falling within the jurisdiction of the International Criminal Court, this possibility was excluded early on. Neil Boister, “The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics” (1998) 3:1 Journal of Armed Conflict Law 27.

13 For example, the leading regional human rights court, the European Court of Human Rights, only has jurisdiction over civil and political liberties. See Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [ECHR]. At the universal level, the Committee on Economic, Social and Cultural Rights was the last committee to allow the possibility of individual petition: Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res A/RES/63/117, UNGAOR, 63d Sess, (2008); Michael J Dennis & David P Stewart, “Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health” (2004) 98:3 Am J Int’l L 462.
seems to be a much greater tolerance for radical poverty. For Pogge, such difference in treatment is wholly unsustainable, and is anchored in theoretical and psychological defenses that do not withstand scrutiny.\(^{14}\) For example, the number of preventable deaths caused directly or indirectly by poverty each year is estimated at 18 million, far more than all instances of military violence combined. There have also been isolated efforts to think in terms of a broad category of international crimes against the environment,\(^{15}\) or against the economic, social and cultural well-being of populations.\(^{16}\) Notably, the International Law Commission once included "systematic or mass human rights violations" (which did not, however, really include economic and social rights) and "willful and severe damage to the environment" in its Code of Crimes Against the Peace and Security of Mankind.\(^{17}\) Such efforts nonetheless remain extremely marginal in relation to the larger development of mainstream international criminal law in the last two decades.

The goal then is to devise a broad international crime that encompasses these "forgotten" harms. The actual offences anticipated by Jodoin and Saito serve that role especially if one imagines the heading of "crimes against future generations" as merely a broad umbrella not to be understood as having a very strict meaning in and of itself. The notion arguably serves a role that is not too different from the crimes against humanity label. Although there is much theorizing on the essence of crimes against humanity,\(^{18}\) in practice positive international criminal law soon reduced the notion to practicable "segments," and even the common chapeau requirements have become quite concrete. In the day-to-day practice of international criminal law, there is little need (and some risk) in engaging in foundational debates about what that humanity is or how it is attacked.\(^{19}\)


\(^{19}\) It should be said, in passing, that such foundational debates almost never took place during the creation of crimes against humanity, a concept created towards the end of the Second World War on pragmatic grounds with the goal of prosecuting major Nazi offenders. This is not to say that no thinking went into the label, however, it mostly constituted a useful way to bring together various forms of stigmatized behaviour.
Jodoin and Saito's list is an excellent enumeration of the many ways in which a population might be gravely harmed that do not fit within the conventional narrative of international criminal law. These include grave and systematic violations of economic, social and cultural rights, as well as major economic and environmental offences that have significant impacts on populations. Although there is no doubt that some would find these separate crimes to be too vague, they are not necessarily more so than the constituent parts of crimes against humanity and genocide. There is a clear willingness to see the bar quite high to cover only the most egregious behavior. Indeed, although Pogge's argument is quite radical and covers the general failure to reduce global poverty—something that would not seem to be encompassed by criminal law—Jodoin and Saito's proposal focuses on a small sub-group of deliberate denials of certain basic goods to populations. It is, thus, a perfectly useful blueprint for anyone interested in pursuing the cause of promoting a concept of economic, social and environmental crimes internationally.

2.3 Part of Crimes against Humanity Rather or a Separate Crime?

Once recast as a project of refocusing international criminal attention on more atypical harm, the proposal is both ambitious and welcome, if only as an implicit critique of the dominant international criminal law regime. It is, however, obviously meant to be a lot more than that. If the "crimes against future generations" label is not the most appropriate one, then what might be? Crimes against the economic, social or environmental well-being of populations? Or should there be a separate crime altogether? What about crimes against humanity?

Indeed, it is not clear why the underlying concerns informing the idea of crimes against future generations could not fit within the existing framework of crimes against humanity. There is clearly some degree of overlap with offences already included in the Rome Statute of the International Criminal Court (hereafter "the Rome Statute") under crimes against humanity. It may be, of course, that the purposes of political mobilization are better served by a call to create a "new crime" rather than by a proposal to simply reform the concept of crimes against humanity. There may be fears, for example, that reopening the crimes against humanity category for negotiation might lead some to curtail its current reach. This risk is always present in international negotiations, although it is perhaps difficult to see how a proposal to expand

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20 Each would have to be defined in due course, ideally in a way that took into account existing definitions and law. For example, when it comes to forced labour, enforced prostitution, and human trafficking, there already is a wealth of resources on the definition of such crimes. See e.g. *Convention concerning Forced of Compulsory Labour*, 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) [Palermo Protocol]; *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, 37 ILM 1002 (entered into force 1 July 2002) [Rome Statute].

21 *Ibid* (Crimes against humanity in the Rome Statute already include enslavement, deportation or forcible transfer, and enforced prostitution at article 7(1) and consequently, significantly overlap with 1(a) and (d) in Jodoin and Saito's proposal).

22 One might point, for example, to Protocol II to the Geneva Conventions which narrowed the definition of a non-international armed conflict (but simultaneously extended protections) as a case in point. This was also a prevalent concern during the drafting of the Rome Statute (although it proved to be
the idea of crimes against humanity to one particular area might actually end up narrowing it elsewhere. Moreover, these are really purely tactical arguments, and given the importance of the stakes and the early stage of the debate (and given that these points are not in fact made in the Jodoin and Saito article), it seems worth pondering the fundamental issue a little more.

A decisive argument for creating a new type of international crime is that it better describes that which is irreducible and cannot be adequately named within an existing category. This typically requires a difference that is qualitative and quite deep, yet Jodoin and Saito's argument at times seems to undermine the radicalism of the difference between their proposal and crimes against humanity. Jodoin and Saito argue that the idea of crimes against future generations "builds upon international law by seeking to extend the scope of application of existing international crimes from war-time to peace-time,"23 a path that is quite characteristic of what crimes against humanity have done over the course of their history. The fundamental idea behind crimes against humanity, that of a "widespread or systematic attack directed against [a] civilian population,"24 is different from the threshold Jodoin and Saito had in mind, but it is not clear how different. In most cases, the sort of grave harm the proposal envisages would probably result from an attack that could be characterized as a crime against humanity. Moreover, there are certainly much large-scale harm is committed against the environment that could be characterized as resulting from such an attack. Certainly the internationalization of the repression of these crimes would seem to be most justified when it is not clear if harm to the economic, social or environmental well-being that does not result from a systematic or generalized attack would really warrant international repression, as opposed to domestic criminalization. This is not to mention the fact that the idea of an attack seems more operational than the idea of the foreseeability of harm to future generations.

Although notions of economic, social and environmental harm may seem alien to the register of crimes against humanity, the idea of incorporating economic and social rights within the corpus of crimes against humanity is one that has already been broached convincingly by Skogly, who argued that this was feasible even within the existing definition of such crimes.25 Recently, Eldoie Aba and Michael Hammer have suggested in a policy paper for the One World Trust that the widespread denial of the right to food and the right to housing could amount to crimes against humanity.26 Jodoin and Saito do not make a convincing case as to

unwarranted, at least in the case of crimes against humanity) and, at any rate, that argument was more convincing in the context of the Rome Statute given that its goal was to codify crimes for the scope of International Criminal Court's jurisdiction. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

23 Jodoin & Saito, supra note 1, at §5.1.

24 Rome Statute, supra note 20 at art 7(1).


26 Eldoie Aba & Michael Hammer, "Yes we can? Options and barriers to broadening the scope of the Responsibility to Protect to include cases of economic, social and cultural rights abuse" (One World Trust, Briefing paper no 116, March 2009), online: International Coalition for the Responsibility to Protect <http://responsibilitytoprotect.org>.
why crimes against future generations should be an entirely separate category even though much of their criminological make-up borrows heavily from crimes against humanity.

In fact, the distinction between purely "violent" crimes against humanity and economic, social and environmental crimes will often be more tenuous than it seems at first sight. There is often a reciprocal link between political violence and prolonged situations of environmental, economic, social and cultural deprivation. The link will not always be present, but it falls to reason that situations where a population is violently attacked will rarely coincide with that population enjoying the full range of environmental, economic, social and cultural benefits. The Holocaust was preceded by a systematic effort to deprive Jews in Germany from access to employment. In some cases, severe economic deprivation may actually be a means to a genocidal goal, something which the Genocide Convention hints at when it includes in the definition of genocide "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The Ukrainian famines of the 1930s come to mind, as does the Great Leap Forward or the Killing Fields. In other cases, political violence may create a long-lasting legacy of exclusion, discrimination, and alienation. All things considered, severe deprivation of basic economic, social and environmental benefits will often only be possible under the condition of the heavy use of violent state policing, which can make it hard to distinguish from some crimes against humanity.

Finally, one more subtle critique of creating a separate abode for economic and social and environmental crimes is that it might be seen to reinforce the distinction between civil-political and economic-social violence that it is implicitly challenging. It is worth noting that in practice the field of international criminal law is very much structured by dichotomies between a core and a periphery, grave/gravest and not so grave crimes, etc. These dichotomies come with all kinds of implications in terms of the quality, degree and intensity of enforcement. In that respect, one may question whether relying on the language of economic and social rights to constitute part of crimes against future generations does not risk further entrenching this sort of dichotomy. Jodoin and Saito's pragmatic argument is that it is good practice to build on an existing body of international law, and thus to build upon the existing body of economic, social and cultural rights to create a new international crime. Given the constant debates surrounding economic and social rights one may wonder whether an appeal to such rights as a foundation can actually contribute to solidifying a corresponding international crime.

Indeed, it is possible to think of grave economic and social crimes without drawing on the language of rights, in the same way that the idea of crimes against humanity does not draw

30 Jodoin & Saito, supra note 1 at §5.1
31 It is true that Jodoin and Saito's article only anticipates very positive violations of these rights; the sort suggested by the idea of an "attack," rather than simple "failures to provide." The scope of the international criminal law of economic and social wrongdoing is significantly narrower than the broad program of economic and social rights, corresponding, perhaps, to those segments of the economic and social rights discourse that are most susceptible to an analysis in terms of rights violations.
explicitly on civil and political rights, even though it bears some loose connection with them. In fact, in avoiding rights language, international criminal law has arguably managed to reach for something more fundamental, a sort of universal sense of shock in the face of certain acts that is not tightly linked to any particular political register. Although crimes against humanity are arguably a composite of civil and political (and economic and social) rights violations, it never really occurs to anyone to justify their existence and normative coherence by appealing to civil and political rights or even to the core of rights that protect physical and psychological integrity. Certainly, the last thing a prosecutor would want is to be saddled with the extra obligation of proving that crimes against humanity actually led to the systematic violation of civil and political rights. Encompassing grave economic, social and environmental harms within the existing, overarching framework of crimes against humanity would reinforce the sense of the interrelated, interdependent and indivisible nature of the civil, economic, political, social, cultural and environmental.

3. A MORE AMBITIOUS TAKE ON INTERGENERATIONAL CRIMES

All things considered, the notion of crimes against future generations propounded by Jodoin and Saito is not really about future generations in any meaningful way, even though it is otherwise a very valid and timely proposal. This section will try to take the road not taken and explore the possibility of taking the idea of "crimes against future generations" seriously, as some commentators seem to have done, at least implicitly.32 It does so with an open mind and in the hopes of examining what kind of questions such an idea might raise and less with a view to making a grand proposal of its own. The idea is nonetheless that the Jodoin and Saito proposal makes very little of a vast amount of literature and thinking on intergenerational justice as arguably one of the dominant political themes of our age, especially when it comes to the environment. Could a stronger link be made between such thinking and the criminal law, or are there good reasons why this has not already been done?

To begin, it is important to clarify what "crimes against future generations", strictly understood, might mean. As has been seen, "crimes against future generations" according to Jodoin and Saito are not really crimes against future generations. Rather they are primarily crimes committed here and now with a strong economic, social or environmental element and whose measure of gravity is such that the person committing them foresees that they may have a long-term effect, but even that long-term effect seems strangely incidental—at least absent a more vigorous defense—to the core of the definition. Conversely, it is posited that a strong concept of "crimes against future generations" would have a stricter focus on future generations: crimes whose primary effect is to negatively affect future generations, even as they would not significantly affect current ones (if they did, then that would become their defining feature, and there would not be much point in calling them "crimes against future generations"). In other words, the challenge is to define offences that "skip" generations and whose nefarious consequences are extremely deferred. At the very least, crimes against future generations would encompass crimes committed in the present which in addition to having present effects, have very long-term ones, giving them a particular character of gravity. The fact that such cases are likely to be rare is obviously no reason to fail to investigate what their characteristics might be.

3.1 Taking Crimes Against Future Generations Seriously

Thinking regarding intergenerational justice, and particularly grave harm that might arise in the future as a result of the decisions of the present generations, has exploded in the last two decades. It has put the issue of the moral and political responsibility of present generations for future ones at the forefront, and has raised awareness of the difficulties associated with this responsibility because of the unborn status of future generations and the somewhat speculative character of future-oriented duties. There is also substantial literature on how such principles could be integrated into society concretely through adequate institutions, constitutional mandates or appropriate education. However, it is fair to say that most of this thinking has been of a philosophical nature. Principles of intergenerational justice, however intuitively compelling, have rarely found legal recognition, and certainly little international and even less criminal recognition. In fact, the recognition from the point of view of positive law has been so weak that radical green theorists have argued for an obligation of “ecotage” or “radical disobedience” in the present, rather than electing to be associated with such harm.

Before one looks at some of the problems that might be associated with such a move, it may be useful to outline its basic intuitive appeal by evoking a stylized case on which there might be agreement that the criminal law has a role to play. Even if one sees issues of intergenerational justice as involving mostly issues of equity and morality, it is possible to think of cases where the behaviour towards future generations would be very close to what is intuitively considered as criminal. Imagine, for example, that someone were to place a ticking time bomb in the heart of a city, and the bomb has a very slow detonator, so that it would only explode in 100 years. 100 years later, long after the bomber has died, the bomb goes off and kills a number of young people who were not born when it was planted. We would clearly see this behaviour as not only morally blameworthy, but also strongly evocative of a crime, even though its prosecution might be made impossible by the author's disappearance. If at any time before the explosion and before the bomber dies the latter is apprehended, there is little doubt that he could be prosecuted, for instance under the law of attempts. Since this would be a continuous sort of crime, it is unlikely that a statute of limitation would ever have been triggered. For the purposes of the law, it should not make much of a difference that there was such a considerable time lag between the initial intention and the planned result. Nothing in the law says that a crime long in the making is less of a crime than one committed in the spur of the moment – indeed it is often quite the contrary. Again, this says nothing of the intrinsic difficulty of prosecutions, but it does flag the issue as an appropriate one for the criminal law.

The situation might be marginally more complicated in a case involving negligence but need not be markedly so. Imagine that a factory manager decides to store certain chemicals in an abandoned room which he has reason to know will create a toxic reaction 100 years later, yet negligently fails to minimize that risk: 100 years later, workers who open the room are killed.

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by the emanations. Again, there is little doubt that one can be negligent about actions during our lifetime that could only have consequences after we die. Finally, one can imagine situations in which an individual or a group of individuals conspire to exploit a resource beyond its renewability threshold, in full knowledge of that fact that as a result and at some point in the future their actions will deprive either the world or a particular population of the benefit of that resource. Again, it is tempting to see how such an action, because of the extremely negative impact that it will eventually have, could plausibly fall within the scope of the criminal law. Even in the scenario of present offences with long-term consequences, one can see how an individual who releases nuclear material in ways that would render a certain populated area inhabitable for centuries, in addition to whatever harm might be caused to the current population, would be guilty of a grave offence in relation to descendants who could but never will enjoy the benefits of that land.

Such offences could be described as “extremely slow fuse” offences. The actual offence (murder, manslaughter, battery, administrative offences, a number of sui generis offences) matters less here than the fact that a long time will pass between the initial act and the harmful consequence. For criminalization to be an adequate approach from a human rights point of view, it would have to meet the relatively high threshold of being both a necessary and proportional measure, something often equated with satisfying the “harm principle”, that is, the notion that someone is or could be significantly harmed by the commission of the crime. While the distance of the harm here might cause one to pause for thought, the risk of grave harm, even in the future, could overshadow this concern, making the case for criminalization quite strong.

Criminalization, although far from the only way of dealing with issues of intergenerational justice, could be seen as a sort of last resort to protect future generations against cases of flagrant individual malevolence or criminal negligence. For example, it might be used as a tool that in some cases can have a unique deterrent effect. Criminalization would also be necessary to indicate the high degree of stigma that increasingly accompanies a disregard for future generations. It would more generally raise the profile of all duties of care for future generations. In fact, given the potential of deferred harm on the environment and the well-known weaknesses of other mechanisms that have attempted to constrain the acts of present generations, one might think that this were an area particularly appropriate for the intervention of a strong notion of public order. In the international realm, it would also, as Jodoin and Saito argue, be a particularly suitable way of circumscribing the regulatory gaps created by the transnational operation of corporations, which often take advantage of some the unwillingness of some states to enforce a strong defense of the environment. Finally, the criminal law seems particularly suited to defend virtual victims who have not materialized yet and could, therefore, not be expected to sue for civil remedies.

Of course, a balance needs to be struck, as in all issues of intergenerational justice, between the need to protect future generations and the freedom of current ones. Indeed, criminalization could conceivably (although in this case not very realistically) be excessive, holding present

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36 Through their discussion of the Chevron-Texaco case, Jodoin and Saito rightly point out the costliness of civil remedies. See Jodoin & Saito, supra note 1 at §2.2.
generations “hostage” to future ones and inducing a future-oriented paralysis by imposing exceedingly onerous duties of care on present generations. These could have a chilling effect on progress, even possibly to the detriment of future generations. It is arguable that each generation also has a right to “live for itself” within certain bounds, and not sacrifice its well-being for its distant progeny. A dictatorship of future generations might entail an extremely onerous duty on present ones to leave their environment in exactly the same state or even in a better state than it was when bequeathed to them. The idea suggested here must not mean that any conceivable violation of the “principle of precaution” should be liable to criminal sanctions, in a context where such a principle is at best a loose social guide for how to deal with situations of radical uncertainty.

The case for criminalization will only be as strong as its ability to eschew the more complex issues of risk balancing between generations and instead focus on the most flagrant cases of intentional or grossly negligent disregard for the well-being of future generations. As such, it is certainly rooted in the need to take the well-being and rights of future generations seriously; perhaps not as if they were already here, but as if they were at least partially or virtually present and as a component of any member of a current generation’s moral duties. In knowingly creating certain extremely harmful conditions for future generations, one acts in a predatory and unconscionable fashion. In penological terms, this means that the specific evil of such a crime and one of its central defining elements would be that it would involve a radical prioritizing of the present over future generations, in a way that would be shockingly inconsiderate of the lives of the latter group. From an ethical point of view the fact that the consequence would occur in 100 or even 500 years would not make it significantly less condemnable, all other things being equal (the lives of future people are as worthy of living and are as endowed with dignity as those of present individuals).

In these circumstances, it is surely striking that there has been next to no thought on these issues in criminal law theory or practice. If anything, it is in thinking about tort law that the issue has been considered. Some authors have also envisaged the issue of obligations towards future generations as one that should be conceptualized fundamentally as one of human rights. One famous case from the Philippines involving the destruction of the rainforest recognized the right of children to uphold not only their constitutional rights, but

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37 I see the Jodoin and Saito proposal as based on a similar inspiration in this respect. See Jodoin & Saito, supra note 1 (“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” at §2.3).


also those of future generations.\(^40\) Finally, there is some scholarship on how future generations might shape public or administrative law notions such as the public interest as well as how they may affect policy making more generally.\(^41\) There is also a noticeable trend orienting thinking and theorizing towards intergenerational equity in the global context, situating it at the intersection of international law and international normative theory.\(^42\) Such endeavours are not bereft of positive legal groundings.\(^43\) Yet, criminal law, particularly in its international dimension is largely absent from these debates, even as a relatively strong international environmental framework has begun emerging.

There may certainly be some bad reasons for this. It may simply be a manifestation of the very problem of intergenerational justice, namely that present generations more or less deliberately discount the welfare of future generations. The classic example of this deliberate disregard of future generations is the idea of a carbon-based economy that creates considerable benefits for present generations, but at considerable cost to future ones. In this context present generations are unlikely to want to penalize themselves even as they show themselves willing to entertain matters of inter-generational justice in policy considerations and a manifestation of an enlightened sense of ethics. However, it is also true that, aside from the “bad” reasons for not wanting to engage in the repression of inter-generational offences through criminal law, there are no doubt many reasons to think that applying the criminal law to issues of intergenerational justice is an approach at least fraught with complexity. The drawn-out temporal dimension of crimes affecting future generations creates delicate complications. The two remaining sub-sections are an attempt to think through some of these complications by drawing both on criminal law theory and thinking about intergenerational justice.

### 3.2 Substantive Issues

The idea of crimes against future generations is bound to raise complex questions for the criminal law, an area of law that has been traditionally oriented towards the past—often the proximate past—and that relies on harmful acts having already been committed as a condition for the imposition of sanctions. In other words, thinking about crimes against future generations requires us not only to think about future generations, but also to rethink the criminal law.

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40. *Minor Oposa v Secretary of the Department of Environment and Natural Resources*, (1994) 33 ILM 173, (SC Ct, Philippines) (a group of children, represented by an NGO, were granted standing in order to preserve the rights of future generations. The case attracted huge interest as one of the only cases to have recognized present generations’ ability to litigate issues involving the rights of future ones. This case, however, has remained isolated); See Shyami Fernando Puvimanasinghe, “Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest” (2009) 10:1 Sustainable Development Law & Policy 41.


The challenges to the substantive notion of crimes against future generations and some very tentative responses to such challenges can be briefly described as follows. The first problem is defining the appropriate actus reus. It cannot be the case that any harm to future generations would implicate moral obligations for present ones. There are clearly inter-temporal trade-offs between the benefits obtained at present and the costs that will have to be paid in the future that are legitimate. This is similar to the debate on pollution: not every act that negatively affects the environment amounts to pollution, and the challenge is to assess where legitimate economic use stops and actual harm begins. Moreover, some of the “costs” of the present may lead to the development of investments and resources that are beneficial to future generations. One of the bases of intergenerational justice, nonetheless, is the understanding that each generation is entitled to its “fair share” of global resources. It should act as a custodian of such global resources for future ones, with an obligation not to leave global resources in a worse state than the state in which they were inherited. At the very least, individuals in any given current generation should not engage in acts that will dramatically compromise a future generation’s well-being. It is this small area of characteristic wrongdoing that is most ripe for a notion of criminal actus reus.

A liberal view of criminal law, furthermore, may lean towards the need for the identification of a victim to whom some significant harm has been caused in order for the offence to be considered one. But it may be hard to argue that damage that impacts people in the future actually harms anyone personally in the particular way that harm is understood by criminal law. At best one’s acts may affect some undetermined person(s) in the distant future. At worst, one’s acts in the present may affect what are sometimes known as “statistical lives”. Statistical lives are not lives of actual persons but lives that might or might not potentially be affected, or even exist, depending on a number of courses of action in the present. This makes the concept of victimhood in this context particularly difficult to elucidate since actual victims may be nothing more than people who might but have not existed, whereas actual future generations may be those who, all other things being equal, have, in fact, “benefited” from some of past generations’ decisions. This is the conceptual riddle that philosophers describe as the “non-identity problem.” Although significant, this problem only exists if we see as harmful the fact that an action may prevent some generations from being born. From the point of view of criminal law, however, it should merely matter that those future generations who are actually born see their quality of life and ability to make the most of their environment significantly compromised. Moreover, the potential harm obviously need not be against all generations, but for example, against what might be expected to be future generations in a future area.

Problems of causality are also likely to be a significant hurdle. The criminal law’s tolerance of multiple causality is normally quite high, and it is ordinarily willing to consider as “causal”

45 On the centrality of harm to environmental law in particular, see Albert C Lin, “The Unifying Role of Harm in Environmental Law” (2006) 2006:3 Wis L Rev 897.
46 This could be illustrated by the familiar dilemma of ‘time travelling,’ especially travelling to the past. Any change to the past may have radical impact on that past’s future and may produce any number of ‘presents,’ so that time travel itself may create the conditions of its impossibility. For a well-known illustration of these dilemmas in popular culture, see the Back to the Future film series.
47 See e.g. Derek Parfit, Reasons and Persons (New York: Oxford University Press, 1984).
a variety of contributing acts, even when the actual harm is far away in time and separated by multiple other incidents (for example, as when an assault eventually provokes death a long time later and even when there may be a more immediate cause of death such as a medical mistake). However, this broad tolerance typically operates within the framework of a lifespan, not across generations. In that sense, the implicit assumption in much criminal law thinking is that one can only cause certain harm to the extent that one is still around when its consequences appear. This is of course because of the uncertainty of causality in the future as well as the fact that one may not be convicted in general merely for something that might happen (for example, if one wounds someone, one will not be convicted for murder merely on the off-chance that at a significantly future date that person might die from her wounds). Crimes against future generations would seem to require us to make a substantial leap of faith in terms of the future consequences of certain acts, at costs that might be profoundly illiberal, especially if one were to privilege a more catastrophist reading of the potential consequences of present acts.48

Dealing with such problems through the law of attempts does not resolve the issue either, partly because inchoate crimes are subjective mens rea offences (which as I argue below is not the most plausible construction for offences against future generations), and partly because offences against future generations to the extent that they are prosecuted in the present for potential future consequences are not really attempts in terms of their actus reus. Rather, they are ongoing offences that are committed in extremely slow motion that have neither conclusively failed nor will inevitably succeed like completed offences.49 Having said that, it is also the case that many "administrative" offences that have shaped contemporary criminal law are not based on the actual occurrence of harm, but rather are merely characterized by the violation of general administratively promulgated standards, and on the basis of a likelihood rather than inevitability of harm. In that respect, offences against future generations would not be that different from such administrative violations, except in their willingness to envisage temporally far-flung harm. This might allow a criminological sensitivity less focused on immediate pollution and more interested in the mechanisms by which long-term and irrevocable harm is created.

Second, one needs to address problems of mens rea or fault more generally. It might be argued that ensuring that only a relatively high subjective mens rea is required should rectify the problems associated with lack of immediacy and sheer causal uncertainty involved in crimes affecting future generations. Intention, however, should not be the only acceptable mens rea, since in most cases polluters will not particularly have intended to harm future generations.50

48 Borrowing from the concept of the arbitrariness of the "fortuity of consequences" (see James J Gobert, "The Fortuity of Consequence" (1993) 4 Crim LF 1), one might imagine the arbitrariness of assuming that certain negative consequences will occur even though we have no way of knowing whether they will.

49 Prosecuting certain acts that harm the environment in the future as attempts might be a stopgap measure, given that we cannot know whether the harm will actually be realized. The analogy here is of prosecuting someone for attempted murder if the victim has not died, reserving the possibility of prosecuting for murder in the event that she does subsequently die as a result of her injuries. However, one of the consequences of this relative discounting of the consequential element of the actus reus is a rising of the element of the mens rea (one cannot, by definition, "attempt to commit manslaughter"), which again raises the problem that few offences against future generations are likely to be clearly intentional.

50 Lisa Heinzlerling for example has described environment's risk as "posing[ing] a case not of malice ... but indifference. The perpetrators of environmental killings are often removed in space or time, or both, from
Knowledge as to the harmful potential of the product or practice coupled with wilful ignorance that in the circumstances it could potentially harm the environment and human beings should suffice. An utter failure to conform to a reasonable norm of behaviour by failing to think through the potential consequences of one's acts characteristic of negligence could also be enough. Strict liability for criminal offences is now recognized in many domestic criminal systems, precisely as a result of the growth of regulation linked, inter alia, to protection of the environment.\footnote{The offences are typically regulatory offences rather than traditional crimes, are characterized by a lesser degree of stigma and often entail fines rather than deprivations of liberty. See AP Simester, ed, \textit{Appraising Strict Liability} (New York: Oxford University Press, 2005); Ingeborg Paulus, “Strict Liability: its Place in Public Welfare Offences” (1978) 20:4 Crim LQ 445; GL Peiris, “Strict liability in Commonwealth criminal law” (1983) 3:2 LS 117; Richard G Singer, “The Resurgence of \textit{Mens Rea}: III – The Rise and Fall of Strict Criminal Liability” (1989) 30:2 BCL Rev 337.} A strict liability in environmental matters can better "encourage preventive behavior, advance the 'polluter pays' and 'precautionary' principles, and simplify issues of proof of knowledge, intent and causation."\footnote{Gray, \textit{supra} note 15 at 218.} The standard of care would have to be that of the reasonable person with the interests and well-being of future generations in mind and be based on scientific knowledge at the time, so that excessively onerous standards of care are not read into the past with the benefit of hindsight.

However, the further the consequences are from the initial act, the more difficult it will be to make a claim about knowledge or negligence. One may reasonably think a consequence to be most unlikely, or one may hope for some intervening event, like the development of a new technology, that would neutralize the dangerousness of one's acts before they could affect anyone. Such beliefs may be unreasonable and even unethical when they reflect an unwillingness to think through the consequences of one's acts, but they may nonetheless be sincere, even if dangerously optimistic. Even negligence towards future generations supposes that we have a reasonably clear idea of what a non-negligent standard would be. In other words, negligence vis-à-vis the future must imply at least that the reasonable person or some equivalent has a fairly clear idea of what the appropriate behaviour is. In that respect, wanton negligent behaviour, entirely oblivious to the consequences one's acts could have for future generations might stray so obviously from a basic respect for the precautionary principle as to warrant some criminalization.\footnote{The precautionary principle has received significant soft international law recognition. See for example UNDESA, “Rio Declaration on Environment and Development”, Annex 1 in \textit{Report of the United Nations Conference on Environment and Development} (3-14 June 1992), subsequently issued as UN Doc. A/CONF.151/5/Rev.1 (1992), 31 ILM 874 at principle 15 [\textit{Rio Declaration}].} Nonetheless, it is evident that we live in a world where the precautionary principle cannot be allowed to have an entirely paralyzing effect: innovation is based on a degree of risk-taking, and the costs of minimizing any danger can probably not far outweigh the likelihood and extent of potential harm. The further the generations, the more the potential negative ramifications one would have to guard against, ending up in a crushing duty of care that would be an almost meaningless standard for the operation of the criminal law.

\textit{"The victims of their actions. Polluters might not even know who is exposed to their pollution, let alone who will eventually succumb to it. There is nothing personal, or even \textit{purpose}, about the harm they cause."} Lisa Heinzerling, \textit{“Knowing Killing and Environmental Law”} (2006) 14:3 NYU Envr LJ 521 at 528.
Third, a number of *sui generis* issues of attribution are bound to arise. Although the criminal law is certainly at ease with complex theories of co-perpetration, it does ultimately rely on some concept of agency. The more remote the harm (in the past or the future), the greater the number of individuals that may be identified as having a role to play in causing such harm. Agency becomes very difficult to establish, unless a very direct line of causation can be found between certain acts committed in the past or the present and their potential impact in the future. At a certain level, intergenerational justice is conceived of as justice between entire generations. Such general justice issues are obviously beyond the scope of the criminal law which, to make sense, requires that only a select few individuals be culpable. A responsibility so widely shared that it can only be appropriately described as societal cannot meaningfully be considered as simultaneously criminal in nature. If there are any legal consequences to be eventually attributed to massive failures to discharge one's duty as custodian of resources as a generation, they will be better addressed through some sort of innovative take on transitional justice. Only in cases where an individual bears a clearly disproportionate or highly decisive role in harming or potentially harming future generations, would criminal liability be conceivable. And it is quite clear that the more remote the harm the less likely we will be able to identify an individual with such a role. However, such cases are obviously not inconceivable, and incalculable consequences can flow from the acts of a very few, as amply acknowledged in the context of existing international crimes. Moreover, in some cases it may be possible to hold not only individuals, but also moral persons, such as corporations or even states, which as broad entities have been responsible for particularly predatory behaviour and who reflect more collective forms of responsibility.

3.3 The Enforceability Issue

To be absolutely sure that acts committed today do indeed affect future generations, some might say that one has to wait until these generations are actually affected. That, however, would clearly defeat the purpose: future acts would no longer be future acts, they would be the present consequences of past acts and those responsible for them would have long disappeared. Individuals could coolly “kill from the grave,” ensuring that they never have to pay for the consequences of their wrongdoing. If there is a particular “impunity gap” when it comes to inter-generational justice it is quite a different one than the sort that prevails in the present

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and one that lies in the relative temporal unreachability of past perpetrators. The Brundtland Commission once deplored that “we borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.” One might have added to this list that future generations cannot prosecute us for our crimes to the extent that they are not in our present and we are absent from their future. One may decide, therefore, that one cannot wait for that damage to have occurred and that it needs to be “nipped in the bud.” However, therein lies another danger: the more one anticipates harm, the more one runs the risk of highly illiberal results that detract excessively from a model based on the realistic prospect of harm. Clearly, the creation of very abstract risk will cause the criminalization to become too difficult because the more remote that risk, the more likely it is to be traced to a multiplicity of factors that would greatly complicate proof of causation. Punishing people for something that is highly unlikely is a recipe for criminal heavy-handedness.

At the very least there would have to be some relatively close nexus between the individual causing the harm in G1 (generation 1), and the harm suffered by G2 (generation 2). There are several ways one can think of resolving the difficulties posed by these inter-temporal scenarios. The easiest is that of generational overlap where G1 and G2 coincide in time. The case where a member of G1 does something that negatively affects G2 in the present can be resolved through the ordinary operation of the criminal law and is not particularly relevant to the problem of intergenerational justice. The more interesting cases involve: (i) acts committed by a member of G1 before any member of G2 is born, or (ii) harm materializing in the future after the likely disappearance of the person having caused it. In both cases, there is a major temporal disjunction in that perpetrator and victim either do not coexist when the act is committed or when the harm is suffered (i.e. they coexist only when only one of these two conditions is realized). The most difficult problem is where there is no overlap at all. For example, G1 and G5 do not coexist at any point in time. In such a case, the alleged perpetrators are entirely absent from the lifespan of the alleged victims.

Yet the problem of non-temporal overlap does not necessarily entirely exclude the possibility of intergenerational responsibility. First, looking back at past deeds, the criminal responsibility might be, as has already been suggested, of moral persons whose lifespan is obviously much longer than that of individuals, and who could, in some cases, easily shoulder the responsibility of their earlier incarnations. Although not of a criminal nature, much litigation arising out of the Holocaust, for example, targeted corporations which had been instrumental or profited from the extermination of Jews. This might deal with the problem of prosecuting long past

offences with moral persons acting as links between the past and present. Second, the notion of offences against future generations might be a way of merely identifying the particular gravity of present offences whose main characteristic is that they will have very long-term consequences. The consequence of such identification may then be that in the realm sentencing, possibly as an aggravating circumstance, rather than at the stage of establishing guilt. Third, it is possible to think of offences being prosecuted in the present before they have actually caused a certain harm and even before one can know the extent of the harm. The models for such criminalization are of course abstract endangerment offences that have been used in the environmental realm quite actively for decades. The essential idea behind endangerment offences is that one is liable to the absence of a harm having occurred. One might view endangerment offences as inchoate strict liability crimes, the equivalent of attempts for subjective liability crimes. Endangerment avoids the pitfalls of having to wait for harm to materialize itself or of prosecuting someone as if that harm had been subjectively desired. It makes the task of proving an actual contribution or even an actual risk of harm secondary. Internationally, this is the road that the Council of Europe has taken. The advantage here, as Gossieres put it, is that "Acting ex ante (...) may play a stronger preventive role. It allows to stop the wrongdoer at the moment he is still alive in cases where we cannot expect an existential overlap between the victim and the wrongdoer." There are, of course, difficulties with endangerment offences. Endangerment offences are frequently faulted for being unduly vague and thus in tension with the legality principle. In order to avoid accusations of excessive vagueness, a broad "endangerment of future generations" offence might identify some of the ways in which it could be committed and, in addition, require a correspondingly high mens rea. Traditionally, the emphasis was on present, even imminent harm, and this is quite clearly the case of contemporary environmental criminal law. Endangerment offences against future generations would merely take seriously the fact that in some cases the danger can only be comprehended as one potentially affecting future generations.

4. CONCLUSION

This article has argued that the idea of criminalizing grave harm to the economic, social and environmental well-being of populations welcome, but not very helpful in describing the resulting offence as "crimes against future generations". Nor does it help in understanding why a need exists to create a separate offence rather than broaden the scope of crimes against humanity. On the other hand, the possibility of crimes against future generations strictly

59 Under the US Clean Water Act, for example, "knowing endangerment" of the environment can lead to up to 15 years in prison and $250,000 fines. Federal Water Pollution Control Act, 33 USC § 1319 (1977) at 309(c)(3)(A).
understood as offences primarily affecting future generations has been explored. Ultimately, international crimes against future generations should be restricted to the gravest attacks of this kind, those that are likely to have a significant, reasonably direct and predictable impacts. Such offences would, by necessity, only be elements in a larger arsenal of means to deal with threats to the environment, just as the criminal law domestically is only part of a broader framework in response to these harms. They could, however, be an interesting and valuable part of that arsenal.

These include attempts to better take into account the interests of future generations through better conservation policies, resorting to the precautionary principle, creating ombudspersons with future generation mandates, or granting future generations a type of legal status under a common heritage of mankind, among others.