



Crimes against Future Generations
A New Approach to Ending Impunity for Serious Violations of
Economic, Social, and Cultural Rights and International
Environmental Law

Sébastien Jodoin

A WFC & CISDL Legal Working Paper
Draft Version 2 / 29 March 2010

About the World Future Council

The World Future Council brings the interests of future generations to the centre of policy making. Its 50 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 lawmaking and thus produces practical and tangible results. In order to achieve a just, sustainable and peaceful future, the World Future Council has defined four key areas of action for the upcoming years: Future Justice, Climate and Energy, Living Economies and Future Finance, and KidsCall/Youth. The Future Justice programme was set up with the goal of analyzing and exposing the long-term effects of our decisions today from a holistic perspective. Its Expert Commission works to develop a legal and policy framework that guarantees human security, ecological integrity, and social equity in the interest of future generations. The solutions promoted in this programme address the root causes of our current crises, seeking to ensure that justice now does not sacrifice future justice, that intragenerational solidarity does not jeopardize intergenerational solidarity, and that all human solutions respect the development of other species of life on this planet. Our political work is guided by existing international accords on humanity's duties and responsibilities towards future generations, our planet and towards each other. Concrete tools for political change that have been developed in cooperation with CISDL include policy standards and the Crime against Future Generations discussed in this report.

World Future Council Secretariat:

Jakob von Uexküll, Founder, email: jakob@worldfuturecouncil.org

Maja Göpel, Director Future Justice, email: maja.goepel@worldfuturecouncil.org

Bei den Mühbren 70

D – 20457 Hamburg

Germany

Tel: +49-40-3070 914-0

Fax: +49-40-3070914-14

About the Centre for International Sustainable Development Law

The Centre for International Sustainable Development Law (CISDL) aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law. The CISDL is an independent legal research centre which has a collaborative relationship with the McGill University Faculty of Law in engaging students and interested faculty members in sustainable development law research and scholarly initiatives. CISDL also has a partnership with Oxford University Faculty of Law, the Université de Montréal, Yale University and a network of developing country faculties of law. It has guidance from the three Montreal-based multilateral treaty secretariats, the World Bank Legal Vice-Presidency, the United Nations Environment Programme and the United Nations Development Programme. The CISDL has six legal research programmes led by jurists from developing and developed countries, and publishes books, articles, working papers and legal briefs in English, Spanish and French. With the International Law Association and the International Development Law Organization, under the auspices of the United Nations Commission on Sustainable Development, CISDL is the leader of a new Partnership, 'International Law for Sustainable Development' that was launched in Johannesburg at the 2002 World Summit for Sustainable Development, to build knowledge, analysis and capacity on international law for sustainable development.

CISDL Secretariat:

Ashfaq Khalfan, Director, email: akhalfan@cisdl.org

Marie-Claire Cordonier Segger, Director, email: msegger@cisdl.org

Centre for International Sustainable Development Law

Chancellor Day Hall

3644 Peel Street, Montreal (Quebec), H3A 1W9 Canada

Tel: +1-514-398-8918

Fax: +1-514-398-8197

TABLE OF CONTENTS

Introductory Note.....	1
The Draft Definition of Crimes against Future Generations.....	2
Executive Summary.....	3
1. Introduction.....	6
2. The Concept of Crimes against Future Generations	8
2.1 Nature and Status of Crimes against Future Generations	8
2.2 Foundations for Crimes against Future Generations in International Law	8
2.3 The Justification for Creating Crimes against Future Generations	11
2.4 The Benefits of Creating Crimes against Future Generations	16
3. Commentary on the Legal Elements of Crimes against Future Generations.....	20
3.1 The Elements of Crimes against Future Generations	20
3.2 The Chapeau Element in Paragraph 1	20
3.3 The Elements of Prohibited Acts.....	24
3.4 The Definition of Identifiable Groups or Collectivities in Paragraph 2.....	34
4. Conclusion.....	35
Annex A: Biographies	37
1. Author.....	37
2. International Advisors.....	38

INTRODUCTORY NOTE

This legal working paper discusses the creation of a new international crime: crimes against future generations. The legal working paper discusses the draft definition of crimes against future generations revised in March 2010 and will be finalised once the third draft definition has been approved by the World Future Council (WFC).

The initiative of creating crimes against future generations grew from discussions held by the Expert Commission on Future Justice set up by the WFC to develop new laws and policies in order to guarantee human security, ecological integrity and social equity in the interest of future generations. In the Fall of 2007, the Centre for International Sustainable Development Law (CISDL) was commissioned to prepare an initial set of working papers to develop a new international crime. These papers served as the basis of workshops, consultations and meetings held over the next three years both within the WFC and CISDL and with leading international judges and lawyers working in international criminal law, human rights and international environmental law.

Many individuals assisted in this work and were generous with their time, their advice and their knowledge. They notably include: Hon. Fausto Pocar, Judge, Appeals Chambers of the ICTY and ICTR; Judge Abdul G. Koroma, Judge, International Court of Justice; Hon. Mohamed Shahabuddeen, former Judge, Appeals Chambers of the ICTY and ICTR, former Judge, ICJ; Hon. Catherine Marchi-Uhel, Head of Chambers, ICTY, Reserve Judge, ECCC; and Mr. Ken Roberts, Deputy Registrar, ICTY.

In addition, an international team of legal researchers has assisted with some of the research on crimes against future generations. This group of dedicated and talented individuals includes Natalie Senst, Hannah Cochrane, and Emma Siemiatycki.

Finally, special thanks are due to the current or former members of or advisors to the World Future Council Commission on Future Justice who actively fostered this work, most notably and Hon. Arthur Robinson, Hon. Christopher J. Weeramantry, Bianca Jagger, Dr. Scilla Elworthy, Dr. Rama Mani, Prof. Marie-Claire Cordonier Segger, 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. Maja Göpel's work in setting up related activities and in coordinating the work of the Expert Commission on Future Justice was also invaluable.

Sébastien Jodoin,
Legal Research Fellow, Centre for International Sustainable Development Law

Ottawa, Canada,
29 March 2010

THE DRAFT DEFINITION OF CRIMES AGAINST FUTURE GENERATIONS

Crimes against Future Generations

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

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

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

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

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

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

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

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

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

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

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

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

EXECUTIVE SUMMARY

1. Introduction

The international community's on-going failure to address the challenges and injustices associated with serious violations of economic, social and cultural rights and severe environmental harm requires the development of a new approach to fulfilling the demands of social and intergenerational justice, one which can effectively protect present and future generations from harm capable of foreclosing their options for the future. This legal working paper discusses one such novel approach involving the creation of a new category of international crime: crimes against future generations.

2. The Concept of Crimes against Future Generations

Crimes against future generations would prohibit acts and conduct that have severe consequences on the long-term health, safety and means of survival of identifiable groups or collectivities. The creation of this crime builds on current international law by extending the scope of application of existing international crimes or by establishing criminal liability for existing prohibitions in international human rights law and international environmental law. Crimes against future generations would ensure that serious violations of economic, social and cultural rights attract individual criminal responsibility under international law as is already the case for serious violations of civil and political rights and that severe environmental harm in peace-time would be penalised as is already the case in war-time.

Existing international legal concepts and mechanisms are not up to the task of preventing or punishing the sort of reprehensible and harmful behaviour that would be penalised under crimes against future generations. The prosecution of acts or conduct that would amount to crimes against future generations as existing international crimes requires the presence of elements that are largely limited to situations of direct physical violence. War crimes must be associated with an armed conflict, crimes against humanity must be committed as part of a widespread or systematic attack against any civilian population, and genocide must be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

Creating a new crime of crime against future generations would impose upon states a duty to investigate, arrest and prosecute perpetrators. In addition, the International Criminal Court would have jurisdiction over these crimes including in situations where domestic authorities unwilling or unable to do so. Beyond the immediate benefits of their potential use for the purposes of prosecuting perpetrators and providing victims with reparations, the creation of crimes against future generations would give advocates and law-makers a new tool and concept for upholding the importance of certain norms and values and for criticising conduct in breach of these norms and values. Indeed, the creation of crimes against future generations would play a crucial role in demonstrating that serious violations of economic, social, and cultural rights and severe environmental harm are reprehensible and morally wrong and deserving of condemnation in the strongest possible terms.

3. Commentary on the Legal Elements of Crimes against Future Generations

The establishment of a crime against future generations would require the commission of any of the prohibited acts listed in sub-paragraphs 1(a) to 1(j) to be committed with the 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 following table provides a brief overview of the relevant sources in international criminal law, international human rights law and international environmental law that provide the basis for different provisions of the draft definition of crimes against future generations. Most of the references are to the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *Rome Statute of the International Criminal Court (Rome Statute)*.

Provision	Origins and Purpose	Interpretative Sources
Paragraph 1 “Crimes against future generations means any of the following acts within any sphere of human activity, such as military, economic, cultural, or scientific activities, when committed with knowledge of the substantial likelihood of their severe consequences on the long-term health, safety, or means of survival of any identifiable group or collectivity;”	The first part of the chapeau element provides that the scope of crimes against future generations is broad, applying to military, economic cultural or scientific activities. The second part of the chapeau element introduces a knowledge requirement setting out an additional level of moral blameworthiness and gravity that justifies the prosecution of an individual for an international crime.	The use of a knowledge standard and its application in terms of a human population draws on the chapeau element of crimes against humanity. The language of “substantial likelihood” is drawn from the customary international law standard for the <i>mens rea</i> element in ordering.
1(a) “Forcing members of any identifiable group or collectivity to work and live in conditions that seriously endanger their health or safety, including forced labour, enforced prostitution and human trafficking;”	Sub-paragraph 1(a) penalises serious violations of the rights to liberty and security of the person and to freedom of residence and movement (<i>ICCPR</i> , arts. 9 and 12) and the rights to work of one’s choosing and to work in safe and healthy conditions (<i>ICESCR</i> , arts. 6(1) and 7(1)).	Sub-paragraph 1(a) draws on the crimes of forced labour and human trafficking found in the crime against humanity of enslavement (<i>Rome Statute</i> , art. 7(1)(c)) and the crime against humanity of enforced prostitution (<i>Rome Statute</i> , art. 7(1)(g)).
1(b) “Unlawfully appropriating or acquiring the public and private resources and property of members of any identifiable group or collectivity, including the large scale embezzlement, misappropriation or other diversion of such resources or property by a public official;”	Sub-paragraph 1(b) penalises grave violations of the customary international law principle of permanent sovereignty over resources, which provides that the citizens of a state should benefit from the exploitation of resources and the resulting national development.	The first part of sub-paragraph 1(b) is an extension of the war crime of pillaging to the context of peace-time (<i>Rome Statute</i> , art. 8(2)(b)(xvi)). The second part of sub-paragraph 1(b) is based on the crime of corruption as set out in article 17 of the <i>UN Convention against Corruption</i> .
1(c) “Deliberately depriving members of any identifiable group or collectivity of objects indispensable to its 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;”	Sub-paragraph 1(c) penalises serious violations of the right to life, referring in particular to the rights to food and water (<i>ICESCR</i> , art. 11).	Sub-paragraph 1(c) represents a peace-time extension of the war crime of starvation of civilians as a method of warfare (<i>Rome Statute</i> , art. 8(2)(v)(xxv)). It also draws on the underlying act of genocide by the deliberate infliction on a protected group of “conditions of life calculated to bring about its physical destruction in whole or in part” (<i>Rome Statute</i> , art. 6(c)).
1(d) “Forcefully evicting members of any identifiable group or collectivity in a widespread or systematic manner;”	Sub-paragraph 1(d) penalises one of the most serious violations of the right to housing (<i>ICESCR</i> , art. 11(1)).	Sub-paragraph 1(d) draws on the general comment of the U.N. Committee on the <i>ICESCR</i> relating to the right to housing (General Comment no. 7).
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,	Sub-paragraph 1(e) penalises one of the most serious violations of the right to health (<i>ICESCR</i> , art. 12).	The initial part of sub-paragraph 1(e) from “Imposing” to “disability” draws on the general comment of the U.N. Committee on the <i>ICESCR</i> relating to the right to health

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;”		(General Comment no. 12). The part of sub-paragraph 1(e) that refers to medical or scientific experiments is an extension of a war crime to the peace-time context (<i>Rome Statute</i> , art. 8(2)(b)(x)).
1(f) “Preventing members of any identifiable group or collectivity from enjoying its culture, professing and practicing their religion, using their language, preserving their cultural practices and traditions, and maintaining their basic social and cultural institutions;”	Sub-paragraph 1(f) penalises serious violations of the right to culture (<i>ICCPR</i> , art. 27 and <i>ICESCR</i> , art. 15).	Sub-paragraph 1(f) draws on the previous drafts of the <i>Genocide Convention</i> which included the crime of cultural genocide.
1(g) “Preventing members of any identifiable group or collectivity from accessing primary, secondary, technical, vocational and higher education;”	Sub-paragraph 1(g) penalises one of the most serious violations of the right to education (<i>ICESCR</i> , art. 13).	Sub-paragraph 1(g) draws on the general comment of the U.N. Committee on the <i>ICESCR</i> relating to the right to education (General Comment no. 13).
1(h) “Causing widespread, long-term and severe damage to the natural environment, including by destroying an entire species or ecosystem;”	Sub-paragraph 1(h) penalises the serious violations of the customary international law duty to prevent grave environmental harm and damages.	Sub-paragraph 1(h) is based on 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 (<i>Rome Statute</i> , Article 8(2)(b)(iv)).
1(i) “Unlawfully polluting air, water and soil by releasing substances or organisms that seriously endanger the health, safety or means of survival of members of any identifiable group or collectivity;”	Sub-paragraph 1(i) penalises serious violations of the right to life, particularly the rights to health, housing, food, and water (<i>ICESCR</i> , arts. 11 and 12).	Sub-paragraph 1(i) draws on the general comments of the UN Committee on the <i>ICESCR</i> relating to the rights to health, housing, food, and water (General Comments no. 12, 14 and 15).
1(j) “Other acts of a similar character intentionally and gravely imperilling the health, safety, or means of survival of members of any identifiable group or collectivity;”	Sub-paragraph 1(j) is a catch-all provision and thus penalises serious violations of the rights protected by other sub-paragraphs.	Sub-paragraph 1(j) draws on a similar catch-all provision for crimes against humanity (<i>Rome Statute</i> , art. 7(1)(k)).
Paragraph 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.”	Paragraph 2 defines the concept of an identifiable group or collectivity.	This paragraph draws on the crime of persecution (<i>Rome Statute</i> , art. 7(1)(h)). The principal difference is that paragraph 2 includes geography as a ground.

4. Conclusion

The *Rome Statute* explicitly provides for the possibility of amending the provisions dealing with the crimes within the jurisdiction of the ICC. Before it can be successfully amended, it will be necessary to launch a policy dialogue to further develop the concept of crimes against future generations and build support for its inclusion in the *Rome Statute*.

1. INTRODUCTION

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.

Justice Jackson, Counsel for the United States, International Military Tribunal in Nuremberg¹

More than twenty years ago, the World Commission on Environment and Development, chaired by Gro Harlem Brundtland, served notice that the world was faced with a series of interlocking, global crises in the fields of the environment, development and energy, the results of which were “rapidly closing the options for future generations.”² The Brundtland Commission urged States to tackle the problems of environmental degradation and lack of social and economic development together and thus called for action towards sustainable development, development that met the needs of the present generation, especially the needs of the world’s poor, without compromising the ability of future generations to meet their own needs.³

Unfortunately, to the great discredit of all, the Brundtland Commission’s assessment and prescriptions are still as relevant and timely as they were in 1987 as the world continues to face unprecedented challenges in the fields of social, economic and cultural rights, development and environment, which have serious consequences on the well-being of current generations and which gravely threaten the interests of future generations. Despite significant increases in prosperity in some regions of the world, massive and serious violations of economic, social, cultural rights remain common in much of the developing world as vulnerable populations, living in conditions of squalor, are denied the levels of nutrition, water, shelter, health, physical safety and livelihood required for basic survival. In addition, unsustainable human activities have continued unabated with detrimental consequences for the global commons, including the depletion of natural resources, long-term and severe environmental degradation, significant losses in biodiversity, the destruction of whole ecosystems and the highest mass species extinction rate in human history, which will have lasting consequences for human populations vulnerable to environmental disasters or stress or otherwise dependent on the environment.

The international community’s on-going failure to address these urgent challenges and injustices requires the development of a new approach to fulfilling the demands of social and intergenerational justice, one which can effectively protect current generations from serious violations of their economic, social and cultural rights and future generations from harm capable of foreclosing their options for the future. This legal working paper discusses one such novel approach involving the creation of a new category of international crime: crimes against future generations.⁴

Crimes against future generations would prohibit acts and conduct that have severe impacts on the health, safety and means of survival of any identifiable group or collectivity as well as the natural

¹ “Opening Statement before the International Military Tribunal,” Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg: IMT, 1947), p. 98.

² Brundtland Commission, *Our Common Future: Report of the World Commission on Environment and Development* (Oxford: OUP, 2007), p. 8.

³ *Ibid.*, pp. 3 and 43.

⁴ The draft definition of crimes against future generations is set out at the beginning of this legal working paper.

environment in which they live and upon which they depend and which are of such scale and magnitude that they should be recognised as international crimes. The concept of crimes against future generations thus underscores that gross violations of economic, social and cultural rights and massive environmental degradation are not always the result of a lack of resources or of structural factors, but are in some cases the product of deliberate and morally blameworthy behaviour that should be penalised by international criminal law.

The effort to create crimes against future generations seeks to build upon the considerable success of the international community in developing a system of international criminal justice to hold individuals criminally responsible for breaches of international legal norms which concern the international community as a whole. Throughout the mid-1990s to early 2000s, the international community set up a number of *ad hoc* international or hybrid criminal courts in response to crimes committed during particular armed conflicts.⁵ The momentum created by these developments and an organised and relentless campaign led by civil society actors across the world eventually led to the creation of a permanent International Criminal Court (ICC), based on the *Rome Treaty* which was negotiated in 1998, entered into force in 2002 and had 110 parties as of 2009.⁶

The creation of a new international crime is a daunting endeavour, one which will have its obstacles and detractors. However, as will be seen below, the concept of crimes against future generations derives from a number of existing rights and principles in international criminal law, international human rights law and international environmental law. While this concept certainly seeks to move international law forward, it does so in the spirit of attaching the appropriate penal consequences for behaviour which the international community has already recognised as being reprehensible and intolerable. The idea of creating a new international crime against future generations is therefore as much about punishing and deterring morally wrong conduct as it is about strengthening existing taboos about appropriate behaviour.

This legal working paper proceeds as follows. Part 2 discusses the basic features of and arguments in favour of the creation of crimes against future generations. Part 3 provides a brief legal commentary on the elements of crimes against future generations. Part 4 concludes by outlining an agenda for the process of creating crimes against future generations under international law.

⁵ These initially included the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, with later additions being the Special Court for Sierra Leone, the Special Panel for Serious Crimes in East Timor, the War Crimes Chamber in Bosnia and Herzegovina, and the Extraordinary Chambers in the Courts of Cambodia, the

⁶ *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 15 and 17-19.

2. THE CONCEPT OF CRIMES AGAINST FUTURE GENERATIONS

2.1 Nature and Status of Crimes against Future Generations

Crimes against future generations are not future crimes, nor crimes committed in the future. Rather, they apply to specific acts or conduct undertaken in the present which amount to serious violations of the economic, social and cultural rights of members of any identifiable group or collectivity or have serious repercussions for the natural environment in the present and which are substantially likely, as assessed in the present, to have severe consequences on the long-term health, safety, or means of survival of this group or collectivity.

Just as crimes against humanity are not crimes which are directly committed against humanity, crimes against future generations are also not directly committed against future generations. The term “humanity” in crimes against humanity indicates that this crime concerns offences which are of concern to all of humanity as the gravity of the crime is such that when it is committed, all of humanity is injured and aggrieved. Crimes against humanity are actually committed against specific individuals provided that the underlying acts or conduct are part of a widespread or systematic attack against any civilian population. Likewise, although crimes against future generations would penalise conduct that is of such gravity that it can be characterized as injuring future generations of humans, they ultimately attach to acts or conduct that affect the long-term health, safety, or means of survival of an identifiable group or collectivity.

Although, as is discussed below, the concept of crimes against future generations builds upon significant existing developments in international law, it does not constitute customary international law. For the violation of a rule in international law to be recognised as an international crime under customary international law, the rule in question must not only be part of customary international law, but the violations of this rule must also entail individual criminal responsibility. For the second condition to be met, there needs to be consistent and uniform state practice indicating an intention to criminalise the prohibition and actual instances of the punishment of violations by national or international courts and tribunals.⁷ While crimes against future generations would apply to conduct which is already proscribed under international law, there is little to no practice indicating that this conduct is also penalised under customary international law. In fact, the absence of the existence of crimes against future generations in existing customary international law is the impetus behind the effort to create such an international crime.

In line with contemporary international criminal law, crimes against future generations apply to the acts and conduct of individuals and seek to impose liability for such acts or conduct on these individuals. Nonetheless, while crimes against future generations are founded on the principle of individual criminal responsibility, there is no doubt that some of the acts or conduct that it would penalise could also attract the international responsibility of a State under international law.

2.2 Foundations for Crimes against Future Generations in International Law

The concept of crimes against future generations is based on a number of foundations in international criminal law, international human rights law and international environmental law. Sub-paragraphs 1(a),

⁷ *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 94 and 128 [*Tadić* Decision on Jurisdiction].

(b), (d), (f), (g) and (i) would penalise conduct that is already prohibited as a violation of international economic, social and cultural rights or other international conventions, sub-paragraph 1(a)), would penalise, without requiring proof of an attack against any civilian population, conduct that is already prohibited as a crime against humanity and sub-paragraphs 1(c), (e) and (h) would penalise in the context of peace-time, conduct that is already prohibited as a war crime.⁸ At a more general level, there is also clear support in various areas of international law for seeking the criminal prohibition of conduct that would amount to crimes against future generations.

Existing international criminal law includes certain elements which are of conceptual significance to the notion of a crime against future generations. To begin with, the harm caused by international crimes can often be collective in scope. For instance, the crime of genocide requires “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”⁹ and crimes against humanity must be committed “as part of a widespread or systematic attack directed against any civilian population”.¹⁰ Moreover, international crimes can proscribe a broad variety of acts. Genocide includes acts such as causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.¹¹ Finally, these crimes often proscribe behaviour which can affect protected groups or individuals in an indirect manner. Indeed, in certain circumstances, actions which cause unnecessary and significant harm to property or the environment might constitute war crimes as they would run afoul of the fundamental principles of necessity, proportionality and distinction between military and civilian objects.¹²

The history of international criminal law, particularly the development of crimes against humanity, also demonstrates that expanding the scope of the application of international criminal law is not without precedent. Crimes against humanity emerged in international law in the wake of the Second World War as a creation of the *Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter)*.¹³ During the negotiations which led to the *Nuremberg Charter*, it became apparent that certain crimes committed by the Nazis did not fall within the purview of existing law, most notably those atrocities perpetrated by German forces against their own nationals. In order to resolve this lacuna, the Allies conceived of a third category of crimes, crimes against humanity, to fill the gap left by the provisions pertaining to crimes against peace and war crimes.¹⁴ Initially, crimes against humanity were closely linked to other categories of international crimes as the *Nuremberg Charter* conferred jurisdiction over this category of crimes only to the extent that they were committed in execution of or in connection with war crimes and crimes against peace. Today, crimes against humanity consist of acts which can be committed in peace-time and which rise to the level of an international crime, not because of their connection with

⁸ The specific origins and sources for the elements of crimes against future generations are detailed in section 3.2 below.

⁹ *Statute of the International Criminal Tribunal for Rwanda*, in Security Council Resolution 955, UN SCOR, 49th Year, Res. And Dec., at 15, UN Doc. S/INF/50 (1994) art. 4 [*ICTR Statute*]; *Rome Statute*, art. 6.

¹⁰ *Rome Statute*, art. 7.

¹¹ *ICTR Statute*, art. 4.

¹² See *Rome Statute*, art. 8(2)(b)(iv). The International Court of Justice has held that “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.” (*Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep. 226, para. 30).

¹³ Antonio Cassese, *Violence and Law in the Modern Age* (Princeton: Princeton University Press, 1988), p. 109; Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 70.

¹⁴ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), pp. 17 and 22-24; Cassese, *International Criminal Law*, pp. 68-69.

an armed conflict, but because of their level of gravity.¹⁵ Similarly to crimes against humanity, the creation of a crime against future generations would both fill a gap in the law and strengthen existing taboos regarding acceptable human conduct, including by criminalizing in peace-time conduct which currently constitutes a war crime.

Many international crimes are directed at gross and serious violations of human rights. International criminal law has thus far essentially focused on conduct which violates civil and political rights such as the rights to life, personal liberty and freedom from torture. However, in light of the principle that all human rights should be respected equally, there is little justification for restricting the scope of international criminal law to one category of rights only.¹⁶ Given that crimes against future generations focus on the most egregious violations of economic, social and cultural rights, the absence of international criminal liability attaching to such violations is all the more unjustified.

There are also a number of developments in international environmental law that support the creation of crimes against future generations. In many ways crimes against future generations, especially in those sub-paragraphs that address environmental harm, build upon the principle of imposing liability for environmental harm,¹⁷ the principle of the protection and preservation of the common heritage of humankind or the global commons¹⁸ and the principle of intergenerational equity.¹⁹ Of particular relevance is the growing recognition of individual responsibility for environmental harm or of an individual responsibility to protect the environment, which is often expressed with reference to future generations.²⁰ In sum, as recognised by the Institut de Droit International in its *Responsibility and Liability Under International Law for Environmental Damage Resolution*, “international environmental law is

¹⁵ Cassese, *International Criminal Law*, pp. 64-65; Darryl Robinson “The Elements of Crimes Against Humanity” in Roy S. Lee, ed., *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence* (Ardsey, NY: Transnational Publishers Inc., 2001), p. 57.

¹⁶ *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993, U.N. Doc. A/CONF.157/23, para. 5: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

¹⁷ See, e.g., *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/6/Rev.1, (1992), 31 ILM 874 (1992), Principle 16 [*Rio Declaration*].

¹⁸ See, e.g., Convention Concerning the Protection of World Cultural Property and Natural Heritage, 23 Nov. 1972, UST 40, Preamble [World Cultural Property and Natural Heritage Convention]

¹⁹ *New Delhi Declaration*, Principle 2. See also Emmanuel Agius, “Obligations of Justice Towards Future Generations: A Revolution on Social and Legal Thought,” in Emmanuel Agius, ed., *Future Generations and International Law* (London: Earthscan Publications, 1998), p. 10.

²⁰ See, e.g., *Stockholm Declaration on the Human Environment*, UN Doc. A/C. 48/14 (1972), 11 ILM 1461 (1972), Principle 1 (stating that man “bears a solemn responsibility to protect and improve the environment for present and future generations.”) (“*Stockholm Declaration*”); *Draft Principles on Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, Annex I (1994), Art. 21 (“All persons have the duty to protect and preserve the environment.”); *World Charter on Nature*, 28 October 1982, UNGA Res./37/7, para. 24, (providing that each person “has a duty to act in accordance with the provisions of the present Charter”); *Hague Declaration on the Atmosphere*, 11 March 1989, (1989) 28 I.L.M. 1308, Preamble, para. 6 (“Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.”) [*Hague Declaration*].

developing significant new links with the concept of intergenerational equity [which is] influencing the issues relating to responsibility and liability.”²¹

The above concepts and principles in international criminal law, international human rights law and international environmental law thus constitute solid foundations for imposing individual criminal liability for the type of conduct that would be penalised by crimes against future generations.

2.3 The Justification for Creating Crimes against Future Generations

There is little doubt that existing mechanisms for sanctioning, preventing and deterring violations of economic, social and cultural rights or severe environmental damage are deficient. As the Committee on Economic, Social and Cultural Rights (CESCR) has pointed out: “In effect, 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.”²² In the environmental field, the inadequacy of existing means of enforcement is also well recognized.²³

The legal commentary in section 3.3 below provides information on the sort of acts or conduct which would amount to crimes against future generations should all of the required conditions be met. This legal commentary shows that the acts that would be penalised as crimes against future generations are serious and should entail the individual criminal responsibility of those individuals implicated in their commission. This raises the issue of whether existing international criminal law could be used to prosecute conduct that would amount to crimes against future generations. The suitability of the existing core crimes, war crimes, crimes against humanity and genocide, for this purpose is examined below.

2.3.1 War Crimes

War crimes are serious violations of customary or conventional rules which form part of the corpus of international humanitarian law, the body of law which regulates armed conflicts. This body of law is principally codified in the 1907 Hague Conventions on the Rules of Warfare, the 1949 Geneva Conventions and the 1977 Additional Protocols. There is a number of war crimes which could be used to prosecute some of the conduct that would be penalised by crimes against future generations. As explained in section 3.3 below, sub-paragraphs (c), (e) and (h) of the draft definition of crimes against future generations draw on the existing war crimes of starving civilians as a method of warfare (*Rome Statute*, art. 8(2)(v)(xxv)), subjecting individuals to medical or scientific experiments (*Rome Statute*, art. 8(2)(b)(x)) and causing widespread, long-term and severe damage to the natural environment (*Rome Statute*, Article 8(2)(b)(iv)).

The main difference between these war crimes and similar crimes against future generations is the former’s restricted scope of application. The *Rome Statute* provides that war crimes listed in sub-paragraphs (a) and (b) of Article 8(2) only apply to international armed conflicts and that the war crimes listed in paragraphs (c) and (d) of Article 8(2) apply “to armed conflicts not of an international character” and not “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Armed conflicts have been defined by the

²¹ Eighth Commission, Rapporteur: Mr. Francisco Orrego Vicuna, *Responsibility and Liability Under International Law for Environmental Damage Resolution*, Adopted on 4 September 1997, (1998) 10 Georgetown Int’l Env’tl Law Review 269.

²² CESCR, Statement to the World Conference on Human Rights, U.N. Doc. E/1993/22, para. 5.

²³ Philippe Sands, *Principles of International Environmental Law* (Cambridge: CUP, 2003), pp. 227-228, 938-939.

ICTY Appeals Chamber in the *Tadic* case as “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁴ The ICC Elements of Crime further provide that it is necessary that “[t]he conduct took place *in the context of* and was *associated with*”²⁵ the armed conflict. In addition to these two conditions, the *ICC Elements of Crimes* also provide that it is necessary that “[t]he perpetrator was aware of factual circumstances that established the existence of *an armed conflict*.”²⁶

2.3.2 Crimes against Humanity

Building upon the practice of the ICTY and ICTR,²⁷ Article 7 of the *Rome Statute* defines crimes against humanity as a series of prohibited acts, such as murder, extermination or torture, “committed as part of a widespread or systematic attack directed against any civilian population.” There are two prohibited acts in particular that could be used to prosecute acts or conduct that would be penalised by crimes against humanity: enslavement (*Rome Statute*, Article 7(1)(c)), enforced prostitution (*Rome Statute*, Article 7(1)(g)), persecution (*Rome Statute*, Article 7(1)(h)), and other inhumane acts (*Rome Statute*, Article 7(1)(k)).

To begin with, it is important to note that sub-paragraph 1(a) of the draft definition of crimes against future generations draws on the crimes of forced labour, human trafficking and enforced prostitution found in the first two crimes against humanity listed above. Moreover, persecution and other inhumane acts could be used to cover a much broader variety of acts and conduct that would be penalised by crimes against future generations. Persecution may be defined as “the violation of the right to equality in some serious fashion that infringes upon the enjoyment of a basic or fundamental right”.²⁸ The *Rome Statute* defines the offence as “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.²⁹ Other inhumane acts are defined in the *Rome Statute* as including any act which is of “a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. As such, whether a given act falls within the category of other inhumane acts is a question to be assessed on a case-by-case basis.³⁰ The elements of the act that should be “comparable” to enumerated acts are severity, character, infliction of mental or physical harm in fact, intent to cause harm, and nexus between act and harm.³¹

Using the latter two crimes to prosecute the sort of human rights violations that would be penalised by crimes against future generations would require interpreting the elements of these crimes to cover

²⁴ *Tadic* Decision on Jurisdiction, para. 70.

²⁵ See *Report of the Preparatory Commission for the International Criminal Court*, Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), art. 8(2) [*ICC Elements of Crime*].

²⁶ See *ibid.*

²⁷ *Tadic* Decision on Jurisdiction, paras 140-141; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Appeal Judgment, 1 June 2001, paras 461-469 [*Akayesu* Trial Judgment].

²⁸ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: OUP, 2001), p. 116.

²⁹ *Rome Statute*, art. 7(1)(h).

³⁰ *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Judgment, 26 February 2001, paras 271-272. Report on the Preparatory Commission on the Establishment of an International Criminal Court, Vol. I, Proceedings of the Preparatory Committee, U.N. Doc. A/51/22 (1996), paras 100-102. Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity, PCNICC/1999/WGEC/DP.39, 3 December 1999.

³¹ *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Trial Judgment, May 21, 1999, paras 148-51 [*Kayishema* Trial Judgment].

violations of economic, social, and cultural rights. There is limited case law that supports such an expansive approach to the interpretation of these crimes. With respect to persecution, the *Kupreskic* Trial Chamber has held that “the comprehensive destruction of homes and property” constitutes “a destruction of the livelihood of a certain population” and thus “may have the same inhumane consequences as a forced transfer or deportation”.³² As a result, such an act “may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.”³³ With respect to other inhumane acts, examples of acts which have been held to be of similar gravity to other crimes against humanity include intentionally inflicting serious mental harm and suffering, including, forced nakedness, exertion of pressure on individuals to act in a particular manner, degradation, humiliation, and harassment;³⁴ unlawfully screening for, arresting, imprisoning or killing suspected “collaborators”;³⁵ imprisonment under inhumane conditions;³⁶ and destruction of homes and other property.³⁷ In other words, while an expansive interpretation of these crimes is indeed possible, they have in practice been largely limited to violations of civil and political rights.

Ultimately, the greatest impediment to prosecuting conduct that would amount to crimes against future generations as crimes against humanity is the chapeau requirement of crimes against humanity which requires that they be “committed as part of a widespread or systematic attack directed against any civilian population.”³⁸

The requirement of an attack against any civilian population encompasses any mistreatment of the civilian population of the same gravity as crimes against humanity.³⁹ The term “attack” refers to “a course of conduct involving the multiple commission of acts” amounting to crimes against humanity.⁴⁰ The attack against any civilian population must moreover either be widespread or systematic in nature.⁴¹ The widespread requirement essentially relates to the number of victims. As stated by the ICTY Trial Chamber in *Blaskic*, “[t]he widespread characteristic refers to the scale of the acts perpetrated and to the number of victims.”⁴² This involves that an attack of substantial gravity be undertaken against a multiplicity of victims. The systematic requirement refers to “a pattern or

³² *Kupreskic* Trial Judgement, para. 631.

³³ *Ibid.*

³⁴ *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 493 [*Bagilishema* Trial Judgement]; *Akayesu* Trial Judgment, para. 581; *Prosecutor v. Galic*, Case No. IT-98-29-T, Trial Judgment, 5 December 2003, para. 151.

³⁵ International Military Tribunal, Judgment: War Crimes and Crimes Against Humanity, Murder and Ill-Treatment of Civilian Population, *In Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg*, 14 November 1945-1 October 1946, vol. I; *Prosecutor v. Elizaphan and Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Judgment, 21 February 2003, para. 815; *Bagilishema* Trial Judgement, paras 450 and 490.

³⁶ International Military Tribunal, Judgment: War Crimes and Crimes Against Humanity, Murder and Ill-Treatment of Civilian Population, *In Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg*, 14 November 1945-1 October 1946, vol. I; *Bagilishema* Trial Judgement, paras 450 and 490.

³⁷ International Military Tribunal, Judgment, War Crimes and Crimes against Humanity, Persecution of the Jews, *In Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg*, 14 November 1945-1 October 1946, vol. I.

³⁸ In addition to the chapeau requirement, the *Rome Statute* requires with respect to persecution that it be committed in connection with another international crime and that it be committed with specific discriminatory intent.

³⁹ *Prosecutor v. Kunarac*, Case No. IT-96-23, Appeal Judgment, 12 June 2002, para. 86 [*Kunarac* Appeal Judgment].

⁴⁰ *Rome Statute*, Art. 7(2)(a); See also *Prosecutor v. Kunarac*, Case No. IT-96-23, Trial Judgment, 22 February 2001, para. 387 [*Kunarac* Trial Judgment].

⁴¹ *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Judgment, 15 July 1999, para. 248; *Kunarac* Appeal Judgment, para. 93

⁴² *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgment, 3 March 2000, para. 206. See also *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, para. 648 [*Tadic* Trial Judgment].

methodical plan”.⁴³ Indeed, as held by the Trial Chamber in *Kumarac*, “[t]he adjective ‘systematic’ signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.”⁴⁴ The *Rome Statute* also introduces a policy element to the attack requirement as the acts must be committed “in furtherance of a State or organizational policy”.⁴⁵ Following its definition of attack, the ICC Elements of Crimes further provide that a “‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population”.⁴⁶ In an accompanying footnote however, this statement is qualified in the following manner:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.⁴⁷

As such, the *Rome Statute* requires that a State or organization, whether by its actions or exceptionally by its deliberate failure to take action, actively promote or encourage an attack against a civilian population.

2.3.3 Genocide

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

In order to use these crimes to prosecute conduct that would be penalised as crimes against future generations, it would be necessary, as it was for the case for crimes against humanity, to expand the scope of the material element of these crimes to encompass violations of social, economic and cultural rights. With respect to causing serious bodily or mental harm, there would appear to be little scope for interpreting its material element in a manner that would cover such violations. The quintessential examples of acts falling within this offence as including “torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs” and “the infliction of strong fear or terror, intimidation or threat.”⁴⁸ Likewise, the ICC Elements of Crime, provide that these acts “include, but are not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.”⁴⁹ With respect to the deliberate infliction of conditions of life calculated to bring about a group’s physical destruction, an ICTR Trial Chamber has held that it includes “circumstances

⁴³ *Tadic* Trial Judgment, para. 648.

⁴⁴ *Kumarac* Appeal Judgment, para. 94; *Kumarac* Trial Judgment, para. 429.

⁴⁵ *Rome Statute*, art. 7(2)(a).

⁴⁶ *ICC Elements of Crime*, art. 7(3).

⁴⁷ *Ibid.*, fn. 6.

⁴⁸ *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, para. 46 (finding that these acts falling within this offence has been confirmed by the ICTY Appeals Chamber).

⁴⁹ *ICC Elements of Crime*, Art. 6(b), fn. 3.

which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion” as well as “rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodations for a reasonable period”.⁵⁰ The *ICC Elements of Crime* largely reiterate the above definition, providing that conditions of life “may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”⁵¹ Finally, the offence of imposing measures intended to prevent births within the group has been defined as including sexual mutilation, sterilization, forced birth control, the separation of the sexes, the prohibition of marriages and rape.⁵²

In any case, even if these crimes of genocide could be interpreted to cover acts that would be penalised by crimes against future generations, the chapeau requirement of genocide would remain a serious barrier to its use for this purpose, requiring proof of “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Moreover, it should be noted that the definition of a group is limited to one of the enumerated grounds of nationality, ethnicity, race, or religion and does not therefore encompass the other grounds used to identify groups or collectivities in the context of crimes against future generations.

2.3.4 Conclusion

In sum, the prosecution of acts or conduct that would amount to crimes against future generations as existing international crimes requires the presence of elements that are largely limited to situations of direct physical violence. War crimes must be associated with an armed conflict, crimes against humanity must be committed as part of a widespread or systematic attack against any civilian population, and genocide must be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

Therefore, there is a clear gap in the penalisation of serious economic, social, and cultural rights and peace-time environmental harm in existing international criminal law. This supports the conclusion that existing international legal concepts and mechanisms are not up to the task of preventing or punishing the sort of reprehensible and harmful behaviour that would be penalised under crimes against future generations. Crimes against future generations are required to fill this prohibition gap and ensure that all serious violations of international human rights law and international environmental law are the subject of international criminal repression.

It should be noted that in situations where conduct would constitute a crime against future generations might also amount to conduct constituting one or more of the other international crimes, cumulative convictions would be allowed as long as the legal elements of crimes against future generations were found to be materially distinct from the legal elements of the other international crimes.⁵³

⁵⁰ *Kayishema* Trial Judgement, paras 115-16. See also *Akayesu* Trial Judgement, paras 505-6; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgement, 6 December 1999, para. 52 [*Rutaganda* Trial Judgement]; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Judgement, 27 January 2000, para. 157 [*Musema* Trial Judgement].

⁵¹ *ICC Elements of Crime*, Art. 6(c), fn. 4.

⁵² *Akayesu* Trial Judgement, paras 507-508. See also *Kayishema* Trial Judgement, para. 117; *Rutaganda* Trial Judgement, para. 53; *Musema* Trial Judgement, para. 158.

⁵³ See *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 1032.

2.4 The Benefits of Creating Crimes against Future Generations

2.4.1 Prosecuting Crimes against Future Generations

The most obvious benefits of creating a new crime of crimes against future generations would be the obligation it would impose upon states to investigate, arrest and prosecute perpetrators. A state's failure to meet this obligation would grant the ICC the power to do so in the place of domestic authorities. International criminal justice promises a stronger regime for penalising serious violations of economic, social, and cultural rights and international environmental law than what is currently available under international law. The following sections briefly discuss some of the principal issues involved in prosecuting crimes against future generations in a scenario where the *Rome Statute* would have been successfully amended to include it as one of the crimes over which the ICC has jurisdiction.

2.4.1.1 Jurisdiction and Admissibility

The ICC has jurisdiction to try natural persons who have committed crimes within the purview of its Statute. In order for the ICC to exercise its jurisdiction over a crime against future generations, the following conditions would have to be met:

- the person concerned was 18 years or older at the time of the alleged commission of the crime against future generations;⁵⁴
- the crime against future generations was committed after the entry into force of the amendment granting the ICC jurisdiction over crimes against future generations,⁵⁵ unless a State Party has made a declaration otherwise;⁵⁶
- the crime against future generations was committed by a national or on the territory of a State party who has accepted the amendment granting the ICC jurisdiction over crimes against future generations⁵⁷ or the case involving crimes against future generations has been referred to the Prosecutor by the Security Council acting under Chapter VII of the U.N. Charter.⁵⁸

In addition, for a case involving crimes against future generations to be admissible before the ICC, a Pre-Trial Chamber would have to determine that:

- the State with jurisdiction over the case was unwilling or unable genuinely to carry out the investigation or prosecution or decided not to prosecute the person concerned, as a result of its unwillingness or inability to genuinely prosecute this person;⁵⁹
- the person concerned has not already been tried for conduct which is the subject of the complaint (excluding trials undertaken where the purpose was shielding the person concerned from criminal responsibility or in a manner which is inconsistent with an intent to bring the person concerned to justice);⁶⁰ and
- the case is of sufficient gravity to justify further action by the ICC.⁶¹

⁵⁴ *Rome Statute*, art. 26.

⁵⁵ *Ibid.*, arts. 11(1) and 121(5).

⁵⁶ *Ibid.*, arts. 11(2) and 12(3).

⁵⁷ *Ibid.*, arts. 12(2) and 121(5).

⁵⁸ *Ibid.*, art. 13(b).

⁵⁹ *Ibid.*, art. 17(1).

⁶⁰ *Ibid.*, arts. 17(1)(c) and 20(3).

⁶¹ *Ibid.*, art. 17(1)(d).

Finally, the exercise of the jurisdiction of the ICC over a crime against future generations would be initiated in one of three ways:

- a State Party referred a situation involving crimes against future generations to the ICC Prosecutor;⁶²
- the Security Council, acting under Chapter VII of the U.N. Charter referred a situation involving crimes against future generations to the ICC Prosecutor;⁶³
- the ICC Prosecutor initiated an investigation in respect of a situation involving crimes against future generations.⁶⁴

2.4.1.2 Principles and Modes of Individual Criminal Responsibility

The *Rome Statute* guarantees to every accused person the right to be presumed innocent until proven guilty before the ICC. It also provides that in order for an accused person, the Prosecution must prove the guilt of this person beyond reasonable doubt.⁶⁵

In establishing the guilt of an accused person for a crime, the ICC Prosecutor must prove all of the elements of a particular crime beyond reasonable doubt. This would include in the context of crimes against future generations: the chapeau requirement (the knowledge requirement that elevates prohibited acts of crimes against future generations to the level of an international crime), the material requirement of a prohibited act (the specific prohibited act or conduct amounting to a crime against future generations, including a positive acts as well as omissions when there is a duty to act) and the mental requirement of a prohibited act (the intent to commit the prohibited act or conduct amounting to a crime against future generations). Under the *Rome Statute*, the notion of intent is defined as existing where a person means to engage in a specific type of prohibited conduct or means to cause a prohibited consequence or is aware that it will occur in the ordinary course of events. The notion of knowledge is defined as awareness that a circumstance exists or a consequence will occur in the ordinary course of events.⁶⁶

For example, in establishing that an individual had perpetrated sub-paragraph 1(a) of the draft definition of crimes against future generations, the ICC Prosecutor would have to prove the following facts beyond a reasonable doubt:

- that the perpetrator forced members of an identifiable group or collectivity to work or live in conditions that seriously endangered their health or safety (material requirement);
- that the perpetrator intended to force members of an identifiable group or collectivity to work or live in conditions that seriously endangered their health or safety (mental requirement);
- that the perpetrator knew of the substantial likelihood of the severe consequences of his acts on the long-term health, safety, or means of survival of this identifiable group or collectivity or knowingly took the risk that the occurrence of these prohibited consequences would be substantially likely in the ordinary course of events (chapeau requirement).

Article 25 of the *Rome Statute* sets out the various ways in which individuals may held liable for the commission of international crimes. These include:

- committing a crime, whether as an individual, jointly with another or through another person;

⁶² *Ibid.*, arts. 13(a) and 14.

⁶³ *Ibid.*, art. 13(b).

⁶⁴ *Ibid.*, arts. 13(c) and 15.

⁶⁵ *Ibid.*, art. 66.

⁶⁶ *Ibid.*, art. 30.

- ordering, soliciting or inducing the commission of a crime which in fact occurs or is attempted;
- aiding, abetting or otherwise assisting in the commission of a crime or its attempted commission, including providing the means for its commission, for the purpose of facilitating the commission of such a crime;
- in any other way, intentionally contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose with the knowledge of the intention of the group to commit the crime; and
- attempting to commit a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

Article 28 of the *Rome Statute* also provides for the criminal responsibility of commanders and other superiors if they:

- knew or should have known that their subordinates under their effective control had committed or were committing crimes; and
- failed to take all necessary and reasonable measures within their powers to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The provisions setting out the modes by which individuals may be held liable for the commission of international crimes would thus cover many of the scenarios involving the commission of crimes against future generations. For instance, in a scenario involving forced evictions that would amount to crimes against future generations arising out of a project undertaken by company A with the approval of state B, provided that all of the elements were met, it would be possible to hold the employees of company A liable for committing the crime of forced evictions, the directors of company A for ordering the crime of forced evictions and the officials of state B for aiding and abetting the crime of forced evictions. Alternatively, if the directors of company A did not order the crime of forced evictions, they might still be held liable pursuant to superior responsibility under article 28 of the *Rome Statute*.

2.4.1.3 Defences and Immunities

The *Rome Statute* provides many of the defences commonly found in criminal law, such as mental disease or defect, intoxication, self-defence, duress, and mistake of fact or mistake of law.⁶⁷ The *Rome Statute* rejects the defence of superior orders, save for situations where the accused person was under a legal obligation to obey the orders in question which they did not know were unlawful and which were not manifestly unlawful.⁶⁸ On the other hand, the *Rome Statute* rejects any grant of immunity to heads of states or governments and thus applies to all persons “without any distinction based on official capacity”.⁶⁹

2.4.1.4 Sentencing and Reparations to Victims

The ICC has the power to sentence a convicted person to a term imprisonment not exceeding 30 years or a term of life imprisonment. In determining the sentence, the ICC considers such factors as the gravity of the crime and the individual circumstances of the convicted person.⁷⁰ The ICC also has the

⁶⁷ *Ibid.*, arts. 31-32.

⁶⁸ *Ibid.*, art. 33.

⁶⁹ *Ibid.*, art. 27.

⁷⁰ *Ibid.*, art. 78.

power to impose a fine and the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime⁷¹ as well as order an award of damages against a convicted person, entailing restitution, compensation, and rehabilitation.⁷²

A Victims Trust Fund was established by the ICC administered by the Registry and supervised by an independent Board of Directors which manages the process of allocating funds to victims of crimes. The allocation of funds can take place either on an individual or collective basis.

The powers to order forfeiture and reparations would be particularly relevant to crimes against future generations. Orders for forfeiture and restitution would be appropriate in situations involving the commission of the crime listed at sub-paragraph 1(b) of the draft definition of crimes against future generations. Moreover, orders for compensation and rehabilitation would be appropriate in most situations involving crimes against future generations to cover not only the damages suffered by victims, but also enabling them to recover from the damages caused to their communities, environments, institutions, and their means of survival. The ability for funds to be allocated on a collective basis would moreover assist in addressing the long-term and massive impact of crimes against future generations on affected groups or collectivities.

2.4.2 Proscribing Conduct that would amount to crimes against Future Generations

Beyond the immediate benefits of their potential use for the purposes of prosecuting perpetrators and providing victims with reparations, the creation of crimes against future generations would give advocates and law-makers a new tool and concept for upholding the importance of certain norms and values and for criticising conduct in breach of these norms and values.

The notion of an international crime is indeed one of the most important means through which the international community can condemn morally opprobrious behaviour. International crimes are “breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).”⁷³ International crimes are of international concern because they involve crimes that are international in nature or scope (for example, a war crime in an international armed conflict), that affect the international order adversely (for example, the crime of aggression) or that shock the conscience of humankind (for example, crimes against humanity, torture and genocide). Crimes against future generations exhibit the principal features of international crimes to the extent that they are violations of customary or treaty norms that are intended to protect values considered important by the international community and that there is a universal interest in repressing these violations.

The creation of crimes against future generations would play a crucial role in demonstrating that serious violations of economic, social, and cultural rights and severe environmental harm are reprehensible and morally wrong and deserving of condemnation in the strongest possible terms.

⁷¹ *Ibid.*, art. 77.

⁷² *Ibid.*, art. 75.

⁷³ Antonio Cassese, *International Criminal Law* (Oxford: OUP, 2003), p. 23.

3. COMMENTARY ON THE LEGAL ELEMENTS OF CRIMES AGAINST FUTURE GENERATIONS

3.1 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 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.

3.2 The Chapeau Element in Paragraph 1

3.2.1 *Origins and Purpose*

The chapeau element of crimes against future generations draws on the principle of intergenerational equity.⁷⁴ The principle of intergenerational equity is a vital component of international law and policy on sustainable development, a concept defined by the Brundtland Commission as “development which meets the needs of the present generation without compromising the ability of the future generations to meet theirs.”⁷⁵ 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.”⁷⁶ Intergenerational equity arises out of the recognition of the particular vulnerability of future generations: “Future generations are disadvantaged because they are mute, have no representatives among the present generations. Consequently, their interests are often neglected in present socio-economic and political planning. They cannot plead or bargain for reciprocal treatment since they have no voice”⁷⁷.

The principle of intergenerational equity has been recognised in decisions of international bodies⁷⁸ and courts.⁷⁹ For instance, in the *Nuclear Weapons Advisory Opinion*, the International Court of Justice

⁷⁴ See generally, Jörg Tremmel (ed.), *Handbook of Intergenerational Justice* (Cheltenham: Edgar Elgar Publishing, 2006). See Oscar Schachter, *Sharing the World's Resources* (Bangalore: Allied, 1977), pp. 11-12; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989).

⁷⁵ World Commission on Environment and Development, *Our Common Future* (Oxford: OUP, 1987), p. 43.

⁷⁶ Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Cambridge: CUP, 2004), p. 124.

⁷⁷ World Commission on Environment and Development, *Our Common Future* (Oxford: OUP, 1987), p. 13.

⁷⁸ CESCR, *General Comment No. 12: The Right to Adequate Food*, UN ESCOR, 1999, UN Doc. E/C.12/1999/5, para. 7 (holding that the right to food requires that food must be made accessible for both present and future generations); CESCR, *General Comment No. 15: The Right to Water*, UN ESCOR, 2003, UN Doc. E/C.12/2002/11, para. 11 (holding that the right to water must be realized for both present and future generations); Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 2004, UN Doc. CRC/GC/2003/4, para. 13.

⁷⁹ *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Denmark v. Norway), 1993 ICJ Rep. 38 (Separate Opinion of Judge Weeramantry), pp. 211-279 (discussing the historical and cultural framework for inter-generational equity in global legal traditions), in particular p. 274 (referring to “the concept of wise stewardship [of natural resources] ... and their conservation for the benefit of future generations”);

acknowledged the catastrophic implications for future generations of the environmental harm from nuclear weapons.⁸⁰ 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.⁸¹

Inter-generational equity also appears in numerous international instruments, both in treaties⁸² and non-binding international agreements, resolutions, declarations and reports.⁸³ These references to

⁸⁰ Nuclear Weapons Advisory Opinion, para. 821.

⁸¹ *Ibid.*, para. 888.

⁸² *Charter of the United Nations*, 26 June 1945, Can. T.S. 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*, UN Doc. A/AC.237/18 (Part II) (Add. 1), Misc 6 (1993), 31 I.L.M. 848 (1992), art. 3(1) (“Parties 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.”); *International Convention for the Regulation of Whaling*, 2 Dec. 1946, 62 Stat. 1716, 161 U.N.T.S. 72, preamble (states that the “interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.”); *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 31 I.L.M. 1312, art. 2, para. 6(c) (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 needs.”); *World Cultural Property and Natural Heritage Convention*, 23 November 1972, 1037 U.N.T.S. 151, art. 4 (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 [...]”); *United Nations Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 822, preamble (declaring the determination of State Parties to “conserve and suitably use biological diversity for the benefit of present and future generations”); *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, 1001 U.N.T.S. 3, preamble (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.”); *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243, preamble (recognising that wild flora and fauna must be protected “for this and the generations to come.”); *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 17 June 1994, 33 I.L.M. 1328, prologue (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.”); *Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment*, adopted 14 February 1982, entered into force 20 August 1985, preamble (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.”) and Art. 1 (defining “conservation” as allowing “optimum benefit for present generation while maintaining the potential of [the] environment to satisfy the needs and aspirations of future generations.”); *Convention on Conservation of Nature in the South Pacific*, adopted 12 June 1976, preamble (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”); *Convention on the Conservation of Migratory Species of Wild Animals*, 23 June 1979, 19 I.L.M. 15 (1980), preamble (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.”); *Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region*, 21 June 1985, I.E.L.M.T. 985:46, preamble (stating that States Parties are “conscious of their responsibility to preserve their natural heritage for the benefit and enjoyment of present and future generations.”).

⁸³ *Declaration of the United Nations Conference on the Human Environment*, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev.1 (1973), reprinted in 11 I.L.M. 1416 (1972), Principle 1 (declaring mankind’s “solemn responsibility to protect and improve the environment for present and future generations”) and Principle 5 (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); *Rio Declaration*, Principle 3 (providing that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”); *World Summit for Social*

intergenerational equity most often take the form of a guiding or preambular concept in 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.⁸⁴ There are finally a few sources in international law and domestic law which refer to the rights of future generations.⁸⁵

Although the principle of intergenerational equity has not 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.

3.2.2 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 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).

The chapeau element also implies that crimes against future generations can be committed in peacetime and in war-time. This is most evident from the references to “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 of the draft definition provides that conflicts between the legal elements of crimes against future generations and the norms of international humanitarian law are unlikely to occur. Indeed, acts or conduct that would be prohibited as crimes against future generations would, in all but the most extreme of circumstances, run afoul of international humanitarian law principles governing the protection of civilian populations and the principles of military proportionality and necessity. In

Development Programme of Action, U.N. Doc. A/CONF.166/9 (1995), Part B, Art. 26(b) (asking States to fulfil their “responsibility for present and future generations by ensuring equity among generations.”); *Historical Responsibility of States for the Preservation of Nature for Present and Future Generations*, G.A. Res. 35/8, UN GAOR, 1980 (proclaiming “the historical responsibility of States for the preservation of nature for present and future generations.”); *Protection of Global Climate for Present and Future Generations of Mankind*, G.A. Res. 43/53, UN GAOR, 1988 (concerned with the “protection of the global climate for present and future generations.”); *ASEAN Agreement*, preamble (declaring that State Parties recognise the “importance of natural resources for present and future generations”).

⁸⁴ See Jörg Tremmel, “Establishment of Intergenerational Justice in National Constitutions,” in Jörg Tremmel (ed.), *Handbook of Intergenerational Justice* (Cheltenham: Edgar Elgar Publishing, 2006), p. 187.

⁸⁵ *Review of Further Developments in Fields with which the Sub-Commission has been concerned, Human Rights and the Environment*: Final Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN. 4/Sub.2/1994/9 (1994), Principle 4. (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.”); *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, (1994) 33 I.L.M. 173, at 11-12 (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.”)

addition, paragraph 2 of the draft definition limits its scope of application to civilian populations, as discussed in section 3.4 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, this requirement is a knowledge requirement, as for war crimes and crimes against humanity. It is not a special intent requirement, as for genocide, in order to avoid difficulties in proving that certain activities were undertaken with the intent to cause long-term harm to an identifiable group or collectivity.

The knowledge 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.⁸⁶ Moreover, knowledge could be inferred from the relevant facts and circumstances of a given case,⁸⁷ such as, *inter alia*, the perpetrator's statements and actions, their functions and responsibilities, their knowledge or awareness of other facts and circumstances, the circumstances in which the acts or consequences occurred, the links between themselves and the acts and consequences, the scope and gravity of the acts or consequences and the nature of the acts and consequences and the degree to which these are common knowledge.

The language of "substantial likelihood" is drawn from the customary international law standard for the *mens rea* element in ordering.⁸⁸ 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.

Similarly to 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."⁸⁹ While the terms "group or collectivity" refer to acts that necessarily affect a 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.

⁸⁶ See *Kumarac* Appeal Judgement, para. 102; *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, para. 140; *Rome Statute*, art. 30(3).

⁸⁷ Report of the Preparatory Commission for the International Criminal Court, Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), para. 3[ICC Elements of Crime].

⁸⁸ *Blaskic* Appeal Judgement, para. 42.

⁸⁹ *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 105 (stated in relation to the expression "civilian population") [*Blaskic* Appeal Judgement].

3.3 The Elements of Prohibited Acts

3.3.1 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

3.3.1.1 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 and to freedom of residence and movement⁹⁰ and the rights to work of one's choosing and to work in safe and healthy conditions.⁹¹

3.3.1.2 Interpretative Sources and Legal Analysis

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 involve forcing individuals to work in conditions that endanger the health or safety. Guidance for the interpretation of conditions endangering the health and safety of individuals should thus be sought in 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.

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*).⁹² Indeed, a footnote in the *ICC Elements of Crime* defines enslavement as including “exacting 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.” The crimes of forced labour and human trafficking would thus adopt the definition set out in the *ICC Elements of Crime* 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.” Other relevant sources include, for forced labour, the definition in *ILO Convention No. 29 concerning Forced or Compulsory Labour* (“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”)⁹³ and for human trafficking, the definition in the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime* (“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

⁹⁰ *International Covenant on Civil and Political Rights*, opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, 999 U.N.T.S. 171, arts. 9 and 12 [ICCPR].

⁹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966, entered into force 3 January 1976, 993 U.N.T.S. 3, arts. 6(1) and 7(1) [ICESCR].

⁹² See *Kunarac Appeal Judgement*, paras 539-540.

⁹³ *ILO Convention No. 29 concerning Forced or Compulsory Labour*, 28 June 1930, ILO Gen. Conf., 14th sess., entered into force 1 May 1932, art. 2(1). See also *ILO Convention No. 105 concerning the Abolition of Forced Labour*, 25 June 1957, ILO Gen. Conf., 40th sess., entered into force 17 January 1959, para. 2.

achieve the consent of a person having control over another person, for the purpose of exploitation”).⁹⁴

The crime of enforced prostitution should be interpreted by reference to the crime against humanity of the same name (Article 7(1)(g) of the *Rome Statute*). The *ICC Elements of Crime* 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.” 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.⁹⁵

3.3.2 Sub-paragraph 1(b): Unlawfully appropriating or acquiring the public and private resources and property of members of any identifiable group or collectivity, including the large scale embezzlement, misappropriation or other diversion of such resources or property by a public official

3.3.2.1 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.⁹⁶ In doing so, sub-paragraph 1(b) penalises the pillaging of public and private resources, including through the corrupt behaviour of a public official, of what has often been called the crime of spoliation.⁹⁷

3.3.2.2 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 the more fundamental and long-standing of these 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.⁹⁸ It has been taken up by numerous treaties relating to the law of armed conflict. The *1907 Hague Regulations*⁹⁹ 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 *Fourth Geneva Convention*¹⁰⁰

⁹⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime*, adopted pursuant to UN GA Res. 55/25 of 15 November 2000, entered into force 25 December 2003, art. 3(a). See also the *Council of Europe Convention on Action against Trafficking in Human Beings*, opened for signature 5 May 2005, not yet in force.

⁹⁵ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 21 March 1950, entered into force 25 July 1951, 96 U.N.T.S. 271.

⁹⁶ As discussed by Nico Schrijver in *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: CUP 1997), pp. 390-392.

⁹⁷ See Mdiva Kofele-Kale, *The International Law of Responsibility for Economic Crimes* (London: Ashgate Press, 2006); W. Michael Reisman, “Harnessing International Law to Restrain and Recapture Indigenous Spoliations,” (1989) *Am. J. Int’l L.* 83.

⁹⁸ *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Judgment, 26 February 2001, para. 99.

⁹⁹ *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*, The Hague, 18 October 1907, arts 28 and 47.

¹⁰⁰ *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [*Fourth Geneva Convention*].

and in Article 3(g) of Additional Protocol II.¹⁰¹ The *Rome Statute* includes the crime of pillaging as a war crime at Article 8(2)(b)(xvi). As such, the *ICC Elements of Crime* 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 Corruption*¹⁰²:

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.

3.3.3 Sub-paragraph 1(c): Deliberately depriving members of any identifiable group or collectivity of objects indispensable to its 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

3.3.3.1 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. Freedom from hunger implies a right to freedom from starvation, *i.e.* to the fulfilment of basic needs 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.”¹⁰³

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.”¹⁰⁴ The CESCR has concluded 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).”¹⁰⁵ 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.”¹⁰⁶

¹⁰¹ *Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict*, 8 June 1977, 1125 U.N.T.S. 609 [*Additional Protocol II*].

¹⁰² 31 October 2003, 2349 U.N.T.S. 41.

¹⁰³ CESCR, General Comment no. 12, 12 May 1999, U.N. Doc. E/C.12/1999/5, para. 14.

¹⁰⁴ CESCR, General Comment no. 15, 20 January 2003, U.N. Doc. E/C.12/2002/11, para. 3.

¹⁰⁵ *Ibid.*, para. 6.

¹⁰⁶ *Ibid.*, para. 10.

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 *ICESCR*, namely deliberate conduct that seeks to prevent individuals from accessing existing sources of food or water.¹⁰⁷

3.3.3.2 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* by “depriving [civilians] of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.” Another crime of relevance to sub-paragraph 1(c) is the underlying act of genocide of the deliberate infliction on a protected group of “conditions of life calculated to bring about its physical destruction in whole or in part” (*Rome Statute*, art. 6(c)). The *ICC Elements of Crime* 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.”

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

3.3.4.1 Origins and Purpose

Sub-paragraph 1(d) would penalise one of the most serious violations of the right to housing, which is guaranteed under article 11(1) of *ICESCR*. In defining the scope of the right to housing, the CESCR has paid particular attention to the practice of forced evictions.¹⁰⁸

3.3.4.2 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.”¹⁰⁹ 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.”¹¹⁰ 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 (*Rome Statute*, art. 6(c)).

¹⁰⁷ CESCR, General Comment no. 12, para. 15; CESCR, General Comment no. 15, paras 21 and 37.

¹⁰⁸ CESCR, General Comment no. 7, 20 May 1997, U.N. Doc. E/1998/22.

¹⁰⁹ *Ibid.*, para. 3.

¹¹⁰ *Ibid.*, at para. 4.

4.3.5 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

3.3.5.1 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.”¹¹¹

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.”¹¹²

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.¹¹³

3.3.5.2 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.¹¹⁴ 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” (*Rome Statute* art. 2(b)(x)).

3.3.6 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

3.3.6.1 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” while Article 15 of the *ICESCR* provides guarantees the right of everyone “to take part in cultural life”. The right to manifest one’s culture is a fundamental element of human dignity and is

¹¹¹ CESCR, General Comment no. 14, 11 August 2000, U.N. Doc. E/C.12/2000/2, para. 3.

¹¹² *Ibid.*, para. 8.

¹¹³ *Ibid.*, paras 34-36, 43-44.

¹¹⁴ *Ibid.*

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, verbal communication, oral and written literature, song, religion or belief systems which included rights 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 the community.¹¹⁵

3.3.6.2 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 and early drafts of the *Genocide Convention* contained provisions on cultural genocide. These 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.¹¹⁶ While the definition of genocide included in the *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.¹¹⁷

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

3.3.7.1 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 *ICESCR*. CESCR 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.¹¹⁸

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.¹¹⁹

¹¹⁵ CESCR, *Report on the Seventh Session*, U.N. ESCOR, 1993, Supp. No. 2, E/1993/122/E/C.12/1992/2, p. 58.

¹¹⁶ Report of the Ad Hoc Committee on Genocide, 5 April- 10 May 1948 (Official Records of the Economic and Social Council, Third Year, Seventh Session, Supplement No. 5 (E/794)), Art. HI.

¹¹⁷ William A. Schabas, *Introduction to the International Criminal Court* (Cambridge : CUP, 2007), p. 31.

¹¹⁸ CESCR, General Comment no 13, 8 Dec. 1999, U.N. Doc.E/C.12/1999/10, para. 1.

¹¹⁹ *Ibid.*, para. 57.

3.3.7.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(g) is based on the findings of CESCR on the most serious violations of the right to education.¹²⁰

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

3.3.8.1 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 treaties¹²¹ and instruments¹²² and has been recognized as having achieved customary status by the International Court of Justice.¹²³ The importance of this duty is that its breach can result in the imposition of State responsibility for transboundary environmental harm caused by activities within a state's control or jurisdiction.¹²⁴

In its Commentary on the *Draft Articles on State Responsibility*, the International Law Commission (ILC) makes numerous references to the duty not to prevent transboundary environmental harm as well as to environmental damages.¹²⁵ 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.¹²⁶ 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

¹²⁰ *Ibid.*, para. 57.

¹²¹ See, e.g., *United Nations Convention on the Law of the Sea*, 10 December 1982, Un Doc. A/CONF.62/122, Part XII; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 28 ILM 649, art. 2(8); *Convention on Long-Range Transboundary Air Pollution*, 13 November 1979, 18 ILM 1442, art. 1(b); *Convention on the Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 30 ILM 800, art. 2(2); *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849, Preamble [*Climate Change Convention*]; *Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution*, 24 April 1978, 1140 UNTS 133; *Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment*, adopted 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*, 29 January 1991, 30 ILM 773; *Charter establishing Gulf Cooperation Council, Including Rules of Procedure and Unified Economic Agreement*, 1987, 26 ILM 1131.

¹²² *Stockholm Declaration*, Principle 21 (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.”). See also *Rio Declaration*, Principle 2; and many regional treaties.

¹²³ Advisory Opinion on the Legality of the Use of Force by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, [1996] ICJ Rep. 226 [*Nuclear Weapons Advisory Opinion*].

¹²⁴ See the landmark case of *Trail Smelter Arbitration (United States v. Canada)*, (1938) 3 R. Int'l Arb. Awards 1911, reprinted in (1939) 33 AJIL 182.

¹²⁵ *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, most notably Article 14, para. 14; Article 31, para. 10 and Article 36, paras 14-15.

¹²⁶ *Yearbook of the International Law Commission*, 1976, Vol. II, Part Two, at 120.

enjoyment for everyone of a resource common to all mankind.”¹²⁷ 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.”¹²⁸ 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.”¹²⁹ This report includes a lengthy discussion of the notion of international environmental crime, which specifically refers to the rights of future generations.¹³⁰

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.” 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 ...].”¹³¹ 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.

3.3.8.2 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.” (*Rome Statute*, art. 8(2)(b)(iv)).

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 Additional Protocol I. 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) 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.¹³²

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 substantially 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

¹²⁷ *Ibid.*, at 54.

¹²⁸ *Ibid.*, at 95-96.

¹²⁹ *Ibid.*, at 121.

¹³⁰ *Ibid.*, at 101 and 108-109.

¹³¹ *Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) at 107.

¹³² Didier Pfirter, “Article 8(2)(b)(iv) – Excessive Incidental Death, Injury, or Damage” in Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute* (Boston : Kluwer Law International, 1999), pp. 149-151.

proportionality. It preserves the requirement that environmental damage must be “widespread, long-term and severe.”

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

3.3.9.1 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 (ICESCR, art. 11 and 12).

At another level, sub-paragraph 1(i) penalises serious violations of the right to environment. The right to environment forms an important and influential notion in 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 solidary right (for example, a people’s right to a healthy environment). In its formulation as economic, social, and cultural right, it recognizes the right of everyone 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 regional treaties,¹³³ international instruments, resolutions and reports¹³⁴ and the decisions of international bodies.¹³⁵

¹³³ See, e.g., Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, (1999) 38 I.L.M. 517, preamble (“Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being”) and art. 1 (“In 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”); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights*, 14 November 1988 (Protocol of San Salvador), OAS Treaty Series No. 69 (1988), art. 11 (“Everyone shall have the right to live in a healthy environment and to have access to basic public services.”); *African Charter on Human and People’s Rights*, 26 June 1981, OUA Doc. CAB/LTG/67/3/Res. 5, art. 24 (“All peoples shall have the right to a general satisfactory environment favorable to their development.”).

¹³⁴ See, e.g., *Stockholm Declaration*, Principle 1 (“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”); *Rio Declaration*, Principle 1 (“They are entitled to a healthy and productive life in harmony with nature.”); United Nations General Assembly Resolution 45/94, 14 December 1990, UN Doc. A/RES/45/94 (1991), para. 1 (“individuals are entitled to live in an environment adequate for their health and well-being”); *Declaration on the Rights of Indigenous Peoples*, UN Human Rights Council, Resolution 2006/2, Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994, Annex, art. 29(1) (“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”); *Declaration of Santa Cruz de la Sierra*, 26 November 1996, OAS GT/CCDS-51\96 rev. 2, at para. 2 (reaffirming that “human beings are entitled to a healthy and productive life in harmony with nature.”); *Hague Declaration*, Preamble, para. 1 (“The 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.”); *The Dublin Declaration on the Environmental Imperative*, Council of Europe, 7 July 1990, (1990) Eur. Comm. Bull., No. 6, 17, para. 19 (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”); *ECE Charter on Environmental Rights and Obligations*, December 1990, UN Doc. ENWA/R.38., art. 1 (“Everyone has the right to an environment that is adequate for his general health and well being.”); *Draft European Charter on Environment and Health*, 8 December 1989, World Health Organisation, art. 1 (“Every

3.3.9.2 Interpretative Sources and Legal Analysis

Sub-paragraph 1(i) specifically draws on the general comments issued by the CESCR on these rights in focusing on the release of substances or organisms in the air, water and soil. Indeed, the CESCR has emphasized the obligation for 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.”¹³⁶ 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.”¹³⁷ 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 substances and radiological hazards that constitute a threat to a person’s health,”¹³⁸ that respecting the right to water entails refraining, *inter alia*, from “unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons”.¹³⁹ 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.”¹⁴⁰ Commenting on the right to food, the CESCR has held that states are obliged to set “requirements for food safety and for a range of protective measures by both public and private

individual is entitled to: an environment conducive to the highest attainable level of health and wellbeing.”; Parliamentary Assembly of the Council of Europe Recommendation 1130 (1990) on the *Formulation of European Charter and European Convention on Environmental Protection and Sustainable Development*, adopted 28 September 1990, art. 1 (providing for a human right to an environment “conducive to [...] good health, well-being and full development of the human personality.”); *Draft Principles on Human Rights and the Environment*, in particular art. 2 (“All persons have the right to a secure, healthy and ecologically sound environment.”), art. 4 (“All 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.”), and art. 5 (“All 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.”); *Bizkaia Declaration on the Right to Environment*, International Seminar of Experts on the Right to Environment, organised by UNESCO and the High Commissioner for Human Rights 24 September 1999, UN Doc. 30C/INF.11. (“Everyone has the right, individually or in association with others, to enjoy a healthy, ecologically balanced environment.”); Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (1986), principle 1 (“All human beings have the fundamental right to an environment adequate to their health and well-being.”); ECE Experts Meeting, Oslo, October 1991, *Draft Charter on Environmental Rights and Obligations* (proclaiming the right of everyone “to an environment adequate for his general health and well-being.”); *Declaration of Limoges*, 1991, reprinted in (1991) 21 *Environmental Law & Policy* 39 (recommending the recognition of a “human right to the environment”); IUCN, *Draft International Covenant on Environment and Development*, Cambridge, United Kingdom, IUCN, 2000, art. 12(1) (“Parties undertake to achieve progressively the full realization of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity.”).

¹³⁵ See, e.g., *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) [1997] ICJ Rep. 78 (separate opinion of Judge Weeramantry) p. 109 (“The people of both Hungary and Slovakia [...] are entitled to the preservation of their human right to the protection of their environment.”) and p. 111 (“The 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.”).

¹³⁶ CESCR, General Comment no. 14, 11 August 2000, U.N. Doc. E/C.12/2000/2, para. 15.

¹³⁷ CESCR, General Comment no. 4, 13 December 1991, U.N. Doc. E/1992/23, para. 8.

¹³⁸ CESCR, General Comment no. 15, para. 12.

¹³⁹ *Ibid.*, at para. 21.

¹⁴⁰ *Ibid.*, at para. 23.

means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain.”¹⁴¹

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

3.3.10.1 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.

3.3.10.2 Interpretative Sources and Legal Analysis

Sub-paragraph (j) is based on a similar catch-all provision for crimes against humanity (*Rome Statute*, art. 7(1)(k)).¹⁴²

3.4 The Definition of Identifiable Groups or Collectivities in Paragraph 2

Paragraph 2 defines the expression “any identifiable group or collectivity” used throughout paragraph 1. In the context of crimes against future generations, this expression should be interpreted in accordance with the same sources and principles as for the interpretation of this expression in the context of article 7(1)(h) of the *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”. The principal difference between the two provisions is the inclusion of geography as a ground. The term “any identifiable group or collectivity” for the purposes of crimes against future generations is thus 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.¹⁴³ 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 tied 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 which it seeks to protect from harm.

¹⁴¹ CESCR, General Comment no. 12, 12 May 1999, U.N. Doc. E/C.12/1999/5, para. 10.

¹⁴² For more discussion of this crime, see section 2.3.2 above.

¹⁴³ *Prosecutor v. Jelisic*, Case No. IT-95-10, Trial Judgment, 14 December 1999, paras 33 and 54.

4. CONCLUSION

For crimes against future generations to fit within the existing framework of international criminal law, they would have to crystallize as norms of customary international law or be enshrined in an international treaty. In addition, for such crimes to be eventually prosecuted, a court would have to be given jurisdiction over them. The most obvious route for recognizing crimes against future generations under international law and for ensuring that a court has jurisdiction over them would therefore involve an amendment to the *Rome Statute*.

The *Rome Statute* explicitly provides for the possibility of amending the provisions dealing with the crimes within the jurisdiction of the ICC.¹⁴⁴ This possibility was left open as a result of a compromise reached during the Rome Conference to consider the eventual inclusion of other international crimes, most notably “treaty crimes” dealing with terrorism and drug trafficking and other types of crimes against humanity and war crimes.¹⁴⁵

The *Rome Statute* sets out the following process for amending the provisions dealing with the crimes within the jurisdiction of the ICC:

- a State Party must propose an amendment to the *Rome Statute*, which is then circulated to the State Parties by the Secretary-General of the United Nations (*Rome Statute*, art.121(1));
- at its next meeting held at least three months after the proposal has been circulated, a majority of the Assembly of State Parties must decide to take up the proposal, either by dealing with the proposal directly or by convening a Review Conference (*Rome Statute*, art. 121(2));
- either at its meeting or at a Review Conference, a two-thirds majority of States Parties must vote in favour of the Amendment (*Rome Statute*, art. 121(3));
- the amendment enters into force only for those State Parties that have accepted the amendment one year after they have notified their acceptance; however, if the amendment has been accepted by a seven-eighths majority of States Parties, the amendment enters into force for all State Parties and those State Parties that have not accepted the amendment may withdraw from the Rome Statute with immediate effect (*Rome Statute*, art. 121(3) and (4)).

Of course, before the formal *Rome Statute* amendment process for the creation of crimes against future generations can be initiated, it will be necessary to launch a policy dialogue and campaign to further develop the concept of crimes against future generations and build support for its inclusion in the Rome Statute. In developing such a campaign, it will be vital to distinguish crimes against future generations from other international crimes that were not included in the *Rome Statute* at the Rome Conference. A majority of states opposed the inclusion of “treaty crimes” in the Rome Statute 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.¹⁴⁶

¹⁴⁴ See, e.g., *Rome Statute*, arts. 121(5) and 1231(1).

¹⁴⁵ Tuiloma Neroni Slade and Roger S. Clark, “Preamble and Final Clauses,” in Roy S. Lee, ed., *The International Criminal Court. The Making of the Rome Statute. Issues. Negotiations. Results.* (The Hague: Kluwer Law International, 1999) 421, pp. 440-441.

¹⁴⁶ Darryl Robinson, “Crimes within the Jurisdiction of the Court,” in Roy S. Lee, ed., *The International Criminal Court. The Making of the Rome Statute. Issues. Negotiations. Results.* (The Hague: Kluwer Law International, 1999) 79, pp. 81 and 86.

This legal working paper responds to many of these concerns. First, it establishes that the concept of crimes against future generations draw on existing international criminal law, international human rights law, and international environmental law. Second, it demonstrates that crimes against future generations would penalise serious violations of economic, social, and cultural rights and international environmental law that should be penalised by the *Rome Statute*. Third, it discusses the inadequacy of existing mechanisms for sanctioning violations of economic, social, and cultural rights and serious environmental harm and the lack of seriousness with which they violations are addressed when compared to other international crimes that are comparable gravity. Finally, it points to the advantages of using international criminal law to penalise serious violations of economic, social, and cultural rights and international environmental law.

In the end, this legal working paper shows that the creation of crimes against future generations would respond to two long-running concerns in international law: the unjustified primacy accorded to civil and political rights against economic, social, and cultural rights in the field of human rights and the effort to end impunity for violations of international law that have serious consequences for the life, dignity and well-being of humans in the field of international criminal law. In moving the law forward in both of these areas, crimes against future generations would thus advance crucial efforts for protecting the core of all human rights and the environment for the benefit of present and future generations.

ANNEX A: BIOGRAPHIES

1. Author

Mr. Sébastien Jodoin (Canada), M.Phil. (Cantab.), LL.M. (L.S.E.), B.C.L., LL.B. (McGill) is an international law and policy expert and advocate specialising in environmental governance, human rights, sustainable development, climate change and international criminal justice.

Sébastien is currently a Public Interest Law Fellow at Amnesty International Canada, where he works on litigation and research relating to human rights in Canada and abroad. He is also a Legal Research Fellow at the Centre for International Sustainable Development Law (CISDL) and sits on its Board of Governors. With the CISDL, Sébastien has undertaken consulting, capacity-building and research projects with, most notably, the Canadian and Quebec governments, the World Future Council, the United Nations, and the International Development Law Organisation.

Sébastien regularly delivers presentations at conferences and international negotiations on climate change and sustainable development. He also frequently participates in hearings held by parliamentary commissions and other government bodies in Canada. He has been involved in legal challenges and interventions before the Supreme Courts of Canada and the United States, the Federal Court of Canada, the Canadian Human Rights Tribunal and the Military Police Complaints Commission.

Sébastien previously worked in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, the Office of the President and Trial Chamber III of the International Criminal Tribunal for Rwanda and in the McGill Special Court for Sierra Leone Legal Clinic. He has also served as Executive Editor of the Québec International Law Review.

Sébastien holds a Master's degree in international relations from the University of Cambridge, a Master's degree in international law from the London School of Economics and Political Science and two law degrees in Common law and Civil law from McGill University. He also undertook an academic exchange at the Université Libre de Bruxelles.

Sébastien has received numerous awards and scholarships in support and recognition of his work and studies, including an Associate Fellowship from the Centre for Human Rights and Legal Pluralism, a Public Interest Law Fellowship from the Law Foundation of Ontario, a John Peters Humphrey Fellowship in Human Rights from the Canadian Council for International Law, a Bursary from the Cambridge Commonwealth Trust, an International Bar Association Fellowship in International Criminal Law, a Young Professionals Award from the Government of Canada, and a J.W. McConnell Scholarship from McGill University. Among other honours, he has been named to the Earth Institute's Global Roundtable on Climate Change and the Kyoto Mind Advisory Group. His work has been published in leading peer-reviewed journals, such as the *Leiden Journal of International Law* and the *International Criminal Law Review*, and has been cited in a report of the International Law Association Committee on Sustainable Development and in the *Oxford Companion to International Criminal Justice*.

2. International Advisors

Marie-Claire Cordonier Segger (UK / Canada / Switzerland), MEM (Yale), BCL & LL.B (McGill) is a leading international legal scholar in the field of sustainable development and Director of the CISDL, in a pro bono academic capacity. At the CISDL, she serves as a mentor for CISDL lawyers and fellows, writes and edits international law research and publications, trains senior officials and high court judges, and provides international legal advice, through the United Nations, to countries in the Americas, Africa and Asia on the implementation of sustainable development accords, including trade and investment agreements, the Cartagena Protocol and the Kyoto Protocol.

She also serves as a Fellow of the Lauterpacht Research Centre for International Law (LRCIL) at Cambridge University Faculty of Law in the United Kingdom, and as a visiting Professor at the University of Victoria Law Faculty and at the International Development Law Organization (IDLO). She has authored / edited eleven books on sustainable development law and policy in three languages, including *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004) with A. Khalfan; *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff, 2004) with former Vice-President of the International Court of Justice, Judge C. G. Weeramantry; and *Sustainable Development in World Trade Law* (Kluwer Law International, 2005) with Dr. M. Gehring. Also in her personal capacity with the CISDL, she serves on the board of the International Law Association (Canadian Branch), as an expert on the International Law Association's (ILA) Committee on International Law on Sustainable Development, as a councillor of the World Future Council, and as a chair of the IUCN Environmental Law Commissions' Expert Group on Trade and Environment Law. She chairs a joint CISDL – ILA – IDLO Partnership on International Law for Sustainable Development that was launched at the 2002 World Summit for Sustainable Development, is a fellow of the Royal Society of the Arts, is profiled by the United Nations Environment Programme in their global 'Who's Who of Women and the Environment', has twice been appointed to an AVINA Fellowship, and has held several valuable international awards including a Chevening and a SSHRC Fellowship for a Ph.D. in International Law at Oxford University (Exeter College). Previous to her work at the CISDL, she coordinated international law seminars at Oxford University; taught international environmental law at the CERIUM, University of Montreal; directed a collaborative Americas Portfolio for the International Institute for Sustainable Development (IISD); and served as a Fellow at the Royal Institute of International Affairs in London, UK.

Marie-Claire, in her professional capacity, also leads International Affairs at Canada's Ministry of Natural Resources. For Natural Resources Canada, she serves on the Advisory Board of the International Trade and Investment Centre (Conference Board of Canada), on the Management Committee of the Extractive Industries Transparency Initiative (EITI) Trust Fund and the Governance Committee of the EITI Board, and on the Board of the UN's International Panel on Sustainable Resource Management. She is fluent in French, English and Spanish, and also speaks German and Portuguese.

Judge Christopher G. Weeramantry (Sri Lanka) is the former Vice President, International Court of Justice, and Chair of Weeramantry International Centre for Peace, Education and Research Judge Weeramantry, a member (1991 - 2000) of the International Court of Justice and a former Vice President of that Court, was prior to his appointment to the Court a Professor of Law and a Justice of the Supreme Court of Sri Lanka. He is a Doctor of Laws of the University of London and the author of numerous books and articles published throughout the world on peace, intercultural understanding,

human rights and many other related legal topics. He is founder of the Weeramantry International Centre for Peace, Education and Research (WICPER), Colombo, Sri Lanka, and is currently an Emeritus Professor in the Law Faculty at Monash University, Victoria, Australia.

Ashfaq Khalfan (Kenya), B.C.L & LL.B (McGill), B.A. Hons. (McGill) helped found and has served as a Director of the Centre for International Sustainable Development Law since 1999. He is also Coordinator of the Right to Water Programme at the Centre on Housing Rights and Evictions. He co-authored *Legal Resources for the Right to Water: National and International Standards* (COHRE, 2004) and *Monitoring the Right to Water: A Framework for Developing Indicators* (Heinrich Boll Foundation, 2005) as well as several book chapters on national implementation of the right to water. He has provided legal and policy advice to international organisations and civil society organisations involved in international campaigns on the right to water. He is author of *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004) with M.C. Cordonier Segger. He has written a range of book chapters and journal articles on legal and judicial reform, minority rights and constitutional reform, human rights and development financing and principles of international law related to sustainable development. He has previously worked with the Federal Department of Justice in Canada and the Investigations Branch of the Canadian Human Rights Commission. He has also worked with the Law & Society Trust, a Sri Lankan human rights NGO where he coordinated the work of a civil society coalition on constitutional reform in 2000 and with the Kituo Cha Sheria (Legal Advice Centre) in Kenya carrying on research on insecurity in informal settlements. He has served as an editor on the *Revue québécoise de droit international*, a Montreal-based international law journal. He is from Kenya and speaks English, Swahili and French.

Prof. Salim Nakhjavani (South Africa), LL.M (Cantab.), BCL & LLB (McGill), is Lead Counsel for Cross-cutting Issues at the Centre for International Sustainable Development Law (CISDL). He is Lecturer in Public Law at the University of Cape Town in South Africa, where he conducts undergraduate and postgraduate teaching and research in general public international law and international criminal law. He previously served as Associate Human Rights Officer at the UN Office of the High Commissioner for Human Rights and Assistant Legal Adviser in the Office of the Prosecutor of the International Criminal Court. He was elected to the Whewell Scholarship in International Law in the University of Cambridge in 2002. He has lectured on international human rights law and specialist topics in international criminal law in Germany, Italy, Norway and Australia. His current research work focuses on international criminal law and procedure. He has published articles on compliance-building in international sustainable development law and state responsibility for breaches of international environmental law. Mr. Nakhjavani currently resides in Cape Town, South Africa with his spouse, and is fluent in French and English, with notions of isiXhosa.

Dr. Maya Prabbhu (United States) LL.B. (McGill), M.D. (Dalhousie Medical School), M.Sc. (Political Economy, LSE), A.B. (Social Studies, Harvard) is Lead Counsel for Sustainable International Health Law at the CISDL. A medical doctor and a lawyer, her research interests include international humanitarian law, post-traumatic stress disorder in post-conflict situations and various issues at the nexus of health and human rights. Dr. Prabbhu's past experience includes health policy analysis at the United Nations Policy Development Branch, the International Affairs Division of Health Canada, the Canadian International Development Agency and the Manitoba Center for Health Policy and Evaluation. She has previously practiced corporate litigation at Davis Polk & Wardwell in New York and most recently was a Deputy Counsel with the Volcker investigation into the UN Oil-for-Food-Programme. She is currently with continuing her specialization at the University of Toronto in the department of psychiatry.

Mr. Jaykumar Menon, B.A. (Brown), M.I.A. (Columbia), J.D. (Columbia), is a legal research fellow at the CISDL. He is also an attorney with the Center for Constitutional Rights in New York City. He is exploring commercial law solutions to the sovereign debt crisis that may be of use in courts and other fora. He was formerly with the New York boutique law firm of Rabinowitz Boudin, which specializes in the representation of developing country governments in U.S. courts, where he worked on matters on behalf of South Africa, Angola, Cuba, and other countries. With the Center for Constitutional Rights, he has worked on a variety of cutting-edge transnational litigation matters, serving as co-counsel in a case against Royal Dutch Shell for environmental degradation and human rights violations in Nigeria, lead counsel and co-counsel for student leaders from Tiananmen Square in a human rights suit against the former Premier of China, and on a trial team that won a \$4.5 billion judgment on behalf of victims of the Bosnian genocide. He was a co-finalist for the 2000 Trial Lawyer of the Year Award from Trial Lawyers for Public Justice. He has drafted a chapter on domestic, third-country litigation for a report commissioned by the U.S. Congress on legal options for addressing the Cambodian genocide. He has served as a judicial clerk in New Orleans for the Honorable Helen G. Berrigan, U.S. District Judge for the Eastern District of Louisiana, working on both civil and common law cases. He was a National Merit Scholar at Brown University, an International Fellow at Columbia University and twice a Harlan Fiske Stone Scholar at Columbia Law School.