

Introduction

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This book results from fascinating discussions triggered by the interdisciplinary seminars launched by Professor Hélène Ruiz Fabri at the Max Planck Institute Luxembourg for Procedural Law.¹ The general theme of these seminars concerned the scope and limits of various procedures put in place to give ‘some kind of justice’ to victims.² Despite the diversity of disciplines and topics, most analyses questioned multiple ways to ‘re-present’ absent generations and move forward.³ Some were devoted to past generations, while others dealt with future generations.⁴ This led to the idea of focusing on the dimension of absence and ‘re-presentation’.

The ‘absent’ is a notion known in most legal systems. As a legal notion, primarily used in civil law, it refers to one who has left, either temporarily or permanently, their domicile or usual place of residence or business, or

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1 See Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP – launched in 2019).

2 See Judith Shklar, *The Faces of Injustice* (Yale University Press 1990) and Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (OUP 2018).

3 On the presence of the absent, see Edith Goldbeter-Merinfeld, *Le deuil impossible* (De Boeck 2017) and Michaël Foessel, *Le temps de la consolation* (Seuil 2015) 293. On backward- and forward-looking outcomes processes, see William Zartman and Victor Kremenyuk (eds), *Peace versus Justice. Negotiating Forward and Backward-Looking Outcomes* (Rowman & Littlefield 2005).

4 See, for instance: Valérie Rosoux, ‘Memory, Cultural Heritage, and Legacies of Wars’ in Fen Hampson, Alp Ozerdem and Jonathan Kent (eds), *Handbook of Peace, Security and Development* (Routledge 2020); and Valérie Rosoux, ‘Negotiating on Behalf of Previous Generations: Justice in Post-Conflict Contexts’ (2020) 25(1) *International Negotiation* 93; Alessandra Donati, *Le principe de précaution en droit de l’Union européenne* (Bruylant 2021).

whose whereabouts are not known and cannot be ascertained by diligent effort. And yet, the absent may have a family, own a business or property, for whom or which life has to go on. Being absent does not mean having no interest or stake. However, one recurring related issue is determining who can legally speak in the name of, or represent the absent. The project takes root in this idea and widens it by considering the issue of the representation of all those who are not there now, stretching from those who are not there anymore because they have disappeared, to those who are not there yet, because they have not yet appeared. Past and future generations are not only emblematic of both ends of the spectrum but also of the fact that absents can indeed have interests and would therefore need someone to speak in their name/represent them.

We organised two specific workshops to problematise the issue.⁵ As suggested by numerous works in memory studies and environmental/climate law, a great deal is at stake. Millions of citizens are concerned by the existence – or lack – of procedures related to historical injustices⁶ and/or the protection of future generations.⁷

The workshops aimed to understand and analyse, from an interdisciplinary perspective (law, philosophy, sociology, political science) and with a procedural focus, the commonalities and differences between the representation of past and future generations. In this regard, they examined the articulation, in the international arena, between judiciary and non-judiciary procedural techniques, both in terms of reparation (towards past generations) and prevention (towards future generations). They did so by combining theoretical analysis with the examination of some relevant case studies. This methodology was conceived to allow us to shed light on what we considered the common ground between the representation of past and future generations. This common ground is built around some common

5 The seminars took place on 12 June 2020 and 2 December 2020 at the Max Planck Institute Luxembourg for Procedural Law.

6 Adam B Lerner, *Collective Trauma and the Making of International Politics* (OUP 2022).

7 See Alberto Alemanno, 'Protecting the Future People's Future: How to Operationalize Present People's Unfulfilled Promises to Future Generations' (2023) *European Journal of Risk Regulation* (forthcoming) and Sonya Djemni-Wagner and Victoria Vanneau (eds), *Droit(s) des générations futures* (IERDJ 2023) <<https://perma.cc/CE9G-MVAZ>>. On the link between memory and future thinking, see Meymune N Topcu and William Hirst, 'Remembering a Nation's Past to Imagine its Future: The Role of Event Specificity, Phenomenology, Valence, and Perceived Agency' (2020) 46(3) *J Exp Psychol Learn Mem Cogn* 563.

principles (the principles of institutional continuity and temporal non-discrimination), some common obstacles (legitimacy, indeterminacy, conflicting interests) and some familiar procedural techniques (the representation *stricto sensu* of the absents and, more broadly, the procedural avenues to consider their interests).

Following this shared reflection, we identified the two guiding questions at the origin of all contributions to this book: (1) who do we consider as ‘the absents’?; and (2) who represents them? We did not impose fixed once-and-for-all definitions and categories, but we shared some common understanding regarding the notions of absence and representation. We focused on two kinds of ‘absent’ parties: victims of political violence who belong to past generations and potential future victims to be protected. Similarly, we paid attention to both judiciary and non-judiciary procedures. This broad starting point allowed us to better circumscribe the notion of intergenerational justice.⁸ The notion of generation has been largely studied by sociologists, historians, political scientists, and legal experts.⁹ However, numerous questions still need to be explored.

Who can claim to be a legitimate guardian of past or future generations: official representatives, experts, families, or communities? Based on which criteria? Which relationship does the present generation entertain with past or future ones? Do they have specific legal and ethical obligations in this regard? Are these obligations only defined in terms of reparation and protection? Is harm transgenerational? Does the State play a specific role in defending the interests of past and future generations? When does reparation end? When does protection start? How can we correctly understand the combination between guilt, awareness, responsibility, equity, and

8 See: Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (OUP 1989); Edith Brown Weiss, ‘Our Rights and Obligations to Future Generations for the Environment’ (1990) 84 AJIL 198; Clara Sabbagh and Manfred Schmitt, *Handbook of Social Justice Theory and Research* (Springer 2016); Janna Thompson, ‘Historical Injustice and Reparation: Justifying Claims of Descendants’ (2001) 1 Ethics 114; Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016).

9 Karl Mannheim, ‘The Sociological Problem of Generations’ in Paul Kecskemeti (ed), *Essays on the Sociology of Knowledge* (Routledge and Kegan Paul 1952); Jane Pichler, ‘Mannheim’s Sociology of Generations: An Undervalued Legacy’ (1994) 45 British Journal of Sociology 481; ‘Les générations’ (1989) Vingtième Siècle. Revue d’histoire (special issue); Jean-François Sirinelli, ‘Génération’ in Claude Gauvard and Jean-François Sirinelli (eds), *Dictionnaire de l’historien* (PUF 2015) 299–301; Louis Chauvel, *Le destin des générations* (PUF 2010).

solidarity? All these questions show the need for a dialogue on these crucial but also polysemic notions.

Specificity of the Book

In the context of an avalanche of texts on historical and preventive responsibility, this book makes a unique contribution in three respects. Firstly, it seeks an articulation between the dynamics related to past and future victims. The notion of absence encompasses both figures and allows us to understand better the similarities and contrasts between both dynamics. At this stage, the scope and limits of procedures related to past and future injustices are studied in two separate fields: transitional justice and environmental/climate law. It is, therefore, useful to explore the interaction of the two. At first glance, the notion of intergenerational justice towards past and future generations might appear to refer to distinctive processes. However, as several chapters show, they are intimately connected. This book's underlying hypothesis is that arguments in favour of reparation towards past generations and protection towards future generations are not totally disconnected.

Secondly, the book gathers contributions from scholars anchored in law, political sciences, philosophy, ethics, and sociology. This interdisciplinary perspective provided challenging but also vibrant exchanges. The plurality of the approaches gathered in the book is indispensable to evaluating the significance and effectiveness of procedures enabling the representation of past and future generations. It also allows us to understand the multidimensional nature of the notion of generation.

Finally, the book's purpose is exploratory and pragmatic rather than prescriptive or normative. It is to analyse procedural choices and dilemmas and describe how judiciary and non-judiciary proceedings work. The intention is to raise and address questions regarding the scope and practical limits of concrete proceedings. To do so, it is fruitful to gather scholars coming not only from complementary disciplines but also from no less than four continents.

Taking the Longue Durée Seriously

When proceedings involve several generations, agreeing on what qualifies as injustice is difficult. As numerous chapters in this book indicate, the long-term effects of past violence on two, if not three, successive generations critically impact judiciary and non-judiciary processes. Taking into account the links between generations in such a *longue durée* is indispensable to apprehend the impact of past injustices and to frame the potential consequences of future ones.¹⁰ It also allows one to question the loyalty to those considered to have been unfairly treated. It poses the legitimacy issue of engaging proceedings in the name of those who have suffered, or will suffer, injustice.

To address all these issues, not restricting the analysis to the legal dimension based on rights is decisive. Proceedings can also be described as rational games depending on the parties' interests. Admittedly, judiciary and non-judiciary processes related to reparation, compensation, or prevention can hardly be understood without considering power asymmetries, strategic postures, and diverging – if not contradictory – interests. Yet, these processes cannot be studied without considering the emotional dimension of these processes. The significance of emotions such as guilt, humiliation, anger, hatred and fear explains largely why these procedures cannot be reduced to any form of bargaining¹¹. As well as considering rational dimensions (which remains critical), an understanding of procedures devoted to past and future injustices requires insight into psychological processes that scholars and practitioners do not always take seriously. The combination of these three dimensions (rights, interests, and emotions) constitutes the core of most analyses in the book.

The focus on the figure of 'the absent' allows us to question the appropriate time frame to achieve a form of intergenerational justice: should we consider immediate descendants of victims or adopt a longer-term approach? Likewise, should we pay attention only to the next generation

10 See Antoine Garapon, *Peut-on réparer l'histoire? Colonisation, Esclavage, Shoah* (Odile Jacob 2008); Lisa Ott, *Enforced Disappearance in International Law* (Intersentia 2011); Mariana Aguchar, *Discursive Processes of Intergenerational Transmission of Recent History* (Palgrave Macmillan 2016) and Grazyna Baranowska, *Rights of Families of Disappeared Persons. How International Bodies Address the Needs of Families of Disappeared Persons in Europe* (Intersentia 2021).

11 See Damien Short, *Reconciliation and Colonial Power. Indigenous Rights in Australia* (Routledge 2008).

or for more? The answers given to these interrogations are decisive in determining who the ultimate beneficiaries of judiciary and non-judiciary proceedings are. Hence, should we consider that the most critical challenge, in all cases (even those that regard past injustices), is determining the decision that will best serve current and, above all, future generations? Can we consider past or future generations represented in the framework of current proceedings as victims?

Each of these questions demonstrates the need to combine the currently available methods to build bridges between the fields of memory studies, international law, transitional justice, and environmental/climate law – to name but a few.

Outlines of the Book

The book is divided into two main sections. The first refers to the figure of ‘the absent’ in the framework of proceedings related to past injustices. The second discusses the same figure from a future-thinking perspective. Both parties tend to emphasise the main variables that determine the negotiation processes at the international, national, regional, and local levels. They also attempt to underline lessons for practice and theory.

In the initial chapter, Stipe Odak offers stimulating ‘conceptual starting points’. After distinguishing the ‘past absent,’ ‘present absent,’ and ‘future absent,’ he shows that the project of representing the figure of the absent (past, present, or future) is not without ambiguities. He also discusses the political and moral basis on which respect for past generations could be based and presents potential modes of representing the past absent.

Kritika Sharma completes this section with a legal analysis of ‘intergenerational victimhood at the International Criminal Court (ICC)’. In focusing on the representatives of absent victims or indirect victims, she questions the lasting impact of unimpeded and rampant international crime. Her chapter analyses the intergenerational dimension of the victims’ regime at the ICC. To do this, it explores the possibility of family members of victims participating in court proceedings and seeking reparations either as victims themselves or as successors of deceased victims.

Carlos J. Bichet Nicoletti concentrates on the past and future dimensions of the absent victim in international human rights adjudication. His contribution studies the contours of some of the decisions, procedural frameworks, and argumentative strategies used by regional human rights courts

to provide some sort of redress in cases involving violations that can have intertemporal dimensions, either because the victims are not present or because the interests of future victims might also be at stake.

The chapter written by Fé de Jonge guides us in the field of critical archival studies. It interrogates the absence or 'presence of victims in the preservation, articulation and retrieval of the International Criminal Tribunal for the former Yugoslavia (ICTY) archives'. This case study allows us to observe the links between victim communities, international adjudicative mechanisms, and archives of mass atrocities.

The perspective adopted by Sandra M. Rios Oyola is sociological. She considers the notion of absence related to the victims of enforced disappearance who have been violently removed from public existence and made invisible. The chapter examines how families' activism allows the disappeared to continue being represented in the public sphere. The case of Colombia is particularly emblematic due to its large number of cases of enforced disappearance. It raises crucial questions that are relevant on all continents.

In her chapter, Lily Martinet wonders how we can 'untangle competing claims over colonial cultural objects'. Describing the processes of 'longing, belonging and owning', she adopts a critical perspective based on generations and historical injustice. Her main argument is that a shift needs to occur from a legal framework grounded in ownership and property rights focusing on States and cultural objects as assets to an approach integrating human rights and recognising communities as cultural bearers and items as components of a shared heritage.

The way to come to terms with the colonial past is also at the core of the chapter written by Valérie Rosoux. Her participation in the Special Commission established in 2020 by the Belgian Parliament to deal with its colonial past raises the issue of failure. The empirical analysis of this emblematic case study underlines the weight of 'the absents' and the difficulty of agreeing on the most appropriate way to represent and honour them. The tensions that characterise the work carried out by the Parliamentary Commission show how ambiguous the notion of 'absent' is.

The pitfalls and challenges related to the Belgian case studies are confirmed by the broader analysis carried out by I. William Zartman on 'negotiating the past: correcting or resurrecting?'. This chapter relates to a diversity of cases (from Native Americans to Namibia and Rwanda). It raises the question of whether it is the past, the intermediate, or then present

situation that is being repaired. It also raises the question of numbers and apportionment and pays particular attention to the issue of restitution.

In the last chapter of the first section, Alexandra Harrington reflects on the notion of ‘peace for the future’ in studying ‘the incorporation of future generations in peace treaties and reconciliation institutions’. She reminds us that such agreements and entities expressly include future generations in their motivations as well as provisions such as education and the development of a robust, rule-of-law-based justice system. The critical lens used for the chapter’s analysis of peace agreements is that of the principle of prevention in the sense of agreements that are not only created to cause the cessation of hostilities in each State but also to prevent these hostilities from occurring again.

Harrington’s chapter lies at the intersection between both parts of the book. The subsequent chapters are indeed all devoted to analysing the proceedings concerning the representation of future generations. They show that several instruments and institutions can be mobilised at different levels of regulation, whether at international, regional or national levels.

In her chapter on ‘the rights of and obligations towards future generations’, Yumiko Nakanishi examines the rights that could be granted to future generations, in terms of both fundamental rights and intergenerational rights and compares them with the obligations to protect assumed by the current generation towards future ones, with a particular focus on the obligations borne by States and private companies.

Alessandra Donati also focuses on future generations, but under EU law. She indicates that the protection of future generations under EU law should be ensured through a four-fold strategy based on the principle of sustainable development, the precautionary principle, the principle of solidarity between generations, and the principle of environmental non-regression.

In the chapter devoted to ‘the greening of the Inter-American Court of Human Rights’, Luisa Cortat Simonetti Goncalves stresses the evolution of the case law at the Inter-American Court of Human Rights. She dissects the interaction between human rights and rights to future generations. She provides some venues of reflection that would reinforce the protection of both the rights of current and future generations.

Marta Torre Schaub and Marcos de Armenteras Cabot present an empirical assessment of ‘building climate law through intergenerational justice’. Their chapter examines the notion of intergenerational justice from the perspective of climate litigation by highlighting the tools and mechanisms

that could be mobilised in this framework to consolidate the protection of future generations.

In the chapter devoted to the ‘mechanisms available under the law of the sea to speak on behalf of future generations’, Elena Ivanova pays attention to the protection and preservation of the marine environment and marine resources. She draws attention to the actions and tools through which future generations’ interests could be voiced in the context of the law of the sea.

From a broader perspective, Rudolf Schuessler and Fritz Gillerke present a chapter entitled ‘Voice and no votes for future citizens’. Their analysis questions the opportunity and feasibility of representing, in the context of democratic processes, future generations. Against this backdrop, they provide a critical assessment of the rights and the entitlements that the representatives of future generations should have in present political processes to implement their representation mandate.

The following chapter concentrates on ‘democratic legitimacy, institutions for future generations and the problem of constitutional power’. In this study, Ludvig Beckham challenges the idea that future generations should always be given a voice in political decision-making to mitigate ‘presentist’ biases in democratic institutions. His main argument is that, although it may be feasible to include future generations by various mechanisms for proxy representation, they should not enjoy constitutional power.

From a practitioner’s perspective, Marcel Szabo focuses on the Hungarian Ombudsman for Future Generations. This specific case study allows him to examine the institutional interpretation and implementation of the interests of future generations in Hungary, with particular consideration to the institution of the Hungarian Deputy Commissioner Responsible for the Protection of the Interests of Future Generations. The analysis is highly stimulating and questions how we can ‘represent the interests of present and future generations at the same time’.

In the chapter entitled ‘how to see the invisible? The ‘methods’ of the rights of nature to represent future generations’, Michele Carducci and Silvia Bagni argue that, in the framework of our interconnected ecosystems, the recognition of the ‘rights of Nature’ is a powerful tool to also represent and protect the rights of future generations that will suffer the most from the degradation of the health and environmental conditions of the planet.

The last chapter entitled ‘The recognition of the rights of nature in Latin America – The lost linkage with the rights of future generations’ also focuses on the relationship between the rights of future generations and the

‘rights of Nature’. In this study, Luis A. López Zamora outlines the reasons behind the recognition by the constitutions of several Latin America countries of the ‘rights of Nature’ and provides a critical assessment of their use to the benefit of future generations.

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We are thankful to all contributors for their excellent work and collaborative attitude. While we were unable to meet systematically in-person to share drafts and ideas as we had planned, we held one workshop online and one in hybrid format. Everyone was generous with their time and comments. We are delighted to have managed to attract such a wide range of authors in terms of disciplines, geographical origin and age. A subject of such global interest clearly deserved it.

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