
International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys

Peter Lawrence*

Abstract

Stephen Humphreys in his article 'Against Future Generations' in this journal argues against intergenerational framings in the climate context, claiming that such framings work against future generations by carrying forward today's structural inequalities into the future. He contends that those using such framings tend to subordinate global intra-generational equity to local intergenerational equity, glossing over very significant differences in power and wealth amongst those impacted by climate change. This response to Humphreys' article argues that Humphreys has set up a false dichotomy: it is not only developed countries that care about future generations – developing countries are concerned about addressing poverty now and their own future generations. Humphreys' claim that climate litigation has and should limit itself to harms to persons alive now is also unconvincing. Most climate litigation involving children or young people to date has included claims brought by them both in relation to their own interests (now and in the future) and on behalf of future generations. The response points to cases where, contrary to Humphreys' position – harms extending to future generations have made a substantive difference in legal outcomes.

1 Introduction

Stephen Humphreys has recently published in this journal a provocative article entitled 'Against Future Generations' in which he argues against framing the climate problem as one of responsibility that present generations owe to future generations.¹

* Adjunct Senior Researcher, Faculty of Law, College of Arts, Law and Education, University of Tasmania, Australia. Email: Peter.Lawrence@utas.edu.au. The author would like to thank Bridget Lewis, Jonathan Boston and Jonathan Pickering for their helpful suggestions in relation to this article. All errors remain the responsibility of the author.

¹ Humphreys, 'Against Future Generations', 33(4) *European Journal of International Law* (2022) 1061.

an approach that he states has its roots in moral philosophy and United Nations (UN) norm building but has recently ‘gone mainstream’.² Humphreys clarifies at the outset that he is not against future generations per se³ but, rather, against this framing, which he argues ‘cannot sustain analytical precision or normative clarity’ and, in translation to policy, ‘obfuscate[s]’.⁴ His argument is that ‘future generations’ framing works against future generations by carrying forward today’s structural inequalities into the future.⁵ He contends that, by contrast, compelling reasons to act on climate change are already ‘clear-cut and extensive in regard to concrete persons alive today’.⁶

Humphreys’ article raises a series of interconnected issues of vital importance, including the value of intergenerational justice discourse both in the UN negotiation process and in academic literature. This short response is structured around a number of Humphreys’ key claims: (i) that future generations discourse tends to prioritize intergenerational over intra-generational justice; (ii) that intergenerational framings are incapable of translation into legal rights and policy; and (iii) that pursuing national institutions for future generations necessarily prioritizes the future wealthy and is not an appropriate approach for developing countries. Section 2 of this article addresses Humphreys’ claims that future generations discourse tends to prioritize intergenerational justice over intra-generational justice, acts as a smokescreen for the North to divert attention away from addressing poverty and ignores the fact that future generations are likely to vary enormously in terms of their wealth and power. While Humphreys’ point that future generations involve a widely diverging group in terms of wealth and power that should not be lumped together as a single group is well taken,⁷ it is argued here that his view distorts existing developing country views that have manifested a deep concern for their own future generations as well as for addressing poverty now.

The stakes in addressing this issue could not be higher. While current impacts of climate change are a sufficient basis for climate action now, scientists point out that the worst impacts will occur in the future, with the future poor hit hardest. Humphreys contention that intergenerational framings are incapable of translation to policy is unconvincing. Policy-makers cannot avoid making assumptions about the impact of policy on the future and on future generations.⁸ Making transparent these assumptions is of crucial importance. Rather than dismissing out of hand the intergenerational justice dimension, a better approach is to find the most convincing normative grounding for these assumptions, which can also serve as a blueprint for reform of the law. As pointed out by Werner Scholtz, ‘intergenerational equity cannot be viewed in

² *Ibid.*, at 1062.

³ *Ibid.*

⁴ *Ibid.*, at 1063.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See also van Dijk, ‘The Capability Approach as a Roadmap for Rethinking Intergenerational Justice’, in J. Linehan and P. Lawrence (eds), *Giving Future Generations of Voice, Normative Frameworks, Institutions and Practice* (2021) 42.

⁸ Partridge, ‘Introduction’, in E. Partridge (ed.) *Responsibilities to Future Generations* (1981) 1, at 14.

isolation from intra-generational equity which is the other side of the sustainable development “coin”; both should be pursued simultaneously’.⁹

This response then turns in section 3 to discuss Humphreys’ claim that intergenerational justice framings are incapable of translation into workable legal rules and that the focus in climate litigation to date has tended to be on the violation of human rights of people alive today. This response argues that, while a number of prominent climate litigation cases have focused on harm to the human rights of contemporaries, intergenerational equity has been pleaded in a significant number of climate change cases, especially those pursued by youth plaintiffs. Moreover, contrary to Humphreys’ position, intergenerational equity is capable of translation into meaningful legal concepts and outcomes that make a difference. This is demonstrated by reference to the German constitutional decision in *Neubauer* and the Queensland, Australia, decision in *Waratah Coal*.¹⁰ Further, it is suggested that intergenerational justice concepts can provide a fruitful basis for strengthening the representation of future generations’ interests in climate litigation in ways that are helpful to redressing the current bias against their interests.

This response then turns in section 4 to address Humphreys’ claim that pursuing national institutions for future generations is an unhelpful strategy as it necessarily prioritizes the interests of the future wealthy and is incapable of making a difference in terms of the climate problem considered globally. Humphreys’ approach entails rejection of the possibility that pursuing national institutions for future generations can offer benefits for developing countries. This does not stand up to close scrutiny. Moreover, such institutions can have benefits for addressing climate change from a global perspective. Section 5 draws some conclusions.

2 Tensions between Intergenerational Justice and Intra-generational Justice

Humphreys argues that the default in writing on future generations is to use the first person plural ‘we’ to lump together all current generations and thereby paper over existing differences in wealth and power.¹¹ He further argues that future generations discourse ‘tends to subordinate global intragenerational equity to local intergenerational equity’, contending that the philosopher Henry Shue prioritizes future generations in the USA over international justice concerns.¹² In addition, Humphreys argues that invoking future generations is a vehicle for the wealthy North to divert attention from international inequality now. More specifically, he contends that invoking

⁹ Scholtz, ‘Equity’, in L. Rajamani and J. Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, 2021) 335, at 346.

¹⁰ *Neubauer v. Germany*, Bundesverfassungsgericht (BVerfG), Order of the First Senate, Case no. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, 24 March 2021; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No. 6), [2022] QLC 21 (Land Court of Queensland).

¹¹ Humphreys, *supra* note 1, at 1073.

¹² *Ibid.*, at 1088.

the language of future generations glosses over the differences in the range of people impacted by climate change in terms of their power and wealth and thereby risks ‘clothing a parochial interest in universal garb’.¹³

Humphreys’ article helpfully highlights some key challenges in the climate change scholarship relating to future generations. However, some of his arguments involve a caricature of arguments found in the literature. In particular, his claim that philosophers using an intergenerational justice framing in relation to climate change tend to prioritize intergenerational justice over international justice or intra-generational justice is untenable. Most, if not all, of the major contributors writing on intergenerational justice and climate change carefully distinguish these different axes of justice, grapple with the difficult issue of how to reconcile these and propose ways of ensuring that intergenerational justice and intra-generational justice are both addressed in the climate change context.¹⁴ Ever since the first writings by philosophers in this field in the 1990s, there has been a clear tendency by these scholars to argue that industrialized countries have responsibility for addressing climate change as they ‘caused the problem’ and that it would be unjust for developing countries to forsake their right to development.¹⁵ Applying this line of reasoning, developing countries should be given space to increase emissions, while the wealthy countries drastically cut their emissions. For example, Henry Shue, writing in 1993, argued that fairness required that ‘those living in desperate poverty ought not to be required to restrain their emissions, thereby remaining in poverty, in order that those living in luxury should not have to restrain their emissions’.¹⁶ Shue went on to argue that fairness ‘required developing countries be allowed to increase their CO₂ [carbon dioxide] emissions while pursuing economic development as clean as possible while emissions of the wealthy nations be

¹³ *Ibid.*, at 1068.

¹⁴ J. Tremmel, *A Theory of Intergenerational Justice* (2009), at 5 (who distinguishes between international justice, intergenerational justice and intragenerational justice). For application of these definitions in the climate context, see P. Lawrence, *Justice for Future Generations: Climate Change and International Law* (2015), at 11. Approaches for reconciling these axes of justice in the climate context include Henry Shue’s argument for prioritizing subsistence over luxury rights. See Shue ‘Subsistence Emissions and Luxury Emissions’, 15(1) *Law and Policy* (1993) 39. S. Vanderheiden argues for a right to an adequate environment that includes climatic stability possessed by future generations (upon being born) and links this to the idea of equal per capita emissions, which allows per capita shares to rise amongst developing countries to meet their development needs, while the wealthy North countries must reduce their luxury emissions as well as implementing positive obligations that they owe to assist developing countries with their human and economic development. S. Vanderheiden, *Atmospheric Justice* (2008), at 249, 250. Lawrence has proposed an obligation on states to bring about long-term systemic reform to protect the long-term interests of future generations while maintaining minimum standards of protection for current generations. Lawrence, *ibid.*, at 78; see also Meyer and Roser, ‘Enough for the Future’, in A. Gosseries and L. H. Meyer (eds), *Intergenerational Justice* (2009) 219; E. A. Page, *Climate Change, Justice and Future Generations* (2006); Meyer and Roser, ‘Justice between Generations: Investigating a Sufficiency Approach’, 3(1) *Journal of Global Ethics* (2007) 3; Caney and Simon, ‘Climate Justice’, in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2021) 1, available at <https://plato.stanford.edu/archives/win2021/entries/justice-climate/> (see section 3 ‘Intergenerational Justice’ and literature cited therein).

¹⁵ Gardiner, ‘Ethics and Global Climate Change’, in S. M. Gardiner *et al.* (eds), *Climate Ethics, Essential Readings* (2010) 14.

¹⁶ Shue, ‘Subsistence Emissions and Luxury Emissions’, in Gardiner *et al.*, *supra* note 15, 200, at 202.

reduced by more than the amount by which emissions the poor nations increased, given their responsibility for causing the problem in the first place'.¹⁷

This tendency to attribute responsibility for addressing climate change to the developed countries while recognizing the right of developing countries to develop has continued to the present day. Thus, for example, Shue in his 2022 book *The Pivotal Generation* notes that, with the failure of wealthy countries to take strong mitigation action and transfer technology and finance to developing countries and with global emissions continuing to rise, leaders in developing countries are in a dilemma since the rapid rollout of energy to address poverty with a mix of renewables and fossil fuels – furthering intra-generational justice – can potentially put at risk their own future generations, undermining intergenerational justice.¹⁸ This is occurring in a context where the global carbon budget relative to a particular temperature rise is fixed. Shue argues that it would be profoundly unjust if India and Africa ‘could not develop because the carbon emissions budget is about to be used up by the already affluent’.¹⁹ This is in a situation that would not have arisen without the industrialized countries burning up so much of this budget already through their own development. However, he points out that ‘development produced at the price of exceeding the emissions budget would simply not be sustainable – it would in fact undermine itself’.²⁰ Shue goes on to state that ‘[t]he Indian government is entitled to give high priority to reducing poverty in India. India, which arguably is of all the countries in the world the most threatened by climate change, will cut its own throat, however, if it injects large additional amounts of CO₂ into the atmosphere and contributes to humanity’s exceeding the cumulative carbon budget for some “non-disastrous” amount of temperature rise’.²¹ Humphreys seizes on this passage to claim that this amounts ‘(no doubt unintentionally) to the same veiled threat that the West has long made to “the rest” ever since the Club of Rome: you must do this, regardless of whether we assist or not. It is an argument based on necessity – beside which the whole constructed edifice of “moral” responsibility can simply fall away. India must mitigate, the claim goes, for the sake of its own future generations regardless of what we do’.²²

Humphreys has taken Shue’s passage out of context and given it an interpretation at odds with Shue’s argument in the same work, according to which wealthy countries have (i) responsibility to assist developing countries in moving to low carbon development by sharing necessary technologies arising from their causal responsibility for climate change and (ii) negative responsibility not to exploit the vulnerability of the poor and weak.²³ Following the passage quoted, Shue goes on to state that ‘[i]t is vital, however, to remember that additional Indian carbon emissions will be such a dangerous problem for the planet only because of past and present emissions from

¹⁷ *Ibid.*, at 203.

¹⁸ H. Shue, *The Pivotal Generation* (2021).

¹⁹ *Ibid.*, at 70.

²⁰ *Ibid.*, at 70.

²¹ Humphreys, *supra* note 1, at 1088.

²² *Ibid.*

²³ Shue, *supra* note 18 at 71.

developed nations and more recently from the continuing and sharply worsening surge of overwhelmingly coal-driven development by China'.²⁴

While philosophers have struggled to find an answer to the difficult issue of balancing intergenerational justice and intra-generational justice, Humphrey's argument that we should just focus on climate impacts on real persons alive now is unconvincing.²⁵ If we were to take this approach, policy-making would be hamstrung in addressing problems that extend into the future.²⁶ While it is true that governments have enough information about harmful impacts of climate change happening now to take both mitigation and adaptation action, policy-making needs to be responsive to future scenarios that span a range of possible impacts across time,²⁷ including the potential for total breakdown of societal, economic and ecological systems.²⁸ While, at the outset of his article, Humphreys states that he is not arguing against 'imaginative engagement with the future' by rejecting intergenerational justice framings,²⁹ his article leaves unclear how climate policy that has serious impacts on what the world looks like – not just now and next year but also 10, 30, 50 and 100 years from now – can be made without making assumptions as to future generations' needs and interests and making ethical choices. Law and policy-making need to make explicit these assumptions and measure them against principles of justice. While finding agreement on principles of justice at the global level – and, indeed, at all levels – is inherently difficult, a failure to attempt this means implicitly prioritizing particular groups of interests of individuals or countries.

A further argument made by Humphreys is that future generations discourse has the 'insidious effect' of 'prioritiz[ing] one group's sacrifice (ours, of our lifestyles, in the planet's wealthier corners) over another's (theirs, of their aspirations, in "emerging markets"), both now and in the future'.³⁰ He further argues that the future generations discourse tends to redirect the notion of responsibility away from

²⁴ *Ibid.*, at 69.

²⁵ Humphreys, *supra* note 1, at 1063. A similar view is evident in the report by John Knox, Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/37/58, 24 January 2018, at 17–18 (where he contends that 'human rights law does not attempt to define the rights of future generations or of obligations of States to them', and that it is 'difficult, if not impossible, to define the rights of individuals who are not yet alive'). He further points out the fact of overlapping generations, noting that '[w]e do not need to look far to see the people whose future lies will be affected by our actions today. They are already here'. While applying human rights law to future generations is challenging, this approach unhelpfully excludes some of the creative climate change strategies in cases brought by young people which have pointed to harm being done to human rights of both (i) persons alive now and (ii) persons born in the future, invoking the principle of intergenerational equity, discussed below.

²⁶ J. Boston, *Governing for the Future: Designing Democratic Institutions for a Better Tomorrow* (2016).

²⁷ See Faets, Tamoudi and Reder, 'Fresh Perspectives on Intergenerational Justice: Comments on Social Criticism, Temporality, and Future Narratives', vol. 2, *Jahrbuch Praktische Philosophie in Globalen Perspektive* (2018) 279.

²⁸ International Panel on Climate Change (IPCC), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021), at 27.

²⁹ Humphreys, *supra* note 1, at 1064.

³⁰ *Ibid.*, at 1069.

‘well-established themes in the known and knowable present – adaptation, “loss and damage” technology transfer, “climate migrants” – towards vague abstract entities in a notional unbounded and unknowable future’.³¹ One difficulty with this claim is that it seems to imply that developing countries are not concerned about their own future generations as well as about addressing poverty now. Evidence that developing countries have concerns for both intra- and intergenerational justice can be seen in the campaign by the Republic of Vanuatu, which led to the UN General Assembly passing a resolution in March 2023 in which it sought an advisory opinion of the International Court of Justice (ICJ) in relation to climate change.³² The resolution requests the ICJ to address various questions, including ‘the obligations of states under international law to ensure the protection of the climate system ... for present and *future generations*’.³³ The ICJ is also tasked with examining the legal consequences under these obligations ‘with respect to ... peoples and individuals of the present and *future generations* affected by the adverse effects of climate change’.³⁴

In the global environment negotiations, developing countries have at times argued that inequity in the current generation should be addressed before inequity between generations is addressed (for example, when negotiating the Rio Declaration in 1992).³⁵ However, developing countries often have also expressed a dual concern for both ‘inter-’ and ‘intra-’generational justice. This is manifest, for example, in the ongoing UN negotiations related to the Global Summit on the Future, which is scheduled to take place in September 2024.³⁶ The position of developing countries involved in the early consultations relating to this summit and related to the proposed Declaration for Future Generations has been that the UN’s ‘development pillar’ and intra-generational justice must be given equal importance to intergenerational justice in this process.³⁷ This is consistent with an early study that analysed statements made in the UN climate negotiations, which found that developing country participants invoked obligations owed to future generations just as frequently as developed country participants but with the key difference being that developing countries tended to place responsibility for ensuring intergenerational justice on industrialized countries.³⁸ It is also unclear whether the reluctance of developed countries to support more strongly adaptation, loss and damage and ‘climate migrants’ can be attributed to future generations discourse as claimed by Humphreys.³⁹ It would seem plausible that this

³¹ *Ibid.*

³² Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, UN Doc. A/RES/77/276, 29 March 2023, at 3.

³³ *Ibid.*, at 3 (emphasis added).

³⁴ *Ibid.*, at 4 (emphasis added).

³⁵ Atapattu, ‘Global South Approaches’, in Rajamani and Peel, *supra* note 9, 183, at 193; Rio Declaration on Environment and Development 1992, 31 ILM 874 (1992).

³⁶ Modalities for the Summit of the Future, UN Doc. A/RES/76/307, 12 September 2022, para. 3.

³⁷ Statement on Behalf of the Group of 77 and China by Mr Muhammad Imran Khan, Counsellor, Permanent Mission of Pakistan to the United Nations, at the Informal Consultations on the Draft Elements Paper on the Declaration for Future Generations, New York, 7 September 2022, para. 26, available at www.g77.org/statement/getstatement.php?id=220907.

³⁸ Lawrence, *supra* note 14, at 159.

³⁹ Humphreys, *supra* note 1, at 1067.

reluctance rests more squarely on vested economic and political interests than inter-generational justice discourse.⁴⁰

Humphreys highlights that the future scenario models employed by the Intergovernmental Panel on Climate Change (IPCC) range from assuming that existing inequalities persist into the future, through to assuming that existing inequalities will be significantly reduced in the future, with no explanation as to how this is going to happen.⁴¹ He argues that the use of these models – through their neglect of existing inequalities – will operate to set in motion a future where such inequalities become a defining feature.⁴² This argument is unconvincing. While Humphreys demonstrates that some of the IPCC models involve far-fetched assumptions, particularly those models that assume trade, globalization and growth becoming environmentally sensitive, it seems nevertheless entirely reasonable that the IPCC draws upon models that include a range of assumptions as to whether inequality is addressed in parallel with addressing climate change. Indeed, if the IPCC reports only drew upon models involving inequalities being continued or getting worse, this could be interpreted as the IPCC implicitly endorsing the current failure to address inequality as well as climate change!

3 Climate Litigation

Humphreys argues that, as a category, ‘future generations’ is too vague to be the basis of rights on the grounds – future persons are constantly being born so the membership of this group is constantly changing.⁴³ On this basis, he goes on to argue that it is preferable to focus on the impact of climate change on persons alive now. Implicit in this view is the idea that climate litigation should also have this narrower focus, concentrating on the harm occurring to the human rights of persons alive now. Philosophers working on these issues have made the point that the composition of the category ‘future generations’, defined as persons born in the future, is constantly changing and that there is a constant overlap between current and future generations.⁴⁴ This fact does not make the category of ‘future generations’ any more indeterminate than other categories of vulnerable persons who have particular rights ascribed to them under the human rights treaties. For example, the category of ‘children’ is also constantly changing as persons fall within or outside the definition. This fact does not prevent the category from functioning as a legal category and from being the basis of particular rights that flow from the distinctive interests that the particular group has. To deny the utility of the category of ‘future generations’ altogether – which seems

⁴⁰ Stoddard *et al.*, ‘Three Decades of Climate Mitigation: Why Haven’t We Bent the Global Emissions Curve?’, 46(1) *Annual Review of Environment and Resources* (2021) 653, at 661–662.

⁴¹ Humphreys, *supra* note 1, at 1076–1081.

⁴² *Ibid.*, at 1081.

⁴³ *Ibid.*, at 1066.

⁴⁴ Barry, ‘Justice between Generations’, in P. Hacker and J. Raz (eds), *Law, Morality, and Society* (1977) 268, at 271.

implicit in Humphreys' approach – is in effect to deny the interests of the particular group or to make an unsupported assumption that this group's interests are identical to other groups. Thus, Humphreys' claim is that it is better to focus on the rights of individuals alive now, and he implies that individuals alive now – including young people, for example – necessarily have identical interests with persons born in the future. While there is a considerable overlap in the interests between young people alive now and those of future generations, one cannot assume an identity of interests between these two groups, and, in fact, empirical studies examining whether young people have a greater concern for future generations and other social groups have had mixed results.⁴⁵

Implicit in Humphreys' argument is the claim that climate litigation has tended to focus on the rights of persons alive now and that this is as it should be. While it is true that much climate litigation has relied on plaintiffs alive today demonstrating harm to their rights now (for example, the *Sacchi* case⁴⁶ and the *Urgenda* case⁴⁷), this does not mean that we should not push to reform both national and international law to allow representation of future generations. Such representation can be done through creative mechanisms, including, for example, through *amicus curiae* briefs that can highlight the interests of future generations.⁴⁸ These are not 'either or' propositions. Climate litigation should pursue claims based on both harm occurring to individuals now as well as harm to those individuals who exist in the future. Indeed, most climate litigation involving children or young people to date has included claims brought by

⁴⁵ I. Gonzalez-Ricoy and F. Rey, 'Enfranchising the Future: Climate Justice and the Representation of Future Generations', *WIREs Climate Change* (2019), at 7.

⁴⁶ In *Sacchi et al. v. Argentina et al.*, UN. Doc. CRC/C/88/D/104/2019 (8 October, 2021), the plaintiff youths in their petition argued that the United Nations (UN) Convention on the Rights of the Child 1989, 1577 UNTS 3, must be interpreted by taking into account the respondent's obligations under international environmental law, including their duty to ensure intergenerational justice for children and posterity. They argued that the principle of intergenerational equity was enshrined in the United Nations Framework Convention on Climate Change 1992, 1171 UNTS 107, and that the notion of states acting as stewards of public commons held in trust for the good of future generations had been recognized by human rights treaty bodies. C. Sacchi *et al.*, *Communication to the Committee on the Rights of the Child*, UN Doc. No. 104/2019 (23 September 2019), at 48, 54. This argument was not addressed in the decision of the human rights committee. See van Dyke, 'From Exacerbating the Anthropocene's Problems to Intergenerational Justice: An Analysis of the Communication Procedure of the Human Rights Treaty System', 10 *Earth System Governance* (2021) 100123.

⁴⁷ In the *Urgenda* case, a Netherlands non-governmental organization brought a claim against the government of the Netherlands on behalf of both nearly 900 Dutch citizens as well as future generations. *Urgenda Foundation v. Kingdom of the Netherlands*, Hoge Raad, ECLI:NL:HR:2019:2007, 20 December 2019. The district court decision invoked duties towards future generations, but the Appeal Court did not agree, taking the view that it was unnecessary to address the question of the standing of the plaintiffs to represent future generations because the claim on behalf of present generations in the Netherlands was admitted as admissible in itself, given the impact of climate change within the lifetime of the current generation of Dutch nationals. Hague Court of Appeal, *Netherlands v. Urgenda*, Case no. 200.178.245/01 (2018), at 1, para. 37.

⁴⁸ Lawrence and Köhler, 'Representation of Future Generations through International Climate Litigation: A Normative Framework', 60 *German Yearbook of International Law* (2018) 639.

them in relation to both their own interests (now and in the future) and also on behalf of future generations, invoking the concept of intergenerational equity.⁴⁹

In her survey of youth-led climate litigation, Elizabeth Donger concludes that, in all but three of these cases filed to date, arguments were based on the principle of intergenerational equity – ‘that is, arguments that the action or inaction at issue unlawfully prioritizes the present over the future’.⁵⁰ She also points out the centrality of rights of future generations in the German Constitutional Court’s decision in *Neubauer* in 2021⁵¹ and in the Colombian Supreme Court’s 2018 decision in *Andrea Lozano Barragán et al v. President of the Republic et al.*⁵² In referring to the Colombian decision, Humphreys states that it ‘surely [is] the exception that proves the rule’ in basing its decision on the environmental rights of future generations.⁵³ He refers to Donger’s analysis of youth-led climate cases, stating that most such cases ‘today are based on the rights of children alive today’.⁵⁴ But Donger’s analysis is more nuanced than presented here. In her analysis of the youth-led climate cases, Donger observes that the ‘future-generations framing fails to generate much-needed attention on the present day exclusion of children’s vulnerabilities from environmental law and policy’, partly because the cases have tended to involve environmental law experts without strong knowledge of human rights law, but she goes on to say that ‘[y]outh-led litigation should, where possible, advance arguments specific to children as [a] demographic as well as arguments for intergenerational equity’.⁵⁵

A recent decision of the Land Court of Queensland in Australia, the *Waratah Coal* case,⁵⁶ makes clear the value that is added by a court invoking future generations rather than limiting its analysis to the impact of climate change on the existing rights of children. In this case, the Court made a recommendation to the environment minister of Queensland to not permit a coal mine to proceed, based on various rights being limited by the mine, including the rights of children and indigenous rights. This decision was in a context where the Court was mandated to apply principles of ecological sustainable development, including intergenerational equity as well as the 2019 Queensland Human Rights Act.⁵⁷ Key for our purposes is that the Court, in balancing the various interests at stake, made clear that the intergenerational nature of climate change and the disproportionate burden of impacts that would fall on children today and in the future ‘at an ever-increasing level’ was critical to the decision.⁵⁸ The Court referred to expert evidence that demonstrated that large parts of Queensland would

⁴⁹ Donger, ‘Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilisation’, 11(2) *Transnational Environmental Law* (2012) 263, at 272.

⁵⁰ *Ibid.*, at 272.

⁵¹ *Ibid.*, at 273; *Neubauer*, *supra* note 10.

⁵² Donger, *supra* note 49, at 273; Colombia Corte Suprema de Justicia, *Andrea Lozano Barragán y otros v. Presidente de la República y otros*, STC4360-2018 A, Sala de Casación Civil (Appeals Chamber), 5 April 2018.

⁵³ Humphreys, *supra* note 1, at 5.

⁵⁴ *Ibid.*

⁵⁵ Donger, *supra* note 49, at 280.

⁵⁶ *Waratah Coal*, *supra* note 10.

⁵⁷ Queensland Human Rights Act, Act no. 5 (2019).

⁵⁸ *Waratah Coal*, *supra* note 10, paras 1588, 1589.

be unliveable by 2100 owing to climate change and that two-thirds of today's children would be expected to develop chronic conditions in their adult years in the second half of this century.⁵⁹ The Court stated that the

principle of intergenerational equity places responsibility with today's decision-makers to make wise choices for future generations. Children of today and the future will bear the more extreme effects of climate change and burden of adaptation and mitigation in the second half of this century. Their best interests are not served by actions which narrow options for achieving the Paris temperature goal. This weighs the balance against approving the applications.⁶⁰

Humphreys recognizes the 2021 German Constitutional Court's decision in *Neubauer*, which used basic rights in the German Constitution to require Germany to increase its mitigation obligations for the benefit of future generations.⁶¹ But he criticizes this decision for not recognizing the impact of German emissions on developing countries outside Germany and for not imposing any German responsibility for current climate impacts in Bangladesh, for example, 'nor any concrete obligation to assist present (much less) future generations there through adaptation, technology or otherwise'.⁶² Humphreys acknowledges that this would have been difficult given the territorial limitation of the German Constitution, which he notes is 'not surprising' as 'courts generally present as territorially bounded creatures, unprepared to prioritize foreign persons even in the present, much less in the future'.⁶³ This decision is a powerful example of how abstract ethical obligations towards future generations can be made concrete in law. Indeed, this aspect of the decision undermines Humphreys' argument that intergenerational ethical obligations are too vague to be translated into law. Moreover, while the decision did not go as far as to extend Germany's obligations towards the citizens of poorer countries such as Bangladesh for its climate change-related harms, the reduction of emissions by Germany would reduce global emissions and associated climate change impacts, benefitting all countries.

It is also important to remember that law is not just litigation. Recognition of future generations in legal and soft law frameworks is also important. At the risk of labouring the point, such recognition does not imply that the interests of future generations necessarily trump those of contemporaries. But given that future generations' interests – particularly, the interests of the future poor – will be those harmed most by climate change and in a context where these interests are largely ignored by policy-making and law-making, recognition of future generations' interests can be valuable in promoting justice. In its 2022 report, the Philippines' Commission on Human Rights' National Inquiry on Climate Change found that the world's largest producers of crude oil, natural gas and cement could be held responsible for human rights violations that result from climate change and stated that climate change goes against the principle

⁵⁹ *Ibid.*, para. 1593.

⁶⁰ *Ibid.*, para 1603, at 309.

⁶¹ *Neubauer*, *supra* note 10.

⁶² Humphreys, *supra* note 1, at 26.

⁶³ *Ibid.*, at 27.

of intergenerational equity by shifting burdens unfairly onto future generations.⁶⁴ While this report is non-binding, it can feed into pressure on making both governments and corporations accountable for their climate impacts, which extend to vulnerable people now and in the future.

4 Institutions for Future Generations

Humphreys argues that moral philosophers ‘generally’ apply the future generations framing to all future generations everywhere (acknowledging that there are some exceptions), and he points to the work of Stephen Gardiner.⁶⁵ Humphreys points out that there has been a disconnect between this cosmopolitanism and the building of effective institutions, with global institutions for future generations being rather lacking and with a retreat to national institutions such as commissioners for future generations and climate litigation, both of which have tended to have a national focus. He rejects the argument that the sum of national institutions for future generations could benefit all future generations everywhere because some countries may perceive that they actually benefit from climate change.⁶⁶

Humphreys’ dismissal of national institutions for future generations is unconvincing for a number of reasons. First, his criticism implies that, both from a global and a developing country perspective, there would be no benefit in a developing country establishing such institutions. While research on such institutions in developing countries is rather thin,⁶⁷ and measuring the effectiveness of such institutions is challenging,⁶⁸ it is difficult to understand why such institutions could not play a positive role in fostering longer-term sustainable policy-making. Of course, this would not be a substitute for wealthy industrialized countries taking the lead in reducing greenhouse gas emissions, funding adaptation in poorer countries, stepping up on technology transfer and compensating for loss and damage – a leadership role that, as Humphreys rightly points out, they have largely failed to take to date.⁶⁹

Humphreys’ claim that some developed countries may perceive that they will in fact benefit from climate change is not explained. While the IPCC reports that he cites

⁶⁴ Commission on Human Rights of The Philippines, National Enquiry on Climate Change: Report (2022), at 69, available at www.ciel.org/wp-content/uploads/2023/02/CHRP-NICC-Report-2022.pdf.

⁶⁵ S. Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (2011).

⁶⁶ Humphreys, *supra* note 1, at 1065.

⁶⁷ Network of Institutions for Future Generations, *Looking to 2030 and Beyond: How Institutions for Future Generations Can Assist in SDG Implementation*, June 2019 (which provides examples of national institutions for future generations that can assist in implementation of the UN sustainable development goals, but none of these examples come from developing countries with the exception of the Commission on Human Rights of The Philippines’ panel, discussed above. If institutions for future generations is defined as including institutions with a sustainability mandate, there may be a number of such institutions operating in developing countries. See, e.g., ‘Sustainable Development Policy Institute of Pakistan’, available at <https://sdpi.org/>.

⁶⁸ Lawrence and Linehan, ‘Introduction’, in J. Linehan and P. Lawrence (eds), *Giving Future Generations of Voice: Normative Frameworks, Institutions and Practice* (2021) 1, at 9.

⁶⁹ Humphreys, *supra* note 1, at 1075.

contain references to some limited benefits projected to flow from climate change,⁷⁰ these reports overall make clear that Europe and, indeed, all regions of the globe will suffer in net terms from climate change.⁷¹ Given this reality, it is difficult to understand Humphreys' contention that some developed countries might perceive that they will benefit from climate change. It is also important to note that there are some national institutions for future generations in industrialized countries that are embedded in a framework that requires decision-makers to take into account the global – not just national – impacts of their decisions. For example, the future generations commissioner for Wales must take into account the impacts on 'global well-being' when taking action to promote sustainable development in Wales.⁷²

5 Conclusion

In this short reply, I have argued that intergenerational justice framings are vitally important, together with intra-generational justice. And this importance not only covers the UN treaty process but also extends to climate litigation. To address the threat of climate change, intergenerational justice can and must be translated into policy and legal concepts. This involves a complex balancing between the needs of contemporaries and future generations, and there are no easy answers as to how to do this. But law- and policy-making often take place in contexts involving the challenging balancing of conflicting interests. And as Ernest Partridge has observed, barring a nuclear conflagration, there will be future generations.⁷³ International law needs to be responsive to this reality.

⁷⁰ *Ibid.*, at 1065; IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report (2022), at 1892, ch. 13 'Europe', FAQ 13.4, 1817–1927 ('[a]cross Europe, positive effects of climate change are fewer than negative impacts and are typically limited to some aspects of agriculture, forestry, tourism and energy sectors'). The same report points out that climate change will 'exacerbate energy poverty in regions where heating is a major share of energy costs'). *Ibid.*, at 1865.

⁷¹ *Ibid.*, at 1865.

⁷² See *Well-Being of Future Generations (Wales) Act 2015*, anaw 2, sections 4, 17.

⁷³ Partridge, 'Future Generations', in D. Jamieson (ed.), *A Companion to Environmental Ethics* (2001) 377.

