



# Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation

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## Abstract

The exacerbation of climate change effects has rendered the legal adaptation of granting future generations standing in climate change litigation, necessary to achieve intergenerational justice and to protect their human rights. International law and norms do not operate in a legal vacuum. Instead, they possess the evolutionary quality to respond to societal shifts specifically seen in climate change action. This transient quality is greatly questioned in the debate surrounding the current legal lacuna concerning the lack of legal recognition for future generations in climate change actions. This has consequential effects on intergenerational justice and their human rights. Whilst international law has implemented a number of climate change mitigation strategies, these are insufficient in protecting future generations. The granting of standing in climate change litigation adequately complements the current approaches in resolving the lacuna in the law between theory and practice.

## Keywords

International private law – international climate change law – environmental law – tort law – human rights – legal standing – liability

## 1 Introduction

This research addresses the question of whether standing can be granted to future generations in climate change litigation. In addition, this paper further explores the question of whether obligations to notions of intergenerational

justice and protection of human rights as well as surrounding issues of climate change, are safeguarded by granting future generations a standing in climate change litigation.

In order to answer these questions, intergenerational justice issues occurring due to climate change must first be identified. By looking at the Stern Review,<sup>1</sup> it will be argued that the importance and significance of mitigation action justifies the need of giving future generations a legal standing.

Moreover, the legal debate over the requirements of standing and the uncertainties relating to causation will be addressed by arguing that actors can be liable for their contributions to climate change effects influencing future generations. Tracing the successful legal developments across different jurisdictions, specifically that of the *Re Minors Oposa v. Secretary of the Department of Environment and Natural Resources (Philippines Children Case)*,<sup>2</sup> *Massachusetts v. Environmental Protection Agency (Massachusetts)*,<sup>3</sup> and *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment) (Urgenda decision)*,<sup>4</sup> it will be demonstrated how future generations fulfil the current standing requirements and how the doctrine on legal standing created by precedents can be suitably adapted as an international legal norm.

After establishing standing for future generations and the basis for its legal recognition, this paper shall argue for the attachment of rights on this group. Resting on the assumption that present generations will favour their self-interest over future generations and thus disregard the welfare of their descendants,<sup>5</sup> both a sociological and legal lens shall be employed in order to examine the importance of adhering to justice requirements for posterity. It shall be argued that the present generation owes core obligations to future generations.

In addition, this essay adopts a human rights approach, arguing that human rights, specifically the right to life, subsistence and health, are inextricably

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1 The Stern Review discusses the financial impact of climate change conclusively advocating for early action on climate change as the most economically viable option, with the costs of mitigation being far outweighed by the cost of inaction. See Stern Review, 'The Economics of Climate Change, Chapter 2 "Economics, Ethics and Climate Change"' in UNICEF UK, *A Brighter Tomorrow: Climate Change, Child Rights and Intergenerational Justice* (Report, UNICEF 2007).

2 *Re Minors Oposa v. Secretary of the Department of Environment and Natural Resources* [1994] 33 ILM 174.

3 *Massachusetts v. Environmental Protection Agency* [2007] 127 S Ct 1438.

4 *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)* [2005] C/09/456689/HA ZA 13-1396.

5 Christopher D Stone, *Should trees have standing? And other Essays On Law, Morals and the Environment* (Oceana Publications Dobbs Ferry 1996) 66.

linked to the viability of the environment.<sup>6</sup> Condemning climate change action that supports the trade-off of these rights,<sup>7</sup> the case for granting legal standing and the consequential attachment of rights, is made. This approach protects the entitlements of all individuals to their human rights by creating an obligation owed to future generations by the current one, in order to protect and not to exacerbate climate change effects.

Lastly, after establishing that an obligation is owed to future generations by the current one, the ways in which granting of a legal standing can achieve justice will be assessed. Framed within legal interdisciplinary methodologies, a tort-based approach shall be compared with Brown Weiss' conceptual idea of a planetary trust,<sup>8</sup> in order to argue that these solutions complement the current existing climate change mitigation strategies.

### 1.1 *Definitions*

There is an ambiguity surrounding the concept of future generations within legal discourse.<sup>9</sup> Characteristically, they do not make up a distinct group with one generation following the next sequentially. Rather than a linear conception, each generation overlaps the next.<sup>10</sup> Superficially, this essay agrees with Tremmel's definition of future generations as a cohort 'where none of its members [were] alive at the time the reference is made.'<sup>11</sup> However, in order to support the argument of attaching rights to this group, it is essential to define the complex and value-laden concept of future generations past a surface level. In accordance with Herstein's conception, future generations under law do not refer to a particular individual but rather a type of future person.<sup>12</sup> This is imperative to capture the diversity of the group and the collective nature of the rights of future generations,<sup>13</sup> in line with legal norms favouring a general non-subject rather than an individual.<sup>14</sup>

6 Simon Caney, 'Climate Change, Human Rights and Moral Thresholds,' cited in Stephen Gardiner et al. (eds) *Climate Ethics: Essential Readings* (OUP 2010) 166.

7 Ibid 165.

8 Edith Brown Weiss, 'The Planetary Trust: conservation and Intergenerational Equity' [1984] 11 *Ecology L.Q.* 495.

9 Joerg Chet Tremmel, *A Theory of Intergenerational Justice* (Earthscan 2009) 19.

10 Peter Lawrence, *Justice for future generations: climate change and international law* (Edward Elgar Publishing 2014) 18.

11 Tremmel (n. 9) 24.

12 Ori J. Herstein, 'The identity and (Legal) Rights of Future Generations' [2009] 77 *Geo. Wash L. Rev.* 1173, 1180.

13 Ibid 1187.

14 Ibid 1190.

Additionally tied to this notion is the concept of intergenerational justice which is defined in this paper within a climate change framework. Intergenerational justice is the level of mitigation the current generation must bear in order to offset the harmful climate change impacts and higher adaptation costs that would impact future generations.<sup>15</sup> Based upon Rawls traditional notions of justice, intergenerational justice is tied to the equal distribution of social goods.<sup>16</sup>

Moreover, climate change, for the purposes of this essay, is framed through an anthropogenic lens, in line with the conclusion of the Intergovernmental Panel on Climate Change (IPCC) report stating that human influence has led to a noticeable rise in greenhouse gas emissions and impact on global climate.<sup>17</sup> Therefore, climate change is viewed as changes in average weather patterns caused by humans and consequently, climate change litigation as legal challenges concerning these policies and norms.<sup>18</sup>

Furthermore, in centralising human rights as a core consideration for granting legal standing for future generations, this paper defines these rights in line with Caney as 'entitlements of each and every individual to certain minimal standards of treatment,'<sup>19</sup> and the corresponding obligation to respect these standards. Expanding upon this definition, this essay reflects Nussbaum's conception of the value of human rights as universal legal guarantees due to their protection of vital capabilities necessary for a fulfilling life.<sup>20</sup>

## 1.2 *Limitations and Scope*

Climate change litigation concerns issues of distributive justice across many planes such as intergenerational, intra-generational and international.<sup>21</sup> However, with established legal remedies already available to assist with intra-generational and international justice such as the carbon emissions trading scheme offsetting intra-generational inequities, this essay will only focus on

15 Tremmel (n. 9) 17.

16 David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (OUP 2007) 13.

17 Intergovernmental Panel on Climate Change, *Climate Change 1995: The Science of Climate Change, Contribution of Working Group I to the Second Assessment Report* (CUP 1996).

18 Navraj Singh Ghaleigh, "Six Honest Serving Men": Climate Change Litigation as Legal Mobilization and the Utility of Typologies' [2010] 1 *Climate Law* 31, 38.

19 Caney (n. 6) 165.

20 Martha Nussbaum, 'Capabilities and Rights' in Pablo de Greiff and Ciaran Cronin (eds) *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization* (MIT Press 2002) 165.

21 Lawrence (n. 10) 13.

resolving a legal lacuna in intergenerational equity. Furthermore, in limiting the scope of this paper to future generations, this essay will focus on assessing the effectiveness of granting legal standing to posterity in comparison to climate mitigation strategies only.

Based upon the premise that 'development of appropriate international law ha[s] emerged from regional, national and sub-national legal regimes addressing greenhouse gas (GHG) mitigation,'<sup>22</sup> the scope of this essay will be focused on a comparison of private law in a domestic context and its impacts on the development of adapting the legal concept of standing within an international framework. Lastly, by focusing and analysing different jurisdictional cases in the Philippines, The United States of America and The Netherlands, rather than taking a specific regional approach, this paper will argue that precedents. This is created by these domestic cases can be transplanted across varying legal systems to be internationally applicable. This argument is in line with the statement made by the past International Court of Justice (ICJ) President Jennings that climate change 'is a global problem.'<sup>23</sup>

## 2 Climate Change Issues Affecting Intergenerational Justice

The time lag nature of climate change effects and the exacerbation of impacts bearing disproportionately upon future generations justify why legal standing should be granted to this group in order to ensure actions on intergenerational justice and mitigation. As supported by Edward Page, future members will be the most vulnerable to climate change impacts,<sup>24</sup> predicted by the IPCC to include rising sea levels,<sup>25</sup> causing a loss of habitat for low-lying nation states such as Tuvalu – a phenomenon breaching the human right of access to shelter and security.<sup>26</sup> Additionally, the increased frequency of extreme weather events such as heatwaves and floods, as well as the exacerbation of transmittable diseases within these extreme weather climates can contribute

<sup>22</sup> Ghaleigh (n. 18) 33.

<sup>23</sup> Ibid 32.

<sup>24</sup> Edward Page, 'Climate Change, Justice and Future Generations' in Peter Lawrence (ed), *Justice for future generations: climate change and international law* (Edward Elgar Publishing 2014) 8.

<sup>25</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007, Impacts, Adaptation and Vulnerability* (CUP 2007) 10.

<sup>26</sup> UN General Assembly, *Universal Declaration of Human Rights* [1948] 217 A (III), art 25 (UDHR).

to compromising future generations' right to health.<sup>27</sup> Biodiversity will also be depleted with permanent acidification of oceans coupled with extinction of species, flora and fauna.<sup>28</sup>

The significance of these impacts should be taken into account when assessing climate change mitigation actions as supported by Stern who argued that policy decisions, which failed to account for these, were insufficient and inappropriate. Unregulated GHG emissions, imposing reduction costs of five to twenty percent on the level of economic activity concentrated in the next century, demonstrates the intergenerational nature of climate change.<sup>29</sup> The Stern Review provides a substantial contribution to the argument in favour of the welfare of future generations having the same claim over the environment as current ones.

A shift to the inclusion of future generations, significantly through granting them a legal standing in climate change litigation, will challenge the 'intergenerational buck passing' of the current generation who benefits from passing on the costs and harms of their behaviour to future ones due to the time lag effect of climate change, as argued above.<sup>30</sup> With behaviour being driven by contemporary concerns, the lack of capacity of institutions and individuals to act ethically, demonstrates why having them accountable to future generations, through granting the latter a standing, is a necessary step to achieve intergenerational justice.

### 3 Standing for Future Generations

Countering historical barriers to climate change litigation, future generations satisfy the requirements of legal standing, with scientific developments resolving the uncertainty in tracing causation. This can be demonstrated in tracing the legal precedents of *Philippines Children Case*, *Massachusetts*, and *Urgenda Decision*. Furthermore, comparable situations in the other areas of law such as Non-Governmental Organizations' (NGO) standing in international human rights public law, demonstrate the possibility of adapting similar principles in support of granting legal standing to future generations. As the current legal position provides that environmental and associated rights can only be protected by those who have standing, the adaption of legal standing of future

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<sup>27</sup> Ibid.

<sup>28</sup> Intergovernmental Panel on Climate Change (n. 25) 12.

<sup>29</sup> Stern Review (n. 1) 8.

<sup>30</sup> Simon Gardiner, 'Climate Justice' in John S. Dryzek, et al (eds), *The Oxford Handbook on Climate Change and Society* (OUP 2011) 313.

generations is necessary for the protection of their human rights and inter-generational justice.

In granting standing, the concerned party must meet the condition of having concrete interests in the matter and satisfy the threshold test of there being a real threat that the harm will occur.<sup>31</sup> Per Otton J in *R v. Her Majesty's Inspectorate of Pollution, ex parte Greenpeace Ltd.*,<sup>32</sup> a general interest in the environment is not sufficient to prove concrete interest. Instead it is necessary to prove a 'special and long standing interest in the matter.'<sup>33</sup> This is evidenced by the exacerbation of climate change effects impacting future generations identified above that leads to higher costs that will span their lifetime.

Opponents in the debate over giving legal standing to future generations raise the objection that future generations cannot be represented, as we do not know their interests.<sup>34</sup> This argument has merit in so far as the proliferation of scientific developments in climate change as well as the dynamic assessments of environmental problems pose difficulty in ascertaining the future environmental priorities. For example, the rise of Chlorofluorocarbons (CFCs) as a major pollutant was not considered a major issue until recent times, considering the lack of knowledge surrounding their impact decades ago.<sup>35</sup> Yet, despite this, the inability of future generations to communicate their exact needs should not bar representation as it can be reasonably concluded that 'all members of succeeding generations will share a common interest in having clean air, potable water, biodiversity and places of natural beauty.'<sup>36</sup> Furthermore, this is codified in the precedent set out in the *Philippines Children's Case*, which recognised the interest of future generations and provided that these interests are 'not abstract or unascertainable, but can be identified and advocated by a legal representative.'<sup>37</sup> Additional support for this argument is found in the judgement of the *Urgenda Decision* whereby the court allowed the NGO to represent future generations because of the foundation's concrete interests in achieving sustainable development.<sup>38</sup> The ramifications of climate change

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31 Chris Van Dijk, 'Civil Liability for Global Warming in the Netherlands' in Michael Faure and Marjan Peeters (eds), *Climate Change Liability* (Edward Elgar Publishing Limited 2011) 211.

32 *R v. Her Majesty's Inspectorate of Pollution, ex parte Greenpeace Ltd.* [1994] 4 ALL E.R. 329.

33 *Ibid* 351.

34 Ted Allen, 'The Philippine Children's case: Recognising Legal Standing for Future Generations' [1993-1994] 6 *Geo. Int'l Envtl. L. Rev.* 713, 729-730.

35 *Ibid* 730-731.

36 *Ibid*.

37 *Ibid* 741.

38 *Urgenda* (n. 4) para 4.7-4.8.

effects, abrogating future generations' human rights, demonstrate a solid key stakeholder interest and adequately fulfil this standing requirement.

In relation to the second requirement of the threshold test of identifying a real threat, those against giving standing to future generations, whilst acknowledging the contribution of human activities on global warming, argue that it is unknown how these harms will manifest themselves. Thus, future generations will fail to satisfy this threshold requirement.<sup>39</sup> However, this argument inaccurately captures the developments in the climate change field whereby scientific advancements in evidence increasingly captures the likely relationships between particular climate phenomena such as floods, and anthropogenic emissions.<sup>40</sup> Furthermore, in *Massachusetts*, it was established that where there is a risk of catastrophic harm, even if it is remote but nevertheless real, this is sufficient to hold the defendants accountable if the risk could be reduced by any extent by giving the petitioners a legal standing.<sup>41</sup> This important legal precedent supports the argument in favour of granting future generations a legal standing. It demonstrates a more flexible test in the threshold requirement, whilst also establishing that standing should be afforded if there is a possibility of reducing risks, regardless of how little, if the legal case went ahead. Future generations can satisfy the threshold requirement, as the risk of climate change effects are real and would be reduced by granting them a legal standing to fight for injunctions.

Additionally, following the lead of public law and legal adaptations where legal standing has been granted to NGO's, which, similarly to posterity, lack a direct link to the harm suffered, the same principle can likewise be applied to future generations in private jurisdiction. This argument is supported by the fact that there is a blurring of distinctions between public and private spheres in environmental law.<sup>42</sup> Public law is centred on a clear public interest contrasting to traditional private tort remedies that concern redress for a violation of private interests. However, this distinction is less clear in environmental law matters as the wide-ranging effects of climate change concern human rights issues and matters of intergenerational justice for which there is a clear public interest as well as a private wrong.<sup>43</sup> This is evident in the majority judgement penned by Justice Davide in the *Philippines Children Case* whereby he stated

39 Van Dijk (n. 31) 211.

40 Michael Faure, 'Climate Change Adaptation and Compensation' in Jonathan Verschuuren (ed), *Research Handbook on Climate Change Adaptation Law* (Edward Elgar Publishing Limited 2013) 117.

41 *Massachusetts* (n. 3) 1458.

42 Mark Wilde, *Civil Liability for Environmental Damage: A Comparative Analysis of Law and Policy in Europe and The United States* (Kluwer Law International 2002) 82.

43 *Ibid* 83.



that 'the minors' assertion of their right to a sound environment constitutes... the performance of their obligation to ensure the protection of that right for the generations to come.'<sup>44</sup> Therefore it is argued, that in line with adaptations in other legal fields such as public law, standing in climate change litigation should also be afforded to future generations so as to bring harmony to the legal system and protect clear public interests.

It has been argued that future generations should not be given a legal standing in litigation since there is no legal persona to represent. This line of reasoning ignores the important consideration that 'a person's legal interest may exist independently of their actual lifetime.'<sup>45</sup> This principle has been taken into account in other legal domains thereby debunking the above argument. This is evident in actions whereby descendants are able to litigate on behalf of the deceased injured party for past injuries and in the execution of wills where courts take into consideration the intention of the deceased as well as the interest of their heirs.<sup>46</sup> Additionally the pre-condition of being a living person in order for a legal persona to exist is likewise contradicted through the ability of charitable trusts to sue on behalf of unborn beneficiaries.<sup>47</sup> It is further posited that future generations have a greater claim for legal standing than unborn beneficiaries in the above example, as it is a certain fact that there will be succeeding generations, with the definition of the concept not referring to a particular individual but rather a type of future person.<sup>48</sup> Therefore, these broadenings of traditional narrow conceptions of legal personhood supports the argument for the legal adaptation of granting future generations a standing in climate change litigation.

An additional requirement for legal standing is causation between the act and the harm suffered. As climate change litigation hinges upon this line of causation, difficulty arises in tracing emissions of a particular actor as there are multiple contributors. Moreover, climate change is a combination of 'natural sources and CO<sub>2</sub> emissions from various emitters.'<sup>49</sup> This is further complicated when tracing historical emissions from the past and linking them to future damage as it brings up issues of retrospectivity. Past emissions and behaviour may have been lawful in the past but fail contemporary standards of behaviour.<sup>50</sup> This creates tensions with the law and a barrier to applying

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44 *Re Minors Oposa* (n. 2) 185.

45 *Allen* (n. 34) 729–730.

46 *Ibid.*

47 *Ibid.*

48 *Herstein* (n. 12) 1180.

49 Michael Faure and Andre Nollkaemper, 'International Liability as an Instrument' [2007] 43 *Stan. J. Int'l L.* 124, 158.

50 *Ibid.* 171.

traditional liability law as stated in Article 13 of the *Draft Articles on State Responsibility*, which stipulates that '[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.'<sup>51</sup>

Furthermore, causation in climate change liability is hindered in situations of natural disasters as they are commonly deemed 'an act of god,'<sup>52</sup> and thus breaks the causal chain from the defendant. However, evidentiary problems with tracing causal links are alleviated with scientific developments solving the uncertainty on tracing the culpability back. This is supported by the reliance on scientific evidence of the IPCC in *Massachusetts*.<sup>53</sup> As the requirement of absolute certainty is no longer required, liability can be proportionally divided amongst defendants to hold them jointly and severally liable. This reasoning was successfully argued in the *Urgenda decision* through the analogous logic of 'cumulative causation' in *Mines de Potasse d'Alsace S.A. (MDPA) v. Onroerend Goed Maatschappij Bier B.V. et al (Kalimijnen case)*.<sup>54</sup> Thus whilst issues of causation create burdens for future generations, there are legal developments which rectify this problem and thus it does not create a barrier to the attainment of legal standing to future generations.

It can be concluded that future generations fulfil the standing requirements of interest, causation and imminent and real harm in climate change litigation. When viewed against the legal precedents set in the *Philippines Children Case*, *Massachusetts*, and *Urgenda Decision*, and compared with legal developments in other areas of law which grant legal rights to non-persons, there exists a sufficient basis for granting future generations a standing in climate change litigation and such a reform can be suitably adapted as a legal norm.

#### 4 Intergenerational Justice

Due to climate change exacerbating issues of justice between generations, brought about by the climate impacts affecting the non-emitting posterity, it is argued that granting of a standing to future generations is a necessary legal

51 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [2001] Supplement No. 10 (A/56/10), chp.IV.E.1, art. 13.

52 Faure 'Climate Change Adaptation and Compensation' (n. 40) 116.

53 Laura Horn, 'Climate Change Litigation Actions for Future Generations' [2008] *Environment and Planning Law Journal* 115, 133.

54 *Mines de Potasse d'Alsace S.A. (MDPA) v. Onroerend Goed Maatschappij Bier B.V. et al*, [1988] HR Dutch Supreme Court, NJ 1989/743.

adaptation in order to obtain intergenerational equity. This calls into question how the mitigation burden should be distributed between the current and future generations. By examining the sociological debate between presentism and rights-based ethics in climate change, the strength of the latter's arguments demonstrates an obligation owed towards future generations by the present generation. This is further supported by legal tools that enshrine these justice requirements. As the possibility that legal standing can be extended to future generations on the basis of the arguments above, there is likewise a need to discuss intergenerational justice principles in relation to climate change litigation.

First, adopting a sociological framework, the importance of intergenerational justice is demonstrated by countering the presentism ideological arguments with a rights-based approach demonstrating future generations' moral claim to the environment. The current generations' act of favouring policy decisions without taking into consideration its effects to future generations is a key component of presentism.<sup>55</sup> As advocated by Nordhaus, the future benefits of mitigation are too small to justify the imposition of significant costs on the present generation and thus reductions should be deferred.<sup>56</sup> There are significant flaws in this argument on the basis of De-Shalit's critique which provides that through a comparison of the current accepted chain of obligation between duties owed by adults to their progeny,<sup>57</sup> and comparing it to intergenerational community, it can be shown that the current generation do owe core requirements and duties to the future generations.<sup>58</sup> Conversely to presentism, the rights based argument holds central the principal idea of equal opportunity between contemporary and future generations,<sup>59</sup> which taken together with Shue's argument, imposes a moral duty to ensure at minimum, that future persons are entitled to protection from harm.<sup>60</sup> Whilst critics of rights based approaches claim that future generations fail to hold moral standing,<sup>61</sup> this view has already been countered above by the possibility of

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55 Richard Howarth, 'Intergenerational Justice' in John S. Dryzek et al. (eds), *The Oxford Handbook on Climate Change and Society* (OUP 2011) 339.

56 Ibid 340.

57 Ibid 341.

58 Avner De-Shalit, *Why Prosperity Matters: Environmental Policies and Future Generations* (Routledge 1995) 14–15.

59 Howarth (n. 55) 341.

60 Ibid 344.

61 Derek Parfit, 'Energy policy and the further future: the identity problem' in Douglas Maclean and Peter Brown (eds), *Energy and the Future* (Rowman & Littlefield 1983) 166–179.

extending a legal standing to future generations which also paves a way for the latter to attain moral rights that are attached to this.

The rights-based approach is complemented by Sen's and Nussbaum's social justice theory of a 'capabilities approach' that advocates for obligations to be owed to future generations, considering that failure to mitigate climate change will limit the posterity's ability to fulfil their core capabilities.<sup>62</sup> This notion of equal opportunity is backed up by the international environmental norm of sustainable development of meeting present needs without compromising the ability of future generations to meet theirs.<sup>63</sup>

Using the international norm of sustainable development and legal frameworks as the basis, it is safe to conclude that intergenerational justice is a core component of international law and treaties. Granting legal standing to the future generations is a legal means of enforcing respect to intergenerational justice.

It also bears to note that Intergenerational justice is codified in the *Stockholm Declaration*,<sup>64</sup> which sets out a responsibility to 'protect and improve the environment for present and future generations.'<sup>65</sup> The obligation to posterity is similarly found in the preamble to the *Convention on the Conservation of Migratory Species of Wild Animals*,<sup>66</sup> which holds 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 and, where utilised, is used wisely.'<sup>67</sup> Further, the concept of intergenerational equity has been cited in many other international environmental agreements such as *Convention for the Protection of the Mediterranean Sea Against Pollution*<sup>68</sup> and *Convention on International Trade in Endangered Species*.<sup>69</sup> Additionally, the legal precedent of the *Philippines Children's Case* furthers the codification of intergenerational justice by significantly demonstrating the 'willingness of the judges in national legal systems to formulate the concept of intergenerational equity into legal

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62 Lawrence (n. 10) x.

63 World Commission on Environment and Development, *Our Common Future* (OUP 1987).

64 UN General Assembly, *United Nations Conference on the Human Environment* [1972] A/RES/2994.

65 *Ibid* art 1.

66 UN Environment Programme, *Convention on the conservation of migratory species of wild animals* [1983] 1651 UNTS 333.

67 *Ibid*.

68 *Convention for the Protection of the Mediterranean Sea Against Pollution* [1973] 993 U.N.T.S. 243.

69 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* [1973] 992 U.N.T.S. 243.

obligations... and the contribut[ion] to the development of the concept of intergenerational equity as emerging customary law.<sup>70</sup>

Taking into account the legal framework in relation to the concept of intergenerational justice, procedural justice is being created through mobilizing future generations whereby, according to Zemans, citizens can have true participation which allows the law to reflect a democratic nature.<sup>71</sup> This is an important element in safeguarding future generations' rights as the inclusion of meaningful participation by those groups affected ensures that their interests are taken into account.<sup>72</sup> This is critical in regard to climate change where there is a trend of the present generations favouring mitigation policies that prioritise their self-interest over the rights of future generations.<sup>73</sup> A participatory approach is reflected in the 1992 *Rio Declaration* that states that 'environmental issues are best handled with the participation of all concerned citizens at the relevant level.'<sup>74</sup>

Therefore, obligations stemming from intergenerational justice are enshrined in both sociological and legal frameworks. These obligations are key tools in which future generations, through granting them with a legal standing, can assert their rights in climate change litigation in order to decrease the disproportionate burden of climate change effects.

## 5 Human Rights

Adopting a human-rights framework, the viability of the environment is inextricably linked to the safeguarding of human rights, which would be put in jeopardy by a failure of climate change action to support these core interests. It is posited that human rights of future generations support the existence of an ethical obligation on the part of the present generation owed to future ones. Such is codified in law.

The importance of human rights as a central consideration for granting legal standing to future generations is recognised in their universality and

<sup>70</sup> Horn (n. 53) 132.

<sup>71</sup> Frances K Zemans, 'Legal Mobilisation: The Neglected Role of the Law in the Political System' [1983] 77 *American Political Science Review* 695, 700.

<sup>72</sup> Steve Vanderheiden, *Atmospheric Justice: A Political Theory of Climate Change* (OUP 2008) 62.

<sup>73</sup> Stone (n. 5) 66.

<sup>74</sup> UN Environmental Program, *1992 Rio Declaration on Environment and Development* [1992] UN Doc. A/CONF.151/26 (vol 1) art 10.

enshrined in key international law documents such as the *Universal Declaration of Human Rights*.<sup>75</sup> Everyone possesses human rights equally and are not made dependent on any factor including when and where a human being lived.<sup>76</sup> As argued by Caney and Nussbaum, human rights such as the rights to life, subsistence and health comprise universal legal guarantees due to their protection of vital capabilities necessary for a fulfilling life, and must be honoured before other human rights obligations can be met.<sup>77</sup> The fundamental nature of these needs supports the assumption that future generations will also share in these interests and hence, there is a basis to the argument on moral rights for posterity.

Building upon the notion of universal entitlements to certain standards of treatment,<sup>78</sup> and the corresponding obligation to respect these standards, the universal legal norm of the harm avoidance principle is also a central tool to support an ethical obligation owed to future generations. As this principle is linked to core human rights, it advocates for an ethical obligation to undertake behaviour that does not harm these interests. This can be suitably applied to the argument in favour of granting standing to future generations as this principle allows posterity to defend their human rights by calling out current generations' mitigation policies that inadequately safeguard these interests and thus do not abide by the harm avoidance legal norm.

Furthermore, this understanding of the connection between human rights and climate change is manifested in international law. As outlined above, the time lag nature of climate change effects and the exacerbation of impacts bears disproportionately upon future generations. As stated by Edward Page, and as predicted by the IPCC, future members will be the most vulnerable to climate change impacts,<sup>79</sup> such as rising sea levels,<sup>80</sup> which cause the loss of habitat. This phenomenon breaches a human right relating to access to shelter and security.<sup>81</sup> Moreover, the exacerbation of transmittable diseases rampant during extreme weather climates compromises the future generations' right to health.<sup>82</sup>

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75 UDHR (n. 26).

76 Ibid arts 1 and 2.

77 Nussbaum (n. 20) 165.

78 Caney (n. 6) 165.

79 Page (n. 24) 8.

80 Martin Parry, Osvaldo Canziani *et al* (eds), *Climate Change 2007, Impacts, Adaptation and Vulnerability* (CUP 2007) 10.

81 UDHR (n. 26) art 25.

82 Ibid.

International human rights law is responsive to these issues, and with the adoption of the *Resolution on Human Rights and Climate Change in 2008*,<sup>83</sup> the United Nations (UN) observed the immediate and far-reaching threat of climate change on people around the world which affects the full enjoyment of human rights.<sup>84</sup> This resolution, when viewed in conjunction with Article 3.1 of the *UN Framework Convention on Climate Change* (UNFCCC),<sup>85</sup> articulates the protection of the climate explicitly for ‘the benefit of present and future generations.’<sup>86</sup> It also demonstrates that there is an obligation owed to future generations under human rights law to protect them against harms caused by climate change. These instruments not only provide a basis for climate change litigation but also set out a ‘strong moral framework and guiding principles that resonate across different cultures and values systems.’<sup>87</sup> The Inuit Petition,<sup>88</sup> whereby the link between climate change and human rights was the central concern, supports these legal arguments.<sup>89</sup> Whilst only a thematic hearing, the precedent set forth by the Inuit before the Inter-American Commission on Human Rights in 2005, ‘illuminated the climate change and human rights linkages, and helped broaden and re-focus the terms of the climate change debate.’<sup>90</sup>

It can be concluded that climate change and human rights are inextricably linked. Since human rights are universal and applicable to future generations, viewing intergenerational justice in terms of human rights provides a legal ground in asserting an obligation owed by current generations to the future ones. This supports granting posterity standing in climate change litigation as a necessary legal means of achieving intergenerational justice and protecting the human rights of future generations.

83 UN Human Rights Council, *Resolution 7/23. Human Rights and Climate Change* [2008] U.N. Doc. A/HRC/RES/7/23.

84 *Ibid* par 1.

85 *UN Framework Convention on Climate Change* [1992] 1771 U.N.T.S 107.

86 *Ibid*.

87 UNICEF UK (n. 1) 6.

88 Shiela Watt-Cloutier, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting From Global Warming Caused by Acts and Omissions of the United States* <<http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>> accessed 29 November 2015.

89 Jessica Gordon, ‘Inter-American Commission on Human Rights to Hold Hearing after Rejecting Inuit Climate Change Petition’ [2007] *Winter, Sust. Dev. L. & Pol’y* 55, 55.

90 The Center For International Environmental Law, ‘Climate Change & Human Rights: A Primer’ <[http://www.ciel.org/Publications/CC\\_HRE\\_23May11.pdf](http://www.ciel.org/Publications/CC_HRE_23May11.pdf)> accessed 29 November 2015.

## 6 Standing in Practice and as a Solution

Through bridging the gap between the theoretical principles of posterity's rights and practice, the grant of a legal standing to future generations will achieve intergenerational justice and will afford protection of their human rights. Since establishing that an obligation is owed to future generations by the current one, this practical safeguard can be applied using two legal avenues of redress: through a torts approach and a planetary trusts approach.

The tight restrictions and narrow requirements in current mechanisms of legal redress create a lacuna in the law that bars future generations from asserting their rights. Difficulties arise for future generations in safeguarding their rights under the Kyoto Protocol's compliance procedures,<sup>91</sup> whereby consequences apply only to parties that have ratified the said instrument. This is problematic as it demonstrates the ability of 'free-rider states' not to be subject to sanctions considering that they have not ratified international agreements.<sup>92</sup> Moreover, similar to the International Criminal Court (ICC), legal redress is only available to states that are parties.<sup>93</sup> This thus demonstrates the importance of legal adaptation in this field, whereby granting future generations a standing will allow them to use other legal mechanisms to assert their rights established in the above paragraphs.

One such legal mechanism to sufficiently protect the human rights of future generations is based on a torts-based approach. Drawing on the gap in the enforcement of environmental law, the main benefit of tort is to afford individuals and groups 'a means of participating in the enforcement of environmental standards.'<sup>94</sup> By granting future generations a legal standing, practical implementation becomes possible as it allows future generations to seek flexible tort based remedies, which adequately cover the uncertain scope of future climate change issues. Such remedies include injunctions which enable the court to be proactive in requiring the polluter to take abatement measures.<sup>95</sup> Adopting a public interest method of torts will provide a necessary avenue of redress that is not constrained to the aims of compensation but rather on mitigation. This is evident in another strength of tort: being that in defining a standard of conduct that is required such as prohibition against dumping toxins

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91 *Kyoto Protocol to the United Nations Framework Convention on Climate Change* [1998] 37 I.L.M. 22, art 18.

92 Horn (n. 53) 126.

93 Ibid 128.

94 Wilde (n. 42) 14.

95 Ibid 181.



which will impact the water tables for future generations, it provides incentives for research and investment into other 'greener' solutions.<sup>96</sup> This is in line with mitigation aims.

Furthermore, in supporting this tort-based argument, the *Urgenda decision* stated that by establishing the breach of duty of care requirements for negligence, a State can be held liable for its failure to adequately mitigate climate change. Significantly, the universality of these duty of care requirements, which includes 1) 'a reasonable foresight of harm,' 2) 'relationship of sufficient proximity' and 3) 'that it is fair, just and reasonable to impose a duty of care,'<sup>97</sup> creates a precedent enabling future generations to hold a State liable. These requirements likewise create an affirmative duty to take measures in safeguarding human rights, including future rights, within their territory.<sup>98</sup> Therefore granting the future generations a legal standing is necessary as it allows them to safeguard their rights effectively through torts based litigation.

Secondly, drawing on the ideas of Edith Brown Weiss, intergenerational justice can result from granting a legal standing to future generation by relying on a planetary trusts approach.<sup>99</sup> Her conception of a planetary trust hinges on humans holding 'natural and cultural resources of the planet in trust for all generations of the human species.'<sup>100</sup> The fiduciary obligations held by the trustee, the present generation, requires them to act for the benefit of the beneficiary, the future generations. This is an appropriate means of safeguarding the future generations' rights as the concept of trusts is an already established and recognised doctrine and which is flexible enough to suit climate change issues.<sup>101</sup> Furthermore, as outlined by Sax, future generations satisfy the three requirements for the application of this doctrine, which includes: 1) a legal right in the general public, 2) the ability for this right to be enforceable against the government and 3) the interpretation of the trust consistent with current environmental standards.<sup>102</sup>

The first and third requirements are satisfied through international law, evidenced by the ability of protocols to be added to treaties and conventions if new scientific data becomes available in order to ensure that they reflect current

96 Ibid 13.

97 Roger Cox, 'The Liability of European States for Climate Change' [2014] 30 (78) *Utrecht J Int'l & Eur L* 125, 129.

98 Ibid 127.

99 Weiss (n. 8) 495.

100 Ibid 498.

101 Horn (n. 53) 122.

102 Joseph Sax, 'The public trust doctrine in natural resource law: effective judicial intervention' [1970] 68 *Mich. L. Rev.* 471, 474.

environmental standards.<sup>103</sup> The second condition turns on the issue of standing, the requirements of which have been satisfied by the future generations as discussed above. Once again, it is posited that granting future generations a legal standing is necessary to safeguard their intergenerational rights.

The legal adaptation of granting standing to future generations can ensure that intergenerational justice is safeguarded and human rights are protected evidenced through both a torts based approach and planetary trusts approach. This solves the lacuna in the law, whereby the rights of future generations were not directly provided for in policy. Furthermore it compliments and strengthens existing climate change mitigation regulations, as reliance on any one system is ineffective with benefits and weaknesses plaguing every mechanism.

## 7 Conclusion

The exacerbation of climate change effects has rendered the legal adaptation of granting future generations a standing in climate change litigation necessary to achieve intergenerational justice and to protect human rights. Through the myriad of climate change issues, which are projected to inequitably impact upon future generations, legal redress is necessary to counter the self-interested climate mitigation policies undertaken by contemporaries. The failure of these policies to take into account the interests of future generations is in contradiction to their socio-legal justice requirements. Through the universal nature of human rights inherent in future generations and its link with climate change, the intergenerational justice requirements become a legal obligation owed to posterity. Therefore, granting legal standing to future generations is necessary to resolve the lacuna in the law with intergenerational justice and human rights safeguarded through legal remedies based on torts and planetary trusts.

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