14

Intergenerational Equity

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14.1 INTRODUCTION

Intergenerational equity is a legal principle reflected in international treaties[1] and soft law instruments,[2] and recognised by many international and domestic tribunals.[3] It encapsulates the idea that '[t]he present residents of the earth hold the earth in trust for future generations and at the same time the present generation is entitled to reap benefits from it'.[4] Thus, the principle demands a just balance between the needs of present and future generations. Like other equitable principles, intergenerational equity reflects the need for flexibility and fairness. In the context of climate change, it demands consideration of *justice*: decisionmakers must pay attention to the distributive consequences of climate harms, government policies, and lack of action.[5] Further, as the High Court of South Africa put it, intergenerational justice in the context of climate change involves 'a rejection of short-termism as it requires the state to consider the

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1 See United Nations Framework Convention on Climate Change (entered into force 19 June 1993) 1771 UNTS 107 (UNFCCC) art 3, 'The Parties should perfect the climate system for the benefit of present and future generations, on the basis of equity and in accordance with their common but differentiated responsibilities and capabilities'.

2 See e.g. UNEP, 'Declaration of the United Nations Conference on the Human Environment' (1972) UN Doc A/CONF/48/14 (Stockholm Declaration) principle 1, [humankind] 'bears a solemn responsibility to protect and improve the environment for present and future generations … The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate'.

3 Lydia Slobodian, 'Defending the Future: Intergenerational Equity in Climate Litigation' (2020) 32 GELR 569.

4 Werner Scholtz, 'Equity' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 339. See also Edith Brown Weiss, *In Fairness to Future Generations* (Brill 1989).

5 See ibid Brown Weiss.

long-term impact of pollution on future generations'.[6] As a *principle*, intergenerational equity is rarely a standalone basis for decision-making. Rather, it informs the interpretation and application of legal doctrine, with implications for many areas of climate law. This includes issues discussed elsewhere in this volume, such as standing, admissibility, public trust,[7] and the precautionary principle. Judges already frequently refer to 'intergenerational equity',[8] 'intergenerational responsibility',[9] 'intergenerational justice',[10] or the broad interests of 'future generations'[11] when considering the obligations owed by States and other actors. While terminology and doctrine may be jurisdiction-specific, the general animating principle – of considering the future interests of children and unborn generations – has travelled widely across borders.

Intergenerational equity is especially important in the context of climate change. As the UN Committee on the Rights of the Child (CRC) has observed, children are impacted by climate change more than adults in the 'manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime'.[12] This reflects two related dynamics. The first is future oriented. Climate change distributes benefits and burdens unequally over time: the failure by existing adults to mitigate greenhouse gas emissions and invest in adaptation infrastructure means that current children and future generations will experience greater harms.

The second dynamic relates to present, existing harms to children and young people. The dangers of climate change are not an abstract future proposition – they are already felt globally. As the Intergovernmental Panel on Climate Change (IPCC) has recognised, children are at particularly high risk of harm from the physical consequences of climate change (such as food and water security),[13] as well as

[6] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2019] SAFLII 208 (ZAGPPHC) (*Groundwork Trust*) [41]; See also the decision of the Gauteng High Court in *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 65662/16 <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2017/20170306_Case-no.-6566216_judgment-1.pdf> accessed 27 March 2023.

[7] *Fomento Resorts & Hotels and Another v Minguel Martins and Ors* [2009] Civil Appeal No 4154 OF 2000 with Civil Appeal Nos 4155 and 4156 of 2000 [32].

[8] *Advocate Padam Bahadur Shrestha v Prime Minister and Office of Council of Ministers and Others* [2018] Order No 074-WO-0283 (2075/09/10 BS) (Supreme Court of Nepal) (*Shrestha v Office of Council of Ministers*).

[9] See e.g. *Minors Oposa v Factoran* [1993] GR No 101083, 224 SCRA 792 (*Minors Oposa v Factoran*).

[10] *Groundwork Trust* (n 6).

[11] See e.g. *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*); *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)* [2018] 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia) (*Demanda Futuras Generaciones*).

[12] UN Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communication No 104/2019', UN Doc CRC/C/88/D/104/2019 (*Sacchi*) [10.13].

[13] Hans O. Pörtner and others, 'IPCC 2022: Summary for Policymakers' in Hans O. Pörtner and others (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2022) (IPCC) B.1.3.

mental health impacts such as anxiety and stress.[14] Furthermore, children and young people are rendered more vulnerable by their lack of political power – in particular, their inability to vote. Young people have highlighted these dynamics in cases across several jurisdictions, including Australia,[15] the Philippines,[16] Germany,[17] Nepal,[18] Colombia,[19] and the United States.[20]

The ongoing significance of intergenerational equity in climate litigation is evident in international and regional litigation. In the forthcoming case before the European Court of Human Rights (ECtHR), *Duarte Aghostinho and others v Portugal and 32 other States*, six Portuguese children have brought thirty-three member States of the Council of Europe before the ECtHR for alleged violations of Articles 2, 8, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) due to failure to take sufficiently ambitious climate action. In their claim, the applicants rely on intergenerational equity as a principle that must inform the interpretation of States' obligations under the ECHR. The ECtHR recognised the importance of intergenerational equity in this claim by including a question on intergenerational equity in their invitation to the respondent States to react to the application: it asked whether 'the defendant States [have] performed the obligations incumbent upon them …, read in the light of the pertinent provisions and principles, such as the principles of precaution and intergenerational equity, contained in international environmental law, including in the international treaties to which they are a Party'.[21] Furthermore, the recent advisory opinion submitted to the International Court of Justice by the United Nations General Assembly calls on that court to provide guidance concerning obligations owed to future generations, a question which will undoubtedly require consideration and enumeration of intergenerational equity.[22]

Against this backdrop, this chapter contributes to the debate on intergenerational equity and climate change. Like the other chapters in this Handbook, it is divided into a descriptive section and a normative section that identifies emerging best practice. In the first, descriptive section, we analyse how the principle of intergenerational equity has been applied in judicial decisions on climate change, specifically in decisions on cases initiated by children and youth. We survey three

[14] ibid B.4.4.
[15] *Minister for the Environment v Sharma* [2022] FCAFC 35 (*Sharma*).
[16] See e.g. *Minors Oposa v Factoran* (n 9).
[17] See e.g. *Neubauer* (n 11).
[18] See *Shrestha v Office of Council of Ministers* (n 8).
[19] See *Demanda Futuras Generaciones* (n 11).
[20] See e.g. *Juliana v United States* 947 F.3d 1159 (9th Cir 2020) (*Juliana*).
[21] *Duarte Agostinho v Portugal and 32 other States* App No 39371/20 (ECtHR, Statement of 13 November 2020).
[22] Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, UNGA Res 77/276 (29 March 2023).

broad areas of jurisprudence: normative obligations owed by States; procedural mechanisms to ensure courtroom participation of children, young people, and representatives of future generations; and future-focused judicial remedies. These themes are often contained in one and the same judgment. By organising the section thematically, we create an overview of the state of play of climate change jurisprudence in connection with each of these themes across jurisdictions.

The second, normative part of the chapter pulls out judicial practice that could serve as a source of inspiration for legal reasoning in future cases. We consider such practices to be those which best give legal effect to the principle of intergenerational equity, or that best allow for judicial consideration of the principle in a courtroom setting. Continuing rapid emissions of greenhouse gases and failure to invest in climate adaptation infrastructure constitutes an injustice to future generations perpetrated by (some members of) the present. Normatively, only ambitious and equitable climate mitigation and adaptation policies and measures can be consistent with intergenerational equity.[23]

Zooming in on the existing case law, we then identify six areas of emerging best practice. First, best practice entails recognising that based on intergenerational equity, States owe obligations to children, young people, and future generations, such as the development of mitigation and adaptation plans and targets which distribute obligations fairly within and across generations.[24] Second, emerging best practice includes cases where judges have ensured that decisionmakers must account for intergenerational equity in planning and consent decisions which may have negative long-term climate impacts or downstream consequences.[25] Another substantive emerging best practice is the recognition of children, young people, and future generations as classes which may experience discrimination because of insufficiently ambitious climate policy.[26] Furthermore, intergenerational equity considerations are dependent on effective representation in court. Emerging best practice recognises the importance of children's participation both as representative of future generations (understood, as per the High Court of South Africa, as 'a broad concept which can mean posterity, or those whose birth is imminent')[27] and as vulnerable parties in the here and now. Ensuring such participation requires an open approach to issues such as standing, separation of powers, and certification of class actions. It may also require procedural innovations to facilitate courtroom participation

[23] See e.g. Simon Caney, 'Climate Change, Intergenerational Equity and the Social Discount Rate' (2014) 13(4) Politics, Philosophy and Economics 320.

[24] See *Neubauer* (n 11).

[25] See e.g. Australian cases such as *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (*Gloucester Resources*).

[26] *Mathur et al v Her Majesty the Queen in Right of Ontario* [2020] ONSC 6918 (Superior Court of Justice) (*Mathur Strikeout*). See to the contrary, however, the merits decision of the same court in *Mathur v Ontario* [2023] ONSC 2316 (*Mathur Merits*).

[27] *Groundwork Trust* (n 6) [82.4].

and communicate judicial decisions.[28] Finally, emerging best practice incorporates the principle of intergenerational equity in crafting remedies that ensure long-term oversight and enforcement of judicial decisions.[29]

14.2 CASE LAW DEVELOPMENTS

14.2.1 *Development of the Principle in International Law*

Intergenerational equity forms part of the basis of international environmental law (IEL). The Stockholm Declaration of 1972 – widely recognised as one of IEL's founding documents – observes that humans bear 'a solemn responsibility to protect and improve the environment for present and future generations'.[30] Similarly, the United Nations Framework Convention on Climate Change (UNFCCC) requires States to 'protect the climate system for the benefit of present and future generations, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[31] The principle of intergenerational equity has been extensively developed by the scholar Edith Brown Weiss, who argued that these (and other) statements of international law give rise to three obligations on States: to conserve options (ensuring future generations have a resource base they can use to 'satisfy their own values'); to conserve quality ('ensuring the quality of the environment on balance is comparable between generations'); and to conserve access (meaning 'non-discriminatory access among generations to the Earth and its resources').[32] The interests of future generations are also reflected in the principle of sustainable development. Principle 3 of the 1992 Rio Declaration on Environment and Development – a non-binding but highly influential international law instrument – provides that '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[33]

The most recent definition of intergenerational equity by a major international tribunal was recently provided by the UN CRC in its General Comment 26. In that Comment – and drawing on extensive consultation with children – the Committee noted that 'children constantly arriving are also entitled to the realization of their human rights to the maximum extent', and that 'States bear the responsibility for

[28] *Sacchi* (n 12).

[29] *Asghar Leghari v Federation of Pakistan* PLD 2018 Lahore 364; *Demandas Futuras Generaciones* (n 11).

[30] *Stockholm Declaration* (n 2) principle 1. See also *AP Pollution Control Board v Prof M V Nayudu (Retd) and Others* 1994 (3) SCC 1.

[31] UNFCCC (n 1) art 3.

[32] Edith Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 VJEL 615, 616.

[33] United Nations, 'Declaration of the United Nations Conference on Environment and Development' (1992) 31 ILM 874 (Rio Declaration) principle 3.

foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades'.[34]

Intergenerational equity has been developed and recognised by judges of the International Court of Justice (ICJ). In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ observed that

> the environment is not an abstraction, but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond control is now part of the corpus of international law relating to the environment.[35]

Separate and dissenting ICJ judges have gone as far as suggesting that the principle gives rise to *rights* held by unborn generations.[36] For example, in a separate opinion in *Pulp Mills on the River Uruguay*, Judge Cançado Trindade observed that 'it can hardly be doubted that the acknowledgment of inter-generational equity forms part of conventional wisdom in international environmental law', and that the principle demanded that international law be interpreted and applied with reference to the 'long-term temporal dimension', 'displaying concern for seeking to secure the welfare not only of present but also of future generations'.[37]

14.2.2 *Development of the Principle in Domestic Courts in the Climate Context*

14.2.2.1 Obligations Owed by States

14.2.2.1.1 EQUITABLE CLIMATE MITIGATION POLICY The principle of intergenerational equity is frequently referred to in climate litigation. Sometimes, this is framed in terms of the 'rights' or 'interests' of future generations.[38] Despite

[34] Committee on Rights of the Child, 'General Comment No 26 on Children's Rights and the Environment with a Special Focus on Climate Change' (22 August 2023) UN Doc CRC/C/GC/26 (General Comment 26).

[35] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [29].

[36] See e.g. the dissenting opinion of Judge ad hoc Sir Geoffrey Palmer in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1964 in the Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253 (*Request for an Examination – Nuclear Tests*) [114]–[115]. See also the dissenting opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [455], the dissenting opinion of Judge Weeramantry in *Request for an Examination – Nuclear Tests* (especially [341]), and the separate opinion of Judge Weeramantry in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 [106]–[108].

[37] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) (Separate Opinion of Judge Cançado Trindade) [2010] ICJ Rep 14 [114]–[124].

[38] Unfortunately, these terms are used interchangeably in both jurisprudence and academic literature. In this chapter we do not attempt to provide a perfect conceptual distinction between these terms, but we consider legal reasoning concerning the rights of future generations as (potential) manifestations of the principle of intergenerational equity.

some conceptual variation, the principle has shaped judicial decisions which recognise the substantive obligations of States to equitably mitigate the future effects of climate change, and to recognise environmental rights possessed by children, young people, and future generations. The Inter-American Court of Human Rights has observed that the right to a healthy environment – recognised in more than 100 national constitutions and recently by the UN Human Rights Council and the UN General Assembly[39] – includes an individual dimension, as well as a 'collective dimension' as a 'universal value that is owed to both present and future generations'.[40] The Supreme Court of Colombia has observed in 2018 that 'without a healthy environment, subjects of law and sentient beings will not be able to survive, much less protect those rights for our children or future generations'.[41] Relatedly, at least one United States appellate judge has interpreted a 'perpetuity principle' as 'structural and implicit' in the United States Constitution, requiring a guarantee of a stable climate to 'all future generations'.[42] India's National Green Tribunal has interpreted intergenerational equity consistently with sustainable development, requiring the State to 'balance' the objectives of environment protection and development as part of the government's constitutional environmental duty.[43] Similarly, the High Court of South Africa has highlighted the link between sustainable development and the 'principle of "intergenerational justice"' which involves 'a rejection of short-termism as it requires the state to consider the long-term impact of pollution on future generations'.[44]

One of the first courts to recognise rights and obligations derived from intergenerational equity was the Supreme Court of the Philippines in 1993 in *Minors Oposa v Factoran*.[45] In that ground-breaking case, a group of children sought orders that the government cancel all existing timber licence agreements in the country and cease issuing new ones. The case was brought following decades of massive deforestation. The Court acknowledged the climate implications of the

[39] UNHCR, 'The Human Right to a Clean, Healthy and Sustainable Environment' in 'Resolution Adopted by the Human Rights Council on 8 October 2021' (2021) UN Doc A/HRC/RES/48/13; UNGA, 'The Human Right to a Clean, Healthy and Sustainable Environment' (2022) UN Doc A/76/L.75.

[40] *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (IACtHR OC-23/17) [59]. See also the decision of the District Court in *Greenpeace Mexico v Ministry of Energy and Others* [2020] Amparo No 372/2020 (*Greenpeace Mexico*), where the Court observes that the failure to preserve resources for future generations constitutes a violation of the 'collective dimension' of the right to a healthy environment.

[41] *Demanda Futuras Generaciones* (n 11).

[42] Dissenting opinion of Judge Staton in *Juliana* (n 20).

[43] *Court on its own Motion v State of Himachal Pradesh and Ors* Application No 237 (THC)/ 2013 (CWPIL No 15 of 2010) [14], [18].

[44] *Groundwork Trust* (n 6) [41].

[45] *Minors Oposa v Factoran* (n 9).

case, observing that deforestation resulted in 'the reduction of the earth's capacity to process carbon dioxide gases'.[46] Drawing on the obligation contained in the Philippines Constitution requiring the State to 'protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature', the Court found in favour of the plaintiff children.[47] From this, the Court derived an obligation of 'inter-generational responsibility' and 'inter-generational justice'. The Court interpreted 'rhythm and harmony of nature' as incorporating a duty to ensure:

> [the] judicious disposition, utilization, management, renewal, and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, offshore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[48]

The obligation was further developed in 2008 by the Supreme Court in *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay*.[49] In that case the Court affirmed mandamus relief[50] requiring the appellant to repair environmental damage to Manila's badly polluted harbour, observing that '[e]ven assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligations to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly possible. Anything less would be a betrayal of the trust reposed in them.'[51]

In other cases, courts have drawn on intergenerational equity in fixing State obligations to take more aggressive action on climate mitigation. In 2021 in *Neubauer v Germany*, the Federal Constitutional Court of Germany considered a challenge to Germany's national climate legislation.[52] Plaintiffs – including several children – challenged the constitutionality of national legislation which set a 55 per cent reduction target in Germany's greenhouse gas emissions by 2030, and a goal of climate

[46] ibid [3].

[47] Constitution of the Philippines, art II.16. Like art 20A at issue in the German *Neubauer* case, this provision is not textually phrased as an explicit objective right. The *Minors Oposa* Court nevertheless interpreted it is as implying a subjective environmental right.

[48] *Minors Oposa v Factoran* (n 9) [8].

[49] *MMDA et al v Concerned Residents of Manila Bay* GR No 171947-48 (18 December 2008) (*MMDA v Concerned Residents of Manila Bay*).

[50] A mandamus relief is an obligation imposed by a court on a lower court or civil servant to execute their respective tasks adequately.

[51] *MMDA v Concerned Residents of Manila Bay* (n 49).

[52] *Neubauer* (n 11).

neutrality by 2045.[53] The Act set out concrete annual targets up until 2030, but no specific post-2030 targets. Plaintiffs pointed out that the relatively modest cuts in greenhouse gas emissions prior to 2030 implied that significant cuts would be necessary in the following fifteen years to meet Germany's 2045 net-zero goal. The plaintiffs argued that this uneven distribution violated the government's constitutional obligation in Article 20A of the German Federal Basic Law (*Grundgesetz*), which provides that 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by exclusive and judicial action, all within the framework of the constitutional order'.[54] The plaintiffs further argued that the deferral of drastic climate mitigation measures to the future meant that the future fundamental freedoms of future generations would be strongly curtailed, especially relative to those enjoyed by existing adult generations.

The Court accepted the latter of these arguments. It found that Article 20A set a baseline obligation on the government to mitigate climate change, and that the deferral of significant action would create 'advance interference-like effects' (*Eingriffsähnliche Vorwirkung*) which would prevent young people from enjoying their rights and freedoms in the future. Thus, 'fundamental rights have nonetheless been violated because the emission amounts allowed by [the Act] in the current period are capable of giving rise to substantial burdens to reduce emissions in later periods … [t]he duty to afford protection against risks to life and health can also establish a duty to protect future generations'.[55] Although such generations 'do not yet carry any fundamental rights in the present',[56] '[u]nder certain conditions, the *Grundgesetz* imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against [burdens] … being unilaterally offloaded onto the future'.[57]

The decision thus pays close attention to the question of *who* is required to mitigate climate change. The Court found that the State had an obligation to distribute those obligations – concretised in Germany's legislated 'carbon budget' – in a fair and equitable manner. This consideration of the distributional consequences of climate action is closely aligned to the principle of intergenerational equity. However, the granular level of analysis applied in *Neubauer* has not been employed in all

[53] The summary of the case draws heavily on the author's summary of the case elsewhere. See Sam Bookman, 'Creativity and Climate Rights in "Commonwealth Model" Jurisdictions', Public Law Conference, Dublin, 6–8 July 2022.

[54] Grundgesetz art 20A, as translated by the Constitute Project. See <https://constituteproject.org/constitution/German_Federal_Republic_2014?lang=en> accessed 9 February 2024.

[55] *Neubauer* (n 11) [142]–[146].

[56] ibid [146].

[57] ibid [183].

climate cases concerning the interests of future generations. In other instances, courts have paid greater deference to governments' own assessments of justice. For example, in 2015 in *Foster v Washington Department of Ecology*, the Supreme Court of the US State of Washington found that although the state owed public trust obligations to '[p]reserve, protect and enhance the air quality for future generations', this obligation was adequately discharged simply by engaging in a rulemaking process to establish climate regulations.[58]

Intergenerational equity was also discussed in the Dutch *Urgenda* judgments of the District Court of the Hague (2015), Court of Appeal of the Hague (2018), and the Supreme Court (2019).[59] These judgments confirmed that the risks resulting from dangerous climate change can translate into violations of the right to life (Article 2 ECHR) and the right to private and family life (Article 8 ECHR). These risks result in a duty of care by the State to do its 'fair share' to mitigate climate change. The court of first instance, the District Court of the Hague, ruled that this duty of care applies to both current and future generations. Furthermore, the District Court based its decision explicitly on the principle of fairness laid down in Article 3 of the UNFCCC. According to the District Court, this principle entails that a State's climate policy 'should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change'.[60] The Court of Appeal and the Supreme Court, however, did not dwell upon the question of the State's eventual obligations towards future generations, as the risks for current generations were sufficient to establish a breach of the duty of care.[61] Thus, no answer was given to the question whether rights derived from the ECHR also apply to future generations, nor was the intergenerational element of the principle of fairness further touched upon.

14.2.2.1.2 PERMITTING AND CONSENT DECISION-MAKING Intergenerational equity has also played a role in shaping the procedural climate obligations owed by States. Specifically, courts have found intergenerational equity and the interests of future generations to be a factor that decisionmakers must take into account

[58] *Foster v Washington Department of Ecology* No 14-2-25295-1 [2015] (Supreme Court of Washington) (*Foster v Washington*) [6]. The public trust doctrine has its origins in Roman law that was introduced into, among others, the US legal order, through common law. The doctrine entails that the (sovereign) State manages and controls natural resources for future generations.

[59] *Urgenda v the Netherlands* [2015] ECLI:NL:RBDHA:2015:7145 (District Court of the Hague) (*Urgenda District Court*); *Urgenda v the Netherlands* [2018] ECLI:NL:GHDHA:2018:2591 (The Hague Court of Appeal) (*Urgenda Court of Appeal*); *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) (*Urgenda Supreme Court*).

[60] ibid *Urgenda District Court* [4.57].

[61] *Urgenda Court of Appeal* (n 59) [37].

when setting government policy or deciding whether to permit the development of carbon-emitting projects (such as mines or power plants). For instance, in 2013, the Supreme Court of India ordered an Environmental Impact Assessment study on capping iron ore excavations in the State of Goa, taking into account the principles of intergenerational equity and sustainable development.[62] The Supreme Court of Sri Lanka observed in 2000 that the principle 'should be regarded as axiomatic in the decision-making process concerning the natural resources and the environment'.[63]

Intergenerational equity is referred to in several pieces of Australian environmental and planning legislation.[64] In a series of cases, courts and tribunals in Australia have directed decisionmakers to consider the interests of future generations based on this principle. In *Gloucester Resources v Minister for Planning*, the New South Wales Land and Environment Court (NSWLEC) upheld the decision of the Minister of Planning to refuse permission to develop a proposed coal mine. The Court observed that '[t]he principle of inter-generational equity provides that the present generation should ensure that the health, diversity and productivity of the environment are maintained for future generations'.[65] In this case, '[t]he economic and social benefits of the Project will last only for the life of the Project (less than two decades), but the environmental, social and economic burdens of the project will continue for long after'.[66] The Court further drew on the principle of intergenerational equity in concluding that the responsible minister was required to consider the potential climate impacts of the mine before allowing the development to go ahead,[67] including indirect, downstream' emissions – that is, emissions generated by burning the mined coal, which would subsequently be supplied to energy generators.[68]

The NSWLEC in *Gloucester* embarked on an extensive cost–benefit analysis before arriving at the same conclusion as the responsible minister. In other cases, courts have determined that, at a minimum, decisionmakers have a procedural obligation to turn their minds to intergenerational equity. In 2006 in *Gray v Minister for Planning*, the NSWLEC considered a challenge to the defendant's decision to permit the development of the Anvil Hill Coal Mine.[69] One of the issues for the Court to consider was whether the responsible minister had fulfilled his statutory duty

[62] *Goa Foundation v Union of India and Ors* Writ Petition (Civil) No 435 Of 2012 [8]. See also *Intellectuals Forum, Tirupathi v State of Andhra Pradesh and Ors* Appeal (Civil) 1251 of 2006.

[63] *Bulankulama and Others v Secretary, Ministry of Industrial Development and others* [2000] LKSC 18 (Supreme Court of Sri Lanka).

[64] See e.g. Protection of the Environment Act 1991 s 6(2)(b) (NSW); Environment Protection and Biodiversity Conservation Act 1999 s 6A(c) (Cth).

[65] *Gloucester Resources* (n 25).

[66] ibid [415].

[67] ibid [498].

[68] ibid [499].

[69] *Gray v The Minister for Planning, Director-General of the Department of Planning and Centennial Hunter Pty Ltd* [2006] NSWLEC 720.

to consider the principles of 'ecologically sustainable development', which included the principle of 'inter-generational equity'.[70] The Court concluded that the principle demands that decisionmakers consider the *cumulative* impacts of proposed activities, rather than any single event. A cumulative approach 'must include the effect on future generations'.[71] In light of this requirement, the Court concluded that the planning process had been deficient. Specifically, the Court considered that the environmental impact assessment requirements – which set the terms of the mine's environmental assessment – failed to take into account Scope 3 emissions resulting from the development.[72] This omission amounted to a 'failure of a legal requirement to take into account the principle of intergenerational equity'.[73] As in other cases (such as the 2019 decision of the Chilean Supreme Court in *Chauhan Chauhan*),[74] the Court linked the principle of intergenerational equity to the precautionary principle: both suggest a need for caution in the face of future uncertainty. Permission for the mining development was accordingly set aside. By contrast, in 2011 in *Haughton v Minister for Planning and Macquarie Generation*, the minister's decision to allow the construction of a power station was upheld in part because the minister had considered the intergenerational implications of climate change, albeit at a high level of generality.[75]

This jurisprudence was recently applied by the Queensland Land Court in the 2022 case of *Waratah Coal v Youth Verdict*.[76] In that case, the Court recommended against approvals for the development of a new coal mine in an ecologically sensitive area. The Court observed that:

> The intergenerational aspect of climate change risks makes the rights of children paramount. The year 2100 is the reference point for the Paris Agreement long-term temperature goal. My generation of decision makers will be long gone, but a child born this year will be 78 in 2100. The principle of intergenerational equity places responsibility with today's decision makers to make wise choices for future generations. The children of today and of the future will bear both the more extreme effects of climate change and the burden of adaptation and mitigation in the second half of this century. Their best interests are not served by actions that narrow the options for achieving the Paris Agreement temperature goal. This weighs the balance against approving the applications.[77]

[70] ibid [260]–[261], citing the Environmental Planning and Assessment Act 1979 ss 4 and 5(a)(vii).
[71] ibid [279].
[72] That is, downstream emissions resulting from the activities of other parties. In this case, this would include energy producers burning the coal extracted from the Anvil Hill Mine. For a definition of Scope 3 emissions, see >https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf> accessed 9 February 2024.
[73] *Gray v The Minister for Planning* (n 68) [294].
[74] *Chauhuan Chauhuan v Empresa Nacional de Petroleos, ENAP SA* Rol 5888-2019 (Excelentisima Corte Suprema, 2019).
[75] *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217.
[76] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2022] QLC 21.
[77] ibid [1603].

In another recent Australian case, *Sharma v Minister for the Environment* in 2021, a group of children challenged the minister's decision to approve the expansion of a coal mine. Rather than alleging a failure to fulfil a statutory duty, the plaintiffs argued that the minister owed them a tortious common law duty of care. The plaintiffs were successful in the first instance. The Federal Court Judge concluded that it was 'reasonably foreseeable' that the extension of the mine would lead to greater harms faced by the children in the future and that the responsible minister had 'substantial control' over such harm.[78] The decision, however, was overturned on appeal.[79] The most important basis for the minister's appeal was the reasoning of the federal court that formulating climate policy is a task not of judges but of democratically chosen parliaments together with the government. This issue will be discussed further in Section 14.3 below.

14.2.2.1.3 NON-DISCRIMINATION The third context in which intergenerational equity has shaped the obligations owed by States is in equality and non-discrimination challenges brought by children and young people against governments. In this context, child and young person plaintiffs have pointed to the current and future harms that climate change will impose on their generation. Scientific research confirming the presence of such harms and their significance has played an important role in the evolving jurisprudence.[80] Such harms are significant – as the first instance court in *Sharma* observed in factual findings that were upheld on appeal, present children are at a heightened risk of many climate harms (such as heat waves and mental health harms), while in the future, they are more likely to experience greater health, quality of life, and financial harms.[81] The extent of this risk and danger depends partly on the effectivity of the measures taken to counter climate change and to protect children from its consequences.

Despite these uneven impacts, some courts have refused to consider equality challenges brought by children and young people. These claims are particularly prolific in North America. In *ENJEU v Procurer General du Canada*, the Quebec Superior Court declined to certify an equality rights claim brought on behalf of Quebecers under the age of 35, finding the identification of such a group to be 'arbitrary'.[82] In *Aji P*, the Court of Appeals of Washington State determined that children

[78] *Sharma and others v Minister for the Environment* [2021] FCA 560 (*Sharma First Instance*).

[79] *Sharma* (n 15).

[80] See e.g. Wim Thiery and others, 'Intergenerational inequities in exposure to climate extremes' (2021) Science 158; Caroline Hickman and others, 'Climate anxiety in children and young people and their beliefs about government responses to climate change: a global survey' (2021) 5(12) Lancet Public Health 863.

[81] ibid. See *Sharma First Instance* (n 78), where the Court estimated that the average child would lose $41–85,000 in family wealth and $170,000 in lost income over the course of their lives as a result of climate change.

[82] *Environnement Jeunesse v Procureur General du Canada* [2018] 500-06-000955-183 (Quebec Superior Court) 123 (*ENJEU*).

were not a 'suspect class' that attracted equal protection rights under the United States Constitution.[83] This finding was based on three reasons drawn from United States equal protection jurisprudence: childhood is not an immutable characteristic; the alleged harms were not imminent; and 'the aggregate acts of the State do not show any discrimination or discriminatory intent'.[84] The equal protection claim was accordingly rejected.

Other courts, however, have been more open to such challenges. In the 2020 *Mathur v Ontario* case, the Supreme Court of Ontario allowed an equality claim against the provincial government to proceed to a full merits hearing. Plaintiffs alleged that the replacement of previous climate mitigation targets with less ambitious ones constitutes age discrimination prohibited by section 15 of the Canadian Charter of Rights and Freedoms. The Court decided that the section 15 claim 'self-evidently' met the threshold test of having a 'reasonable prospect of success', given that 'most, if not all of [the plaintiffs] will be proportionately [sic] affected by the impacts of climate change and will suffer the most of all generations; but more importantly, these impacts will exacerbate their pre-existing vulnerability and disability'.[85] Despite this initial success, however, the claim was unsuccessful at the merits stage.[86] While the Court accepted that 'climate change has disproportionate impacts on young people and indigenous peoples',[87] it nonetheless found that the government did not have a positive obligation to bridge 'a gap between group and non-group members'.[88] The Court further found that the differentiated impact was not between people of different ages, but rather, 'a temporal distinction', and therefore not a ground protected or recognised by Canadian human rights law.[89]

Recently, the UN Human Rights Committee addressed a claim brought by a number of indigenous Torres Strait islanders alleging that Australia's failure to take effective climate mitigation and adaptation measures violated their rights under the International Covenant on Civil and Political Rights (ICCPR). In this case, known as *Daniel Billy v Australia*,[90] the question at hand was not discrimination against future generations in general but the specific consequences of climate policy for the indigenous groups of which the claimants were members. Substantially, the complaint involved alleged violations of the right to life and the right to privacy, family, and home life, as well as minority rights, rather than age discrimination. Nevertheless, the Committee's jurisprudence may have important implications for

[83] *Aji Pexrel Piper v State* 480 P.3d 438 (Court of Appeals for Washington 2021) (*Aji P*).
[84] ibid [29].
[85] *Mathur Strikeout* (n 26) [178].
[86] *Mathur Merits* (n 25).
[87] ibid [25], [178].
[88] ibid [178].
[89] ibid [180].
[90] UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 3624/2019', 21 July 2022, UN Doc CCPR/C/135/D/3624/2019 (*Billy*).

age discrimination claims. The ground-breaking views of the Committee confirmed the violation of Articles 17 and 27 of the ICCPR, concerning the right to private and family life and the right of minority groups to enjoy their own culture. The Committee considered the right to culture through an intergenerational lens: it recognised that the 'the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture'.[91] This ruling illustrates how intergenerational equity can be effectively integrated into human rights law, thus ensuring that the rights of both present and future generations are protected through the adoption of effective climate policies.

14.2.2.1.4 COURTROOM PROCEDURE In addition to the obligations outlined earlier, intergenerational equity plays a role in considerations of courtroom procedure and access to justice. Many judges have considered that procedural innovations are necessary in order to allow claims of intergenerational equity to be presented in court. In particular, judges have been required to consider *who*, if anyone, may be permitted to represent the interests of future generations; and in particular, whether children may do so. As many judges have noted, these interests are unrepresented in the political process – neither children nor future generations can vote.[92] The Supreme Court of Pakistan observed in 2021 that intergenerational justice requires that 'the Court should be mindful that its decisions also adjudicate upon the rights of the future generations of this country', a 'silent majority' which 'is rendered powerless and needs a voice'.[93] And the High Court of South Africa has found that the right to a healthy environment as protected under section 24 of the Constitution of South Africa 'may be invoked purely for the benefit of future generations' even if violations of the right of present generations cannot be demonstrated.[94]

These considerations are central to decisions concerning standing and the certification of class actions. In *Minors Oposa*, the Court recognised the standing not only of the child plaintiffs to be represented in Court by their litigation guardians but for the children to 'sue on behalf of the succeeding generations … based on the concept of intergenerational responsibility'.[95] The Court later observed that the children had standing not just as parties in themselves but also to 'represent their

[91] ibid [8.14].

[92] *Sharma First Instance* (n 78) [296], 'vulnerability of the children is partly a function of the magnitude of the potential risk of harm they face but is also a function of their powerlessness to avoid that harm', and 'children have no choice but to live in the environment which will be bequeathed to them'.

[93] *DG Khan Cement Company v Government of Punjab* CP 1290-L/2019 (Supreme Court of Pakistan) [19].

[94] *Groundwork Trust* (n 6) [82.4].

[95] *Minors Oposa v Factoran* (n 9) [7].

generation as well as generations yet unborn'.[96] The Court formally certified the children as representatives of a class action, finding that 'since the parties are so numerous, it becomes impracticable if not totally impossible, to bring all of them before the court. We likewise declare that the plaintiffs therein are numerous and representative enough to ensure the full protection of all concerned interests'.[97]

The wide-reaching approach of the *Oposa* court has been influential in Filipino law. Since the 1993 decision, the Philippines has introduced writs of *kalikasan*, designed to streamline and liberalise standing requirements in environmental cases.[98] Nevertheless, the approach has encountered resistance in some quarters. Subsequent courts have been concerned that the approach presupposes that a single group of plaintiffs could speak for entire present and future generations, counterproductively resulting in the court making decisions on their behalf that actually preclude the full range of future decision-making. In *Arigo v Swift*, the Court observed that:

> [w]hile 'intergenerational responsibility' is a noble principle, it should not be used to obtain judgments that would preclude future generations from making their own assessment based on their actual concerns. The present generation must restrain itself from assuming that it can speak best for those who will exist at a different time, under a different set of circumstances. In essence, the representative suit will inevitably result in preventing future generations from protecting their own rights and pursuing their own interests and decisions. It reduces the autonomy of our children and our children's children. Even before they are born, we again restricted their ability to make their own arguments.[99]

Judge Leonen suggested in his concurring opinion to *Resident Marine Mammals of the Protected Seascape Tanon Strait v Reyes* that standing and class action certification of groups on behalf of future generations should be restricted only to cases where:

> a) … there is a clear legal basis for the representative suit; b) there are actual concerns based squarely upon an existing legal right; c) there is no possibility of any countervailing interest existing within the population represented or those that are yet to be born; and d) there is a threat of catastrophe so imminent that an immediate protective measure is necessary.[100]

'Better still', the Court suggested, referring to the *Minors Oposa* case, 'in light of its costs and risks, we abandon the precedent altogether'.[101]

[96] ibid [2].
[97] ibid [7].
[98] *See* Hilario G. Davide, 'The Environment as Life Sources and the Writ of Kalikasan in the Philippines' (2012) 29 PELR 592, 597–598.
[99] *Arigo v Swift* [2014] GR No 206510, 743 Phil 8.
[100] *Resident Marine Mammals of the Protected Seascape Tanon Strait v Reyes* GR No 180771 [2015] (Supreme Court of Philippines), Conflicting Opinion of Judge Leonen.
[101] ibid.

This tension is evident elsewhere in the world. Many courts have followed the path forged by *Minors Oposa* in liberalising participation requirements to facilitate the presentation of arguments on behalf of future generations. In *Demanda Futuras Generaciones*, the Supreme Court of Colombia took a flexible approach to standing, permitting climate claims to be brought on behalf of children and future generations through the streamlined *tutela* procedure.[102] In 2023 in the Belgian case of *VZW Klimaatzaak*, the Court of Appeal reviewed relevant human rights standards on the right to participate in environmental decision-making, and in particular, the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters ('Aarhus Convention'). The Court concluded that the plaintiffs were entitled to bring claims on behalf of future generations, especially in light of the impacts that climate change has on the entire present and future population.[103]

In the United States, plaintiffs face especially restrictive standing requirements. Plaintiffs must generally demonstrate the existence of a particularised injury; caused by the defendant; and redressable by the Court. Some child and youth plaintiffs have met these requirements, particularly before state (rather than federal) courts. In *Funk v Wolf*, the Commonwealth Court of Pennsylvania ultimately rejected a state constitutional law challenge to the state's failure to develop a comprehensive mitigation plan, but it accepted that at least one child plaintiff had experienced harms that could be distinguished from the general population for the purposes of standing requirements.[104] The Court further recognised that the claim met the causation requirement for the purposes of standing, namely the requirement that there is a causal relationship between the defendant's conduct and the injury suffered. The Court observed that '[t]he zone of interests protected by the [state constitution's environmental provision] is the rights of all people in the Commonwealth, including future generations'.[105] The Court, however, rejected the claim on substantive grounds. Youth plaintiffs in at least two other state court claims – *Held v Montana* and *Kanuk v Alaska* – have likewise overcome standing restrictions. In *Kanuk v Alaska*, the Supreme Court of Alaska found that Alaskan state courts do not deny 'injured persons standing on grounds that others are also injured … to require dismissal of … lawsuits because all possible viewpoints cannot be represented would create unacceptable barriers to the courts'.[106] And in *Held v Montana*, a trial court found that youth plaintiffs had standing because they

[102] *Demanda Futuras Generaciones* (n 11). The tutela-procedure facilitates accessibility to the courts through accessible requirements for filing an application that alleges a violation of a constitutional right.

[103] *VZW Klimaatzaak v Kingdom of Belgium and Others* [2023] 2022/AR/891 (Cour d'appel de Bruxelles) (*VZW Klimaatzaak Appeal*).

[104] *Funk v Wolf* 158 A.3d 642 (Supreme Court of Pennsylvania 2017).

[105] ibid [29].

[106] *Kanuk v State* 335 P.3d 1088 (2014) [11]. It should be noted, however, that the Court nevertheless dismissed the claim on political question grounds.

experienced not only speculative future harms but already manifest harms of climate change, such as anxiety-related mental health harms.[107]

Other courts have been more circumspect in relation to standing and class certification. In the Dutch *Urgenda* case, the Supreme Court did not touch upon the question whether interest groups can litigate on behalf of future generations. In the German *Neubauer* case discussed earlier, the standing of child plaintiffs was recognised, but only as existing persons – not as representatives of future generations. The Court observed that '[t]he complainants are not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights. Rather, the complaints are invoking their own fundamental rights'.[108] In the *ENJEU* case also discussed earlier, the breadth of climate impacts was considered a reason to *restrict* the standing of plaintiffs purporting to represent all young people, and instead reserve the matter for the political branches.[109] In addition to these specific concerns related to young people and future generations, as discussed elsewhere in this volume, some courts have drawn on general separation of powers concerns or the political question doctrine to preclude judicial consideration of claims related to intergenerational equity. Such decisions are particularly common in North America.[110]

Finally, it should be noted that child and youth participation may extend beyond formal matters such as standing and class action certification, to issues related to the accessibility and age-appropriateness of procedures. In *Sacchi* for example, the CRC considered a communication brought by children from several countries who argued that inaction on climate change violated their rights under the UN Convention on the Rights of the Child. The communication was unsuccessful on the basis that the children had failed to exhaust domestic remedies, a prerequisite for the Committee to consider the complaint.[111] Nevertheless, the Committee engaged with the complainants by communicating their decision in a plain-language document, intended to be legible to the child complainants, while also adopting a closed-door hearing procedure that allowed the child petitioners to address the Committee directly. Moreover, the complainant Chiara Sacchi and other children were invited to participate in a special advisory team on climate and children's rights. The Committee also organised an online consultation among children and youth to gain a better understanding of the ways in which children's rights are affected by climate change and environmental degradation. These measures suggest the potential for greater innovation in facilitating the access of children and young people to judicial decision-making on climate issues.

[107] *Held v Montana* No CDV-2020-307 (District Court of Montana 2023) [87].
[108] *Neubauer* (n 11) [109].
[109] *ENJEU* (n 82) [35].
[110] See e.g. *Juliana* (n 20); *La Rose v Her Majesty the Queen* T-1750-19 [2020] (Federal Court of Canada); *Lho'imggin et al v Her Majesty the Queen* 2020 FC 1059 [2020] (Federal Court of Canada); *Aji P* (n 83).
[111] See Chapter 5 on Admissibility.

14.2.2.1.5 REMEDIES Intergenerational equity concerns may play a role in remedies awarded in climate cases. The principle suggests that remedies must be effective over a long-term horizon, rather than satisfying the short-term demands of the parties.

Tailoring judicial remedies to the needs of future generations is no easy task. Courts have referred to the need for such tailoring, but explicitly crafted remedies remain rare. In the 2018 *Shrestha v Prime Minister* case, the Supreme Court of Nepal found that the Nepali government owed a constitutional obligation to legislate a comprehensive climate mitigation and adaptation policy. It ordered the government to 'make legal arrangements to ensure ecological justice and environmental justice to the future generation', but gave little guidance as to how such an outcome could be achieved.[112] In *VZW Klimaatzaak*, the Belgian Court in the first instance explicitly declined to specify a remedy, despite finding that the government had violated plaintiffs' rights.[113] More extensive guidance was provided by the Federal Constitutional Court of Germany in *Neubauer*. Although it was left to the legislature to amend the challenged legislation, the Court set out principles to guide that amendment, including a requirement that annual emission amounts and reduction targets be set out in greater detail.[114] The Dutch *Urgenda* judgments show a thoroughly considered level of detail with the District Court of the Hague partly basing its emission reduction order on the principle of intergenerational equity.

A more novel and comprehensive scheme was set out by the Supreme Court of Colombia in *Demanda Futuras Generaciones*. In that case, youth plaintiffs challenged the government's failure to control logging in the Amazon Rainforest, in part because of logging's effect on climate change. The Court recognised the Amazon Rainforest as a subject of rights (*sujeto de derecho*), effectively recognising the rainforest as a legal person. It also ordered several government agencies, together 'with the active participation of the plaintiffs, affected communities, scientific organizations or environmental research groups, and interested populations in general', to develop an 'intergenerational pact for the life of the Colombian Amazon' that includes 'measures aimed at reducing deforestation to zero and greenhouse gas emissions' and has 'national, regional and local implementation strategies of a preventative, mandatory, corrective and pedagogical nature, directed toward climate change adaptation'.[115] The Court further set out a process for judicial oversight to monitor the implementation of the remedy. It should be noted that many groups, including the plaintiffs, have complained that the remedy has not been implemented by the Colombian government.[116] Similar remedy mechanisms are available elsewhere, such as in the

[112] *Shrestha v Office of Council of Ministers* (n 8) [13].
[113] *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile) [2.3.1]–[2.3.2]; *VZW Klimaatzaak Appeal* (n 103).
[114] *Neubauer* (n 11) [254]–[261].
[115] *Demanda Futuras Generaciones* (n 11) [14].
[116] Alex Guillau, 'The Colombian Government Has Failed to Fulfil the Supreme Court's Landmark Order to Protect the Amazon' (*Dejusticia*, 15 April 2019) <www.dejusticia.org/en/

Philippines, where the writ of continuing mandamus has been applied in environmental cases to ensure long-term court oversight and action plans.[117]

Another novel remedy in the environmental context was awarded in the Argentinian case of *Fischer v Comune Dique Chico*. The case concerned an agricultural school which challenged the government's decision to allow inorganic fumigation and fertilisation to take place in the surrounding area. The Court found the decision to be unconstitutional and emphasised the importance of environmental education, finding that children should be taught about the importance of intergenerational equity. As part of the remedies awarded in the case, the Court ordered the judgment to be taught in nearby schools for 'pedagogical-environmental purposes'.[118] The Court observed that was 'a cultural way of strengthening generational equity', demonstrating that 'present generations should not – we must not – adopt environmental decisions that irreversibly compromise them as future generations … [f]or this reason, the corresponding copies [of this decision] will be sent to them'.[119]

Lastly, the UN Human Rights Committee has issued extensive recommendations in the previously mentioned *Billy* case. The Committee determined that the State has an obligation to effectively remedy the damage suffered by the victims of the established human rights violations. This obligation entails among others an obligation to make full reparation and to provide adequate compensation for the harm suffered and to 'engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands'.[120]

14.3 EMERGING BEST PRACTICE

We consider 'emerging best practices' to be those judicial practices which best give practical effect to the principle of intergenerational equity, or which ensure adequate application of the principle in judicial decisions. The principle requires consideration of the obligations owed by the present to future generations. One overriding obligation is clear: intergenerational equity requires that States introduce policies to ensure rapid decarbonisation and climate mitigation, and to adapt to current and future effects of climate change. The absence of such policies is fundamentally inconsistent with the principle of intergenerational equity.[121] When cast in terms of intergenerational distribution, the rapid emission of greenhouse gases into the

the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/> accessed 12 February 2023.

[117] See the decision in *MMDA v Concerned Residents of Manila Bay* (n 49) [598]–[599].

[118] *Fischer v Comuna Dique Chico* (2020) [23].

[119] ibid.

[120] *Billy* (n 90) [11].

[121] See e.g. the decision in *Shrestha v Office of Council of Ministers* (n 8), where the complete absence of any climate legislation was found to be inconsistent with the Constitution of Nepal. The Court referenced the principle of intergenerational equity in reaching this conclusion.

atmosphere amounts to one generation imposing hardship and burdens on another. The adoption of an expressly distributional approach in *Neubauer* fundamentally exposed this. The intergenerational injustice of climate change is clear, whether approached expressly from the standpoint of a right to a healthy environment (as in *Minors Oposa v Factoran*), or through general principles and obligations (as in the dissenting opinion of Judge Staton in the 2020 case of *Juliana v United States*).

In addition to this high-level, overriding obligation, we set out six more specific emerging best practices: (1) consideration of the distributional impacts of climate policies; (2) requiring consideration of long-term and downstream climate effects in planning and permitting decisions; (3) recognising and admitting age discrimination cases that relate to climate change; (4) a flexible approach to the standing and class certification; (5) fostering children and young people's participation in courtrooms; and (6) crafting judicial remedies which promote long-term and participatory implementation.

Best practice involves paying attention to the fair distribution of climate obligations. The approach taken in the *Neubauer* decision is a strong instantiation of intergenerational equity. The Court went beyond Germany's high-level climate policy targets and conducted a distributional assessment of who would bear the burden of reaching them. The analysis reveals how climate policies, in addition to climate change itself, have distributional consequences. The Court drew on well-established constitutional jurisprudence in finding that the State could not unduly interfere with children's rights and freedoms in the development of climate mitigation policies, requiring the German parliament to revisit its approach. This distributional assessment reflects best practice. Such an approach is particularly crucial in jurisdictions which recognise an explicit right to a healthy environment,[122] but it may be applied – as in *Neubauer* – even in jurisdictions where no such subjective right exists. By contrast, we consider that it is insufficient for courts to simply note that a government has, or is considering, a climate mitigation policy, even where such a policy may be ambitious in absolute terms (such as a long-term net-zero target).[123] Such an approach fails to apply considerations of fairness and justice as demanded by the principle of intergenerational equity.

Secondly, emerging best practice involves the application of intergenerational equity considerations in permitting and planning decisions. Depending on the overall decision-making framework and the task of the reviewing court, such applications may be either substantive or procedural. At a minimum, decisionmakers should be expected to turn their minds to the long-term impact of greenhouse gas emitting projects (such as mines, power plants, and airports) and the renewal of infrastructure necessary for climate adaptation. This includes downstream consequences, such

[122] As the Inter-American Court of Human Rights has recognised, such a right includes a collective dimension which is held by future generations.

[123] See e.g. the approach taken in *Foster v Washington* (n 58), where the Court was satisfied that the state government had fulfilled its duty simply by beginning a climate rulemaking process.

as the Scope 3 emissions considered in *Gray v Minister for Planning*. More ambitiously, judges could consider whether to recognise supra-statutory obligations owed by decisionmakers to young people, as the trial court did in *Sharma*. Where a court is entrusted with reviewing the merits of planning decisions, judges themselves should inquire into downstream climate consequences. The *Gloucester Resources* and *Waratah Coal* cases discussed earlier demonstrate how judges can apply the principle of intergenerational equity when engaging in cost–benefit analysis or merits review of permitting decisions.

Thirdly, emerging best practice reinforces the relevance of anti-discrimination and equal protection law. As numerous scientific and judicial bodies have recognised, children and young people face existing and future vulnerabilities as a result of climate change policies.[124] These consequences are entirely the fault of prior generations but will be borne by subsequent ones. This should be recognised as a form of substantive age discrimination, regardless of intent.[125] Alternatively, some have suggested a new ground of discrimination of 'birth cohort' discrimination – that is, differentiated impact that will arise in the future as a result of the timespan in which a cohort of people have been born.[126] The preliminary decision of the Supreme Court of Ontario in the *Mathur* decision is an example of emerging best practice and demonstrates the importance of recognising the differentiated impact of climate change. The subsequent decision on the merits, which rejected the existence of a positive obligation on governments to remediate age-based differentiated impact, should not be considered emerging best practice. By contrast, the *Billy* decision of the UN Human Rights Committee shows how protection of the rights of those who suffer the most from the consequences of climate change can be ensured while keeping in mind the intergenerational dimension of the right to culture.

Fourthly – and relatedly – emerging best practice demonstrates a flexible approach to standing and class certification. Courts should consider the fact that children and young people are generally excluded from the political process, most obviously by being unable to vote. Courts may thus offer one of the few options for children and young people to participate in climate decision-making. This judicial role was forcefully articulated in *Minors Oposa v Factoran*. Courts should be careful not to erect too many barriers to children's access to the courtroom. This does not necessarily imply that judges should exceed the bounds of their proper constitutional role. As Filipino courts have suggested in cases since the *Minors Oposa* decision (such as *Arigo v Swift* and the *Marine Mammals* case), it will often be appropriate for judges to inquire whether child plaintiffs in the particular case are appropriately representative of a

[124] See *Sharma* (n 15) [11]; UNCRC in *Sacchi* (n 12) [10.13]; IPCC (n 13); Commission on Human Rights of the Philippines, 'National Inquiry on Climate Change Report' (CHRP December 2022) [53]–[55].

[125] The intent requirement presents particular difficulties in the United States, where it has long been necessary to prove intent in order to establish an equal protection violation. See *Aji P* (n 83) [28].

[126] See Refia Kaya, 'Environmental Vulnerability, Age and the Promises of anti-Age Discrimination Law' (2019) 1 RECIEL 162.

broader class of children, or of future generations more generally. But where interests are broad and collective – such as where courts are called upon to review the validity of continuing national climate policies – child plaintiffs may play an important role in articulating the long-term interests at stake. Furthermore, as the trial court recognised in *Held v Montana*, harm to children is not merely speculative: it is already manifest, thus meeting the requirement for many injury-based standing tests in national law. The scale of the climate crisis should not be used as a reason to preclude such standing, as occurred in the *Juliana* decision. Judges can play a role in climate governance through more modest declaratory remedies concerning the validity of particular laws and policies, as recognised in the preliminary decision in *Held v Montana*.

Fifthly, once admitted into the courtroom, judges could consider how to facilitate children and young people's ability to participate in judicial decision-making. Rights of participation and access to justice are broadly recognised in IEL and international human rights law and could be better reflected in domestic courtroom processes.[127] The CRC's decision in *Sacchi v Argentina* suggests some basic possibilities, such as the use of closed-door hearings or presentation of evidence, and plain-language communication of decisions. Such procedures will not be appropriate in all cases – indeed, open justice considerations may preclude the possibility of closed-door hearings. Where local rules of procedure permit, judges could consider other mechanisms through which to foster youth participation. This issue was canvassed in the CRC's General Comment No 26 on children's rights and the environment with a special focus on climate change, which in turn clarified the relevance of the UN Convention on the Rights of the Child to climate litigation.[128]

Finally, emerging best practice suggests the importance of remedies that will promote the long-term interests of children and young people. This is a challenging task for any court. Even carefully structured remedies mandating judicial oversight, such as those crafted in *Demanda Futuras Generaciones*, may fail in implementation. But where such remedies are available – as in the Philippines, which permits the use of continuing mandamus remedies in environmental matters – they may offer opportunities for children to play a role in future decision-making and governance. More novel approaches, such as the pedagogical orders made by the Argentinian court in *Fischer*, may also foster children's participation in environmental and climate governance. Recognising the Rights of Nature, as occurred in *Demanda Futuras Generaciones*, may also facilitate children's participation where they are accompanied by participatory governance structures to make decisions on Nature's behalf.

[127] See e.g. Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 3; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (entered into force 22 April 2021) 3397 UNTC 195 (Escazú Agreement).

[128] General Comment 26 (n 34).

Even where such remedies are not available and implementation will necessarily be left to the political branches, clearly specifying the requirements of intergenerational justice in judicial orders can help to integrate intergenerational equity in subsequent legislative and policy decisions. Moreover, the recommendations in the UN Human Rights Committee's *Billy* case suggest that reparations can be used in order to remedy climate damage that has already occurred and reverse, as far as possible, its consequences. Together with measures to mitigate future damage, this remedy could play an important role in ensuring intergenerational equity before the courts.

14.4 REPLICABILITY OF BEST PRACTICES

Intergenerational equity is an increasingly recognised principle of IEL. As such, all States have an obligation to integrate it into their domestic frameworks. The precise form of such integration, however, will inevitably vary between jurisdictions. Where a right to a healthy environment is recognised, such a right should be interpreted as incorporating the principle of intergenerational equity into domestic law. This has been recognised by the Supreme Court of the Philippines in *Minors Oposa*,[129] the Inter-American Court of Human Rights,[130] and the Mexican District Court in *Greenpeace Mexico*.[131] In other instances, such as Australia, intergenerational equity will be referenced in domestic legislation. Even where it is not explicitly referenced in domestic law, it may operate as an interpretive principle or relevant consideration.

Furthermore, the form and extent of implementation will be dictated by doctrine and rules of procedure. In some jurisdictions, judges and rule makers have already integrated principles of intergenerational equity in relaxed standing requirements (as in *Minors Oposa* and subsequent development of the writ of *kalikasan* in the Philippines) or allowing environmental matters to be brought under more streamlined judicial procedures (as reflected in the Supreme Court of Colombia permitting the *Demanda Futuras Generaciones* case to be brought as a *tutela* action). In systems with relatively strict or inflexible procedural requirements, the principle of intergenerational equity may not permit judicial innovation on issues such as standing, remedies, and certification of class actions.

Nevertheless, judges will often be able to develop the law to better reflect the evolving obligations of States to incorporate intergenerational equity into domestic decision-making. We consider that all of the best practices identified in this chapter are in some way applicable to the legal systems of most States. Whatever the *form* in which intergenerational equity is applied, its *function* should permeate all aspects of judging in the context of climate change.

[129] In that case, the Court concluded that the existence of an environmental directive principle in the national constitution entailed a correlative right, which in turn included obligations of intergenerational equity.

[130] IACtHR OC-23/17 (n 40).

[131] *Greenpeace Mexico* (n 40).

14.5 CONCLUSION

In this chapter we have canvassed judicial practice from a wide range of jurisdictions. We have underscored the importance of intergenerational equity as a principle of international and domestic law, emphasising that it demands ambitious action on climate change. The principle introduces a distributional framework that judges can apply when considering claims, especially those made by children, young people, and representatives of future generations. Emerging best practice recognises that the principle entails a set of obligations that States owe to children and young people, including fairness in overall climate policy, consideration of future interests in decision-making, and recognition of the generationally differentiated impacts of climate change. Furthermore, such practice often involves flexibility and innovation in judicial procedure and remedies. Intergenerational equity is a cross-cutting legal principle which is likely to play a growing role as youth-led climate litigation continues to proliferate across the world. By applying this principle in their decisions, judges can ensure that future generations are not left to bear the burden of the current generation's failure to take appropriate action on climate change.