13. Building Climate Law Through Intergenerational Justice: An Empirical Assessment

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Abstract: *Climate change is a global phenomenon with long-term consequences, including for those not yet born. In the same way, climate change has its origins in human activities (industrialization) that date back to the second half of the 19th century. Those who are no longer with us are also connected to the phenomenon. Climate change and absentees are therefore two intimately linked issues. From this angle, climate change is a major challenge for the realization of intergenerational justice. The impact of climate change on future generations depends on decisions taken today. Given the growing importance of climate change litigation as a mechanism for promoting action against climate change, this article analyses the relevance of intergenerational equity in such litigation. By examining case law linking intergenerational justice and climate change, this article explores the extent to which different legal mechanisms can be useful in protecting future generations from the climate crisis. In this sense, it examines the involvement of young people or representatives of future generations in the legal process, and how a broader interpretation of environmental law principles and fundamental rights may be relevant to extending the protection of future generations' interests and achieving intergenerational justice.*

Introduction

'The scientific evidence is unequivocal: climate change is a threat to human well-being and the health of the planet. Any further delay in concerted global action will miss a brief and rapidly closing window to secure a liveable future'[1]. The conclusion of the latest Intergovernmental Panel for Climate Change report is clear: climate change poses a threat to humankind, and time is running out. Time is an essential element in the fight against climate change. Current actions will affect those who will live in the future. It is urgent to drastically reduce global greenhouse gas emissions and carry out climate change adaptation policies.

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1 Hans-Otto Pörtner and others, 'Working Group II contribution to IPCC Sixth Assessment Report, Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary For Policymakers' (2022) 35 <https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf> accessed on 20 July 2023.

In the last few years, climate litigation has emerged as a new regulatory tool[2] with different social actors aiming to trigger ambitious climate policies globally. The lack of ambitious action in recent decades and the 2015 entry into force of the Paris Agreement, which shifts States' obligations from *top-down* to *bottom-up* and, in so doing, empowers social actors to seek greater ambition within their jurisdiction. Consequently, climate litigation has expanded globally since then.[3] Climate change requires that we rethink the vincula of our past and present actions in both the near and distant future. Similar phenomena can be observed in climate litigation, where actions are framed in a time scale that brings past actions to future remote consequences.[4] This is why it is pertinent to account for the relevance of intergenerational relations when dealing with climate litigation: the concepts of 'intergenerational justice' – understood as the relationship between generations (overlapping in time or not) based on principles of justice – and 'future generations' – those who will live in the future but are not yet born- play an important role in the construction of the legal regime concerning the climate[5]. Consequently, inquiring about the role of 'absent' generations (past and future) within climate litigation, understood as a regulatory mechanism to help achieve climate justice objectives, may be central to accomplishing those goals.

This chapter aims to show how those 'absent' generations (future generations) are represented in climate change litigation. The main purpose is to analyse the different tools and legal mechanisms used and bring an understanding of the possible avenues to bring future protection to legal reasoning. In this sense, future generations can be invoked directly and indirectly in climate change litigation. The purpose of this chapter is to show how this direct and indirect invocation is done. We also analyse the legal and practical restraints to bringing 'absent generations' to climate litigation. Finally, we study the best courses of action to incorporate their interests and needs in litigation.

2 Jacqueline Peel and Hari M Osofsky, 'Litigation as a Climate Regulatory Tool' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (CUP 2019).

3 Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16(1) Annual Review of Law and Social Science 21. Currently there are more than 1550 cases across 38 countries.

4 Chris Hilson, 'Framing Time in Climate Change Litigation' (2017) 9(3) Oñati Socio-Legal Series 361.

5 Axel Gosseries, *What is Intergenerational Justice?* (Polity Press 2023).

To better illustrate our remarks, this chapter is divided into two parts: the first analyses the direct invocation of future generations in climate disputes (I). The second focuses on the indirect invocation of absent generations to better show how transgenerational justice is progressively put into place in climate disputes (II).

1. The Direct Invocations of Future Generations: On Standing and Representation

Bringing future generations to climate litigation may be one way to incorporate those who will experience the worst consequences of climate change into courts' decision-making. It has been observed that children have been joining the climate justice movement worldwide, coming to the forefront of public discussion.[6] The role of children in climate movements has also been replicated in the use of litigation as a strategy to influence national and international climate policies effectively.[7] Their involvement in climate litigation may serve as a mechanism to account for this futurability, which is also reflected in the invocation of the interests of future generations. The representation of future generations' interests emphasises the long-term impacts of climate change and its dangerous consequences for those who will live on the Earth in the future. Among climate litigation case-law, there is growing litigation where the connection between generations has been raised through the direct invocation of future generations. In this section, we will give an account of those cases where there has been a direct invocation of future generations through their representation by specific actors. We will first analyse the levers (1) through different examples, and

6 Marcos de Armenteras Cabot, 'La acción global por el clima y la importancia de los jóvenes en el movimiento por la justicia climática' (2021) 18 OXÍMORA Revista Internacional De Ética Y Política 153.

7 Among other cases it is worth mentioning *Duarte Agostinho and Others v Portugal and 32 Other States* App No 39371/20 (ECtHR, 13 November 2020), where six Portuguese children and young people brought a court case to the European Court of Human Rights (ECtHR) alleging violation of their human rights by not taking action against climate change. Also, in *Sacchi, et al. v Argentina, et al.* (11 November 2021) UN Doc CRC/C/88/D/104/2019), 16 children filed a petition before the United Nations Committee on the Rights of the Child alleging the violation of their rights under the United Nations Convention on the Rights of the Child, due their inaction to respond to climate change. For further reading on these cases, see Bridget Lewis, 'Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights' (2021) 39(2) Nordic Journal of Human Rights 180.

then present the limitations in a second step (2). That will allow us to outline the actual value of the arguments for future generations.

1.1. Future Generations as a Core Argument: Levers

The invocation of future generations before the courts stems from the landmark *Oposa Minors* case ruled in the Philippines in 1993. It could be helpful to look at this jurisprudential development to highlight whether the representation of future generations in courts may or may not be relevant in climate litigation.

1.1.1. The Oposa Minors Case as a Landmark Illustration

On behalf of his son and a group of minors represented by their parents, Mr Oposa filed a civil suit against the Secretary of the Department of Environment and Natural Resources of the Philippines Government. The lawsuit filed by 43 children, also on behalf of future generations, claimed that the licences granted under the Timber Licensing Agreements violated the constitutional right to a healthy environment and ordinary environmental standards. The plaintiffs requested that the licences be cancelled and no further licences be granted. In its judgment in 1993, the Court accepted the plaintiffs' arguments, concluding that the licences contravened the duties and functions of the Department of Environment and that the environmental damage they caused violated its obligation to preserve the environment for future generations. In this regard, the Court first explicitly ruled on the possibility that the plaintiffs were also acting on behalf of future generations, thus:

> This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.[8]

8 *Minors Oposa v Factoran* (Supreme Court of the Philippines, case No 101083, 224 SCRA 792, 30 July 1993).

In accepting the representation of future generations by Oposa *et al.*, the Court upholds not only the standing of minors but also that if the interests of future generations are at stake, they can be represented in the proceedings. As to the interpretation of the constitutional articles in relation to the protection of the environment, the Court considers that Article II of Section 16 of the Constitution (1987), despite being included in the section on the Declaration of Principles and Policies of the State, and not under the section on the Bill of Rights, does not mean that it does not have the same importance as any political and civil right protected under the latter, because despite being part of another category of rights, they are linked to 'self-preservation' and 'self-perpetuation'. The Court's interpretation that follows is highly suggestive. Thus, the Court considers that it would not be necessary for this fundamental right to be recognised in the Constitution. The Court further restates that the constituents included this fundamental right out of a fear that if the rights to a healthy environment and to health were not included as a state policy by the Constitution itself – thereby imposing obligations to preserve the environment and advance health protection – one day everything would be lost, not only for the present generation, but also for the generations to come. These generations will inherit nothing but a 'parched earth incapable of sustaining life'[9]. That is, the right to a balanced and healthy ecological system carries a correlative duty to refrain from damaging the environment and, consequently, the reasonable management and conservation of the country's forests. According to the Court, the ecological or environmental balance would be irreversibly disturbed without these forests.

For the case at hand, as some critics point out, the direct result of the judgment on the protection of the environment and the interests of future generations is not commensurate with the importance, scope and notoriety of the judgment[10]. The logging licences were not cancelled because the plaintiffs did not pursue the action, and the recognition of future generations as a party to the proceedings did not set a precedent. Moreover, the settled case law of the Supreme Court already allowed broad standing for any citizen, which raises the legal irrelevance that future generations were represented in the case. Thus, a key question will be whether the inclusion of future generations in the present case, taking into account the fact that

9 ibid., 9.

10 Dante Gatmayan, 'Illusion of Intergenerational Equity: Oposa v Factoran as Pyrrhic Victory' (2003) 15(3) Georgetown International Environmental Law Review 457.

minors could have brought their claim due to the recognised standing, has had any differentiating effect on the outcome of the case.

1.1.2. The Added Value of Standing for Future Generations

According to Gatmayan, it did not. In his view, in environmental protection cases, the distinction between present and future generations is irrelevant because it is impossible to protect the rights of future generations without protecting the rights of present generations.[11] The latter affirmation may be alien to the theoretical grounds of intergenerational justice since it is possible to imagine situations where the 'rights' or interests of future generations are protected, and those of the present generations are not. Thus, in arguing that it is not possible to protect the 'rights' of future generations without protecting the rights of present generations, the author ignores the fact that the protection for the benefit of future generations puts the focus on the fact that processes of ecological degradation have impacts that go beyond one generation of humans, and that cumulative impacts have effects on ecosystems in an interdependent manner – the degradation of one has an impact on others. For instance, harvesting timber for paper production can have both positive and negative impacts on the current generation, as they will not benefit from the ecosystem services provided by forests, but they will reap the economic benefits of the activity. Still, timber harvesting will also affect future generations by increasing the risk of degradation of the ecosystem in which they are located, losing natural sinks and emitting previously captured greenhouse gases, but the economic benefits for future generations will depend on how past generations have managed the economic benefits of the activity. The environmental effect of the activity is not immediate. Environmental degradation is generally a progressive process that tends towards the disappearance of the natural asset in question, which may occur in the long-term. According to this scheme, the protection of the interests of future generations, contrary to what Gatmayan argues, depends on what is decided politically in a balance between present and future interests, which may or may not be in conflict.

Furthermore, when accounting for intergenerational conflicts, the issue at stake is the tension between immediate and long-term interests. Thus, in the present case, we could argue that trade in timber for short-term gains, which has a positive impact on the country's economic revenues

11 ibid., 460.

and, consequently, may lead to safeguarding social rights, may also have perverse effects in the medium and long term. This is, in fact, the regulatory structure of environmental law: the authorisation of degradation and pollution within the limits considered appropriate at a given time. So, if only present generations were taken into account, we would have to include in the reasoning the total benefits, which would be represented by the social and economic benefits (from logging and the timber trade) and the immediate environmental consequences (the loss of part of the biodiversity). In contrast, if future generations – or an intergenerational perspective – were also taken into account, the analysis should include how this logging will affect the long term, how logging may impact the sustainability of dependent forests and ecosystems, whether the immediate benefits of the activity outweigh the potential intergenerational damage, or whether the immediate damage may be justified because the end result may be beneficial for future generations. That is, environmental restrictions viewed through the prism of immediate harm is a very restrictive way of understanding the process of ecological degradation.

However, the central question is not whether it is relevant or not to introduce an intergenerational perspective when interpreting environmental regulations but whether or not it is necessary to open the standing to future generations.

1.2. Is it then Necessary to Open Standing for Future Generations? Limits

In this sense, the Supreme Court of the Philippines again stressed the arguments it upheld in the *Oposa Minors* judgment in *Arigo v Swift* in 2014.[12] The Court affirmed the possibility that the claimants in the present case, minors, could bring a claim on their own behalf, on behalf of their generation and on behalf of future generations, based on intergenerational responsibility concerning the right to a balanced and healthy ecological system. Furthermore, it emphasised that the right of minors to a healthy environment also constitutes the fulfilment of an obligation to ensure the protection of such a right for future generations. However, in one of the concurring votes in the judgment, Judge Leonen held that the representation of future generations by present generations and the representation

12 *Arigo v Swift* (Supreme Court of the Philippines, case GR No 206510, 16 September 2014).

carried out by minors on behalf of their own generation 'allows an unrepresentative group to universally represent an entire population as well as an unborn generation by linking it to causes of action, arguments and grievances it did not choose' and thus 'unborn generations suffer the legal incapacity to assert a false or unwanted representation'.[13] In this sense, the judge distinguishes between collective actions as procedural devices that allow a genuine cause of action to be judicially considered despite the social costs and externalities involved, and class suits that seek to represent the entire population and generations to come. In his view, class suits are based on the constitutional protection of the people and the necessary constitutional protection of citizens. The latter should only be used in extraordinary situations. This opinion is based on the fact that, from his point of view, in environmental issues, the different interests at stake should be taken into account in a balanced way, and, therefore, legal standing should go hand in hand with sufficient and substantial individual interest and capacity.

1.2.1. The Real Utility of Representing the Future Generations in Climate Case Law

In a climate case in 2017,[14] the Supreme Court of the Philippines dismissed a lawsuit filed by a group of young people on their own behalf, the children of the present and the children of the future, against the Climate Change Commission, seeking protection of the right to a healthy environment to achieve emission reductions in mobility and transport under the provisions of the Constitution and an executive order on sustainable mobility. While dismissing the claim, the Court held that the rules of procedure in environmental cases liberalised the requirements for bringing an action. The Court had confirmed this in its previous case law. Still, it stated that the applicants did not prove that the Commission was directly guilty of violating environmental rules and that they had suffered direct or personal injury from such action or omission. However, Judge Leonen again issued a concurring opinion re-emphasising the need to limit the standing of the representation of future generations.[15] According to the Judge, allowing any

13 ibid.

14 *Segovia et al. v Climate Change Commission* (Supreme Court of the Philippines, GR No 211010, 7 March 2017).

15 *Segovia et al. v Climate Change Commission*, Concurring opinion of Justice Leonen (Supreme Court of the Philippines, GR No 211010, 7 March 2017).

person of the present generation to represent others who are not yet born poses three potential dangers:

> First, they run the risk of foreclosing arguments of others who are unable to take part in the suit, putting into question its representativeness. Second, varying interests may potentially result in arguments that are bordering on political issues, the resolutions of which do not fall upon this court. Third, automatically allowing a class or citizen's suit on behalf of minors and generations yet unborn may result in the oversimplification of what may be a complex issue, especially in light of the impossibility of determining future generations true interests on the matter.

It is for these reasons that Judge Leonen states that the *Oposa Minors* judgment opens up a dangerous practice since it binds those who are not capable of making decisions for themselves – either because they are minors or because they do not exist. Once the matter is *res judicata* and the interested agents come into existence or have the capacity to litigate for their interests, they will not be able to modify the judgment. In this sense, the judge objects that the present generation is fully entitled to dictate what is best for those who will exist at a different time and live under different conditions and argues that although the principle of intergenerational responsibility is very noble, it cannot be used to prevent and limit future generations from defending their own interests, since the present generation does not have the right 'to deprive future generations of both agency and autonomy'.

1.2.2. The Legitimacy of Representing Future Generations

The argument of Judge Leonen has a normative ground that is key. In his perspective, the problem would not be who can represent future generations and how but if it is legitimate to represent them. Noting that this argument, *mutatis mutandis*, may apply to any mechanism aiming to represent future generations, it would cancel any attempt to bring the interest of future generations to any decision-making authority. In this sense, depriving future generations of agency and autonomy is really the issue at stake in arguments about intergenerational justice: whether our actions can negatively affect future generations and the reasons we have to avoid doing so. The question is not about the legitimacy of decisions taken to improve the welfare of future generations, as we can give good or bad reasons for this and weigh up short, medium and long-term interests. The question is whether it is relevant or not to grant standing to future generations through

a representative. The central question relies on the practical utility and the substantive relevance that the representation of future generations may have in climate case-law.

This question was also brought up in the case of *Juliana et al. v United States*,[16] where the scientist James Hansen served as a guardian of future generations. In this case, probably the one that has received the most public notoriety, a group of 21 young people, together with the organisation 'Earth Guardian' and 'Future Generations', represented by scientist James Hansen, sued the United States, its president, and the directors and heads of the various offices that had some responsibility for reducing greenhouse gas emissions, in the Federal District Court of Oregon. The plaintiffs asked the Court to compel the defendant to undertake greenhouse gas reductions to bring atmospheric CO_2 concentrations to no more than 350 ppm by 2100. The representation of future generations by Professor Hansen was accepted without questioning its capacity. However, it does not seem to have had any practical relevance. Thus, it is not so relevant to guarantee a broad procedural capacity that includes the representation of future generations in order to safeguard its interests. That is, the representation of future generations before courts may encourage courts to consider long-term impacts.[17] Nevertheless, it is the legal reasoning and not the representation the relevant factor to consider in these cases. Thus, mere 'representation' is not as appropriate as protecting the interests of future generations, whether by virtue of the principle of intergenerational equity, sustainable development, or considering the ultimate ends of environmental law. This is where the emphasis should be placed. The representation and standing of absentees are not decisive for the case at hand. The emphasis should be on the arguments and how it is possible to understand whether or not the current effects will impact the medium and long term. The legal interpretation can also take this into account. Thus, the representation of future generations

16 *Juliana, et al. v United States of America, et al.*, US 9th Cir. 947 F.3d 1159 (2020). Further reading: 'Juliana v United States Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court' (2021) 134 Harvard Law Review 1929.

17 Humphreys notes that referring to future generations allows us to avoid entering into an analysis of more concrete and coherent responsibilities regarding the climate crisis. This is relevant; however, it is not trivial that in interpretative terms, in order to consider long-term impacts, it may be useful to trace the responsibility towards those that do not yet exist, but that are at the axiological core of the principles of environmental law. Stephen Humphreys, 'Against future generations' (2023) 33 (4). European Journal of International Law, 1061.

may have discursive weight. Since the legal force is seen in the arguments and not in whether or not there is a possibility for them to be represented, as it is possible that the interests of those who will live in the future can be commensurate without them having a representative before the court.

Additionally, it is apposite to mention the case brought in Colombia by a group of 25 children who filed a tutela action against different Colombian public bodies for their inaction on the deforestation of the Colombian Amazon. In this case, known as *Generaciones Futuras v Ministerio de Medio Ambiente et al*., the claimants, all young people between the ages of 7 and 26 (in 2018), argued that the short, medium and long-term effects of deforestation in the Colombian Amazon put at risk the safeguarding of their rights in the present and the future. Thus, the plaintiffs consider that deforestation in the Amazon violates their right to enjoy a healthy environment today and puts their rights in the future at serious risk because deforestation is the leading cause of greenhouse gas emissions in Colombia.[18] The Supreme Court, overruling the Bogotá District Court decision,[19] accepted the plaintiffs' recourse to the tutela action, given the connection between a healthy environment and fundamental rights, considering that the damage caused by deforestation to the environment and the climate has been proved, which implies a transgression of the principle of intergenerational equity and a violation of the fundamental rights to water, air, dignified life and health, among others, in connection with the environment. For that, the court, among other measures, ordered the defendants to formulate a short, medium and long-term action plan to counteract the rate of deforestation in the Amazon to address the effects of climate change; it also ordered them, within five months, and with the active participation of the plaintiffs, the affected communities, scientific organisations or environmental research groups, and the interested population in general, to build an 'intergenerational pact for the life of the Colombian Amazon', in which measures would be adopted for the protection of the environment and the environment.[20]

18 Complaint filed on 29 January 2018 before the Superior Court of the Judicial District of Bogotá.

19 *Generaciones Futuras v Ministerio de Medio Ambiente et al.* (Superior Court of the Judicial District of Bogotá DC, 12 February 2018).

20 *Generaciones Futuras v Ministerio de Medio Ambiente et al.* (Supreme Court of Colombia, case No STC4360–2018, 5 April 2018).

In the case at hand, it is important to highlight two elements. Firstly, the definition of 'future generation' and its differentiation from the notion of 'absents'. In this case, unlike those mentioned above, the plaintiffs propose a definition of future generations in which they are included. Thus, they ask the Court to recognise their rights as a future generation. To this end, they define a generation as 'a group of people who, because of their simultaneous historical experiences, share, to a greater or lesser degree, a worldview, a historical consciousness and a collective identity, which is reflected in their attitudes and behaviour'.[21] With this, they state that the claimants have an average life expectancy of 78 years, expecting to live their adult life in the period 2041–2070 and part of their old age from 2071 onwards, a period where the annual temperature of the country could gradually increase by 1.6°C and 2.14°C.[22] Secondly, this configuration of the notion of 'future generation' is not equivalent to those who are not there, those who do not yet exist – the absent – but the projection of subjects who already exist in the future. This may lead to an ontological question about what we are in the present and what we will be in the future, but beyond that, what is relevant is how to deal with the impacts of climate change on those who are alive today and whose lives are projected to the end of the century. This, in addition to showing the semantic indeterminacy of 'future generation', also shows that there are already generations who will be alive at the end of the century and who will coexist throughout their lives with climate change and its consequences; furthermore, it casts doubt on the fact that the procedural capacity of future generations and their representation before the courts lack substantive relevance since the interpretation of future harms can be carried out without including future generations – those who do not exist – in the process.

2. An Emerging Path for Transgenerational Justice: The Indirect Invocation of Future Generations in Climate Change Litigation

Climate litigation is part of a time process that implies both a return to the past and a forecast of the future. The invocation of the 'absents', both

21 Complaint filed on 29 January 2018 before the Superior Court of the Judicial District of Bogotá. Note 269, Elisa Dulcey-Ruiz (2015) Generaciones y relaciones intergeneracionales. Envejecimiento y vejez. Siglo del hombre editores [Author's translation].

22 ibid.

because they are no longer there or because they have not yet been born, is often indirectly present in climate litigation. As we have shown in the first part of this article, 'absents' are frequently the future generations more than past generations. There is a fruitful path to build transgenerational justice through climate change litigation across the argument of future generations' interests[23]. An excellent recent example is provided by the decision of the Montana court in the United States, handed down on August 14, 2023. However, this is a first-instance decision, which is something of an exception[24]. Yet, this argument does not often appear directly, as we have seen, but more in an underlined way.

It is then an 'indirect' invocation that can be observed as part of the defendants' arguments. Despite this modality, the argument is strong and a core and powerful element in climate change litigation for defending the absents' – future generations – interests. As Article 4 of the Paris Agreement notes: countries 'must continue their efforts in reducing GHG emissions'. This indicates a progressive and forward-looking pathway. From a procedural point of view, the absents and, more precisely, future generations appear in two ways: the first is when it comes to constitutional arguments (1). The second is when other legal tools, such as National Plans, are used (2).[25] Finally, we will illustrate how environmental principles can be reinforced through the use of 'the absents' and, more specifically, of 'future generations' (3).

23 Marcos De Armenteras Cabot, 'Justicia intergeneracional derecho y litigio climatico', PHD Universitat Rovira i Virgili, Tarragona, Spain, July 2021; Catherine Redwell, 'Principles and emerging norms in International Law: Intra and Intergenerational Equity' in Cinnamon Carlarne, Kevin Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (OUP 2016).

24 *Held v Montana*, Montana First Judicial District Court, Lewis & Clarck County, 14 August 2023. A group of young people in Montana won a landmark lawsuit on Monday when a judge ruled that the state's failure to consider climate change when approving fossil fuel projects was unconstitutional, see <https://perma.cc/E9DV-XZHP>.

25 Marta Torre-Schaub, 'Climate Change Litigation in France: New Perspectives and Trends' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021); Marta Torre-Schaub, 'Climate Change Risk and Climate Justice: the High Administrative Court as Janus or Prometheus?' (2023) 14(1) *European Journal of Risk Regulation* 1.

2.1. The Construction of an Intergenerational Principle Through Constitutional Arguments

If future generations do not always appear as a specific group or precise community, several climate lawsuits carry the idea of intergenerational justice. The core values of national constitutions are usually at stake in those lawsuits.[26] Those values include fundamental and constitutional rights and freedoms such as the right to life, the right to property, and freedom of speech. Those rights are presented as being challenged by climate change and potentially in danger for present and future generations.

2.1.1. Using Constitutional Rights to Protect the Future

The *Urgenda* case, in its first instance ruled in 2015,[27] considered Article 20 of the Constitution of the Netherlands as an 'obligation for the State to improve the environment'. This case combines three instances (first, appeal and cassation) in the Netherlands between 2015 and 2019. It was a lawsuit brought by almost 900 citizens and the Urgenda Foundation against the Dutch government on the grounds that the government had not acted sufficiently to protect citizens against climate change and that the greenhouse gas reduction targets set by the State were well below those set by European Union law and the need not to exceed a dangerous level of global warming following the international targets resulting from the negotiations of the United Nations Framework Convention on Climate Change of 1992. All three decisions in this case ruled in favour of the defendants and considered that the State had failed in its duty of care to protect citizens against the dangers and risks of global warming. Among other arguments, the defendants asked the Court, based on Article 20 of the Constitution, to establish a constitutional ground for an obligation not only to protect the environment, but also to improve it. This idea of 'improvement' shall be interpreted as an obligation of 'non-regression' and a duty for the present generations to protect future generations.

26 Peel and Osofsky (n 3); Mary Robinson Foundation for Climate Justice, *Principles of Climate Justice* <https://perma.cc/8NDR-9QEP>; Marta Torre-Schaub (ed), *Justice climatique : Procès et actions* (CNRS 2020); Marta Torre-Schaub, 'Justice climatique, nouvelles tendances, nouvelles opportunité' (*IDDRI*, 30 June 2021) <https://perma.cc/7M76-7SPE>.

27 *Urgenda v the Netherlands* (Court of The Hague, case No C/09/456689/ HA ZA 13–1396, 24 June 2015).

Similarly, the *Juliana Olson* case[28] should be analysed as a decision that brings the issue of intergenerational justice to the forefront. This case was complex and presented many procedural obstacles. The decision went against the defendants, but the individual opinion of Judge Eiken about the 'constitutional right to a healthy environment' could be a strong base for future cases establishing environmental rights for the present and future generations. This case cannot, however, establish a model as later cases, for example, *Aji P v Washington* (2018), decided that: 'there is not a constitutional right to a healthy environment -including a right to a stable climate'[29]. The question in the United States jurisprudence is not settled and deserves attention to future jurisprudential developments in this field.

Returning to Europe, the *Greenpeace Nordic* decision ruled in 2018 recognised the foundation of a constitutional right for future cases even though the cause was dismissed.[30] The NGO Greenpeace brought a case before the Oslo District Court asking it to cancel the authorisation given by the Ministry for Petroleum and Energy to extract oil and gas from the Barents Sea. In the first petition, a coalition of environmental groups with Greenpeace sought a declaratory judgment from the Oslo District Court that Norway's Ministry for Petroleum and Energy violated the Norwegian constitution by issuing a block of oil and gas licenses for deep-sea extraction from sites in the Barents Sea. The NGO built this case based on constitutional arguments to preserve both present and future generations. The strongest argument used was Article 112 of the Norwegian Constitution, which establishes a 'right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.' The Oslo District Court ruled in favour of the Norwegian Government on 4 January 2018. The court recognised that Article 112 of the Constitution is a rights provision but found that the government did not violate any

28 *Juliana v United States* (Oregon District Court, case No 6:15-CV-01517-TC, 10 November 2016).

29 The 'Right to a stable climate' is the constitutional question asked by the lawcase *Juliana (Kelsey Cascadia Rose Juliana v the United States)*, brought before the State of Oleron's ninth Circuit Court in 2014. The main goal of the Paris Agreement (2015 and ratified by 193 states in 2016) is to stablize the climate system and avoid global warming up to +2°C or if possible under 1,5°C; see Marta Torre-Schaub, 'L'émergence d'un droit à un climat stable : une construction interdisciplinaire' in Marta Torre-Schaub (ed), *Droit et Changement climatique : Regards croisés à l'interdisciplinaire. Quelles réponses à l'urgence climatique?* (Mare & Martin 2020).

30 *Greenpeace Nordic and Nature & Youth v Ministry of Petroleum and Energy* (Oslo District Court, case No 16–166674TVI-OTIR/06, 4 January 2018).

relevant rights because it had fulfilled the necessary duties before making the licensing decision. Greenpeace Nordic and Nature and Youth appealed the decision alleging that '[t]he District Court erred in interpreting Article 112 in such a way that it limits the duty of the Norwegian government to guarantee the right to a healthy environment.'[31] On 22 January 2020, the Court of Appeal affirmed the District Court's ruling that the oil and gas licenses were valid. The Court held that the appellants could not show a violation of Article 112 in this instance, particularly because it is uncertain whether and to what extent the licenses would lead to increased greenhouse gas emissions. The plaintiffs appealed the decision on 24 February 2020. The Norwegian Supreme Court granted leave to appeal on 20 April. On 22 December 2020, the Supreme Court announced its decision rejecting the appeal and upholding the licenses for deep-sea extraction. Eleven of the 15 judges panel upheld the lower court's ruling. The Court reasoned that although the Norwegian constitution protects citizens from environmental and climate harms, the future emissions from exported oil were too uncertain to bar the granting of these petroleum exploration licenses. The plaintiffs referred the case to the European Court of Human Rights on 15 June 2021.[32] It seems probable that the capacity of the Norwegian government to protect its citizens, both present and future generations through its constitution will be discussed before the European Court.

2.1.2. Consolidating Intergenerational Justice

In Ireland, in the *Friends of the Irish Environment* case[33] ruled in 2017, 2019 and 2020, the final decision implied the recognition of an 'unwritten constitutional right to a healthy environment' and a 'just transition', both pointing to the necessity of prospective protection for the environment through the constitution.

But one the latest and undoubtedly most important case in that field is the decision ruled by the German Federal Constitutional Court in an Order

31 ibid.

32 Natalia Kobylarz, 'Derniers développements sur la question environnementale et climatique au sein des différents organes du Conseil de l'Europe' (2022) 1 Revue Internationale de Droit Comparé 63; Marta Torre-Schaub, 'La construction d'un droit fondamental à un climat stable : évolutions, difficultés et perspectives'(2022) 1 Revue Internationale de Droit Comparé 7.

33 *Friends of the Irish Environment v The Government of Ireland* (2020) IEHC 747.

of 24 March 2021.[34] This decision is considered a landmark judgment. It underlined several crucial questions.[35] First, it affirmed the necessity for the State to organise a 'fair distribution between generations of the burden of climate change budgets'. The second important point highlighted was the affirmation that the protection of citizens is 'intertemporal' and 'transnational', including its elementary preconditions, not only the freedoms exercised today but those infringed for future generations and people living in other countries. The third question referred to the acceptance of 'damage' to a future or 'infringements to a future' due to climate change. Another interesting issue was the recognition by the Court of the necessity of ensuring a 'fundamental right' to a 'subsistence level' or 'a bare minimum' for future generations. It also underlined the necessity to 'ensure future freedoms' for future generations. As several authors emphasise, this 'intergenerational approach' makes this decision one of the most successful and developed in the field[36].

2.2. Using National Plans and Programs to Protect Future Interests

Future generations and current young generations can also be protected in some cases through other legal tools. Temporal scheduling in public policies is also crucial to better 'prepare the future' and to more equitably distribute the burden of reducing greenhouse emissions and the risks generated by climate change. In this sense, two lawsuits illustrate this 'function' and show how future generations are already 'presents' in the judge's reasoning.

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34 Bundesverfassungsgericht (German Constitutional Court), 24 March 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.

35 Felix Eckardt, 'Liberté, droits de l'homme, Accord de Paris et changement climatique : l'arrêt historique allemand sur le contentieux climatique' (2022) 1 Revue Internationale de Droit Comparé 81; Felix Eckardt, 'How Can Climate Litigation Help Fighting Climate Change?' (9 June 2021) <https://www.sciencespo.fr/fr/evenements/how-can-climate-litigation-help-fighting-climate-change> accessed 7 July 2023.

36 Joana Setzer and Keina Yoshida, 'The Trends and Challenges of Climate Change Litigation and Human Rights' (2020) 2 European Human Rights Law Review 161; Marcos De Armenteras Cabot (n 23); Felix Eckardt, 'How can climate litigation help fithting climate change?' (n 34); Marcos de Armenteras Cabot, 'El litigio clímático ante la responsabilidad intergeneracional' (2021) 44 Cuadernos Electrónicos de Filosofía del Derecho 1; Emilie Gaillard, 'L'historique déclinaison transgénérationnelle des devoirs fondamentaux envers les generations futures par le tribunal fédéral constitutionnel allemande' (2021) 7 Revue Environnement, Energie, Infrastructures 1–2.

The *Friends of the Irish Environment*[37] case judgment at the Supreme Court of Ireland in July 2020 had the question of the national climate plan as a central point. This plan is a programmatic law that designates the different activities and obligations of the State in terms of climate according to a specific time scale and deadlines (National Climate Plan). The NGO Friends of the Irish Environment challenged the plan on the grounds that it did not sufficiently protect the rights of citizens, given that the plan was not sufficiently ambitious in terms of the fight against climate change. This lack of ambition of the plan could become a source of violation of fundamental rights by not including the rights of future generations.

In the United Kingdom, the decision concerning the project of future enlargement of Heathrow Airport in London[38] allowed the judges to cast the National Plan of Transports in a new perspective in accordance with the Paris Agreement targets and, more generally, its content, including the principles of common and shared responsibilities and the sustainability principle. By those two principles, as previously stated, future generations' interests can be protected or, at least, taken into account. This case, divided into two decisions, obliged the authorities to justify their project of enlargement of the airport based on the need to remain in line with the Paris Agreement. The decision asserted that the authorities would have to justify any project involving the National Plan of Transports – as was the case for the project of enlargement of the airport – that the project will be compatible with the Paris Agreement statements.

The *Grand Synthe*[39] case in France, which was considered by the *Conseil d'Etat* in two different decisions (November 2020 and July 2021), is another example of this tendency. In this case, brought by the municipality of Grand Synthe and its mayor, the legality of climate planning (in particular, the Stratégy Nationale Bas Carbone – (SNBC) i.e., national climate plan) and

37 *Friends of the Irish Environment v The Government of Ireland* (2020) IEHC 747.

38 *R (Plan B Earth and others) v Secretary of State for Business, Energy and Industrial Strategy* (2018) EWHC 1892 (Queen's Benchs division decision); Court of Appeal, Civil Division, *Re: The Queen on the application of Plan B. Earth and Ors v Sec'y of State for Bus., Energy & Indus. Strategy and Anr* (25 January 2019) EWCA civ. C1/2018/1750 <https://perma.cc/TYX2-Y4EJ>.

39 *Commune de Grande-Synthe et Damien Carème c France* (French Conseil d'Etat, case No 427301, 1 July 2021) et CE, *Commune de Grande-Synthe et Damien Carème c France* (French Conseil d'Etat, case No 427301, 19 November 2020).

other legislative measures was challenged,[40] considering that they do not allow sufficient protection of the city of Grande Synthe against climate risks. In both decisions, the *Conseil d'Etat* considers that, on the one hand, the SNBC is indeed a text that creates obligations for the State. On the other hand, both decisions agree that the State has not made sufficient efforts to reduce emissions by following the current trajectory, which will not make it possible to achieve carbon neutrality by 2050 or else at the cost of immeasurable efforts for future generations.[41] In these decisions, future generations do not appear on the front line. How the State plans and programmes climate change mitigation (by reaching carbon neutrality by 2050) is the core question of this case. However, this discussion contributes to the debate on the protection of future generations by putting on the table the question of whether future generations will not have to make additional efforts to reduce their emissions in the event that today's efforts are insufficient.

The last decision in this case was handed down in May 2023[42]. For the third time, the Conseil d'Etat affirmed that the government had not fulfilled its climate obligations arising from legislative texts committing it to action at a more sustained pace than that stipulated. However, the High court has not yet determined that it is necessary to impose an astreinte on the administration at this stage, and has again set a 'grace' period for the government to deploy more ambitious climate action. Despite this somewhat

40 Christian Huglo and Théophile Bégel, 'Le recours de la commune de Grande-Synthe et de son maire contre l'insuffisance des actions mises en œuvre par l'Etat pour lutter contre le changement climatique' (2019) 5 Revue Environnement, Energie, Infrastructures 38; Remi Radiguet, 'Objectif de décision des émissions de gaz… à effet normatif ?' (2020) La Semaine Juridique Administration et collectivités territoriales 28–33; Beatrice Parence and Judith Rochfeld, 'Tsunami juridique au Conseil d'Etat : Une première décision "climatique" historique' (2020) 49 La Semaine du Droit–Edition Générale 2138; Marta Torre-Schaub, 'Plainte de Grande-Synthe pour inaction climatique : pourquoi la décision du Conseil d'Etat fera date' *The Conversation* (Melbourne, 23 November 2020) <https://perma.cc/D36L-8DA9>; Marta Torre-Schaub, 'L'affaire de Grande Synthe, une première décision emblématique dans le contentieux climatique français' (2020) 12 Revue Environnement, Energie, Infrastructures 13; Hubert Delzangles, 'Le premier "recours climatique" en France : une affaire à suivre!' (2021) 4 l'Actualité Juridique Droit Administratif 217.

41 Marta Torre-Schaub, 'Les contentieux climatiques. Du passé vers l'avenir' (2022) 1 Revue française de droit administratif 75.

42 *Grande Synthe III*, Conseil d'Etat, 10 May 2023 <https://perma.cc/WG6F-S455>; see Jean-Marc Pastor, Dalloz Actualité, 17 mai 2023; Marta Torre-Schaub, 'Qui va doucement, ne va (peut-être pas) durement' (2023) 23 La Semaine Juridique, Commentaires.

timid decision, the Conseil d'Etat has also submitted a preliminary question to the Conseil Constitutionnel on whether certain legal provisions infringe the right to a healthy environment. Indirectly, once again, this fundamental right to a healthy environment is reappearing, like a sea serpent. This right, as we know, protects the environmental rights of present and future generations.

This type of dispute will very likely develop in the short to medium term, as most national climate plans do not seem to have lived up to the ambitions set by the objectives of the Paris Agreement. Let us briefly recall that these objectives include not exceeding global warming of 2° C and staying below 1.5° C if possible. This objective is developed by various domestic laws in terms of the temporality of reduction of emissions at various scales in time until 2050 to achieve the objective of carbon neutrality by that date. Therefore, all domestic laws or climate plans that do not allow these trajectories of reduction to be followed, do not sufficiently protect future generations and there will likely be successive litigation around this issue in the coming years.

The last point we wish to highlight here is the role that general environmental principles can play to protect future generations from climate change's negative effects.

2.3. Affirming Principles and Rights through Climate Change Litigation

The use of environmental legal principles to ensure the protection of future generations is frequent in climate change litigation. Several principles are often discussed as part of the cases. Some of these principles are interesting tools to protect future generations (a). In the same innovative way, in climate change litigation, human rights appear to be a promising path for ensuring sustainable protection for future generations.[43]

43 John Knox, UN Committee for Human Rights, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (24 January 2018) U.N. Doc. A/HRC/37/58 §57, 52; UN Committee for Human Rights, 'Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change' (13 May 2019); Cesar Rodriguez Garavito, 'International Human Rights and Climate Governance: Origins and Implications of a Climate-based Litigation' document presented during the Conference 'Climate Litigation Emergency' (NYU School of Law, 9–10 March 2020); Cesar Rodriguez Garavito,

2.3.1. Asserting Environmental Principles to Protect Future Generations' Interests

The principle of 'common and shared responsibilities' reflected in Article 2 of the CCNU and in the Paris Agreement gives an interesting 'frame' to think about both the past and the future. The past is reflected in the constant reference to the 1990 emission level and industrial activities to fix a 'starting point' for past responsibilities for developed countries concerning their past CO_2 emissions. This principle also appears in reference to 'human activities' as a cause of aggravation of global warming. The future is apparent in this principle because it gives a 'map' of the world, divided into 'developed' and 'developing' countries. This map proposes different time frames for emission levels, for timely reductions and for actual and future National Contributions (NC) for reducing global emissions on a domestic scale. This road map of the world, in terms of reduction obligations by countries, allows a new path for protecting future generations. To date, there are no climate cases concerning this particular principle. However, there will probably will be in the next few years, mostly regarding the developing and emerging economies countries of the Global South, which are particularly concerned by the dilemma for 'economic and industrial development' and 'sustainability and protection for the future generations'.

More explicitly referring to the future, the 'principle of sustainability' is also a very powerful tool for protecting future generations. In the first *Urgenda* decision ruled in 2015, an explicit reference to future generations appears clearly and constitutes one of the core arguments of the defendants. In its decision of June 2015, the Court of District of The Hague retakes this argument and develops it in a very interesting opinion. The decision asserts that the State does indeed have a duty to protect its citizens against

'Litigating the Climate Emergency: The Global Raise of Human-Based Litigation for Climate Action' in César Rodríguez Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts and Legal Mobilisation Can Bolster Climate Action* (CUP 2022); Natalia Kobylarz, 'Balancing its Way Out of Strong Anthropocentrism: Integration of Ecological Minimum Standards in the European Court of Human Rights Fair Balance Review' (2022) Journal of Human Rights and the Environment 16; Helen Keller and Corina Heri, 'The Future is Now. Climate Cases Before the ECtHR' (2022) 40(1) Nordic Journal of Human Rights 153; Marta Torre-Schaub, 'The Future of European Climate Change Litigation. The Carême Case Before the European Court of Human Rights' (*Verfassungsblog,* 10 August 2022) <https://perma.cc/G7XW-U9LN>; Amelie Adam, Delphine Misonne and Marta Torre-Schaub, 'Chronique des contentieux climatiques et droits de l'homme' (2023) 1 Revue européenne des droits de l'homme.

the adverse effects of climate change, based on the sustainability principle. This principle, following the reasoning of the Court, implies a specific and reinforced obligation of duty for the Netherlands, as they are one of the leading countries in the developed world. This duty concerns both present generations and future generations.

In this particular case, the 'precautionary principle' is also visible. The judges develop an interesting use of this principle in the first *Urgenda* decision.[44] According to the judgment, the precautionary principle should be applied by the Dutch government to better protect citizens against future climate risks. Again, the protection of future generations is implied in this reasoning, and the interpretation of this principle concerning climate change opens up an interesting path for the protection of future generations.

Last but not least, the prevention principle plays an important role in 'preparing the future' and reaffirming rights to prevent future damage and risks. This preventive function as a basis for establishing a right for more robust protection appears in the *Friends of the Irish Environment* case of 2020, given the fact that the Irish Climate National Plan cannot prevent harm to human rights. Pushing this argument further, human rights should be interpreted broadly, including future generations' rights.

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44 *Urgenda v the Netherlands* (Court of The Hague, case No C/09/456689/ HA ZA 13–1396, 24 June 2015); *Urgenda v the Netherlands* (Court of Appeal of The Hague, case No 200.178.245/01, 9 October 2018); *Urgenda v the Netherlands* (Dutch Supreme Court, case No 19/00135, 20 December 2019).

45 TA de Paris (Administrative Court of Paris), decisions of 3 February 2021, n°1904967, 1904968, 1904972, 1904976 Lexis Kiosque; 'L'affaire du siècle, une révolution pour la justice climatique? A propos de la décision du TA du 3 février 2021 (n° 1904967, 1904968, 1904972, 1904976/4–1)' (2021) 10 La Semaine juridique Générale 247; Marta Torre-Schaub, 'l'Affaire du siècle, une affaire à suivre' (2021) 3 Environnement, Energie, Infrastructures 10; Denis Mazeaud, 'L'affaire du siècle un petit pas vers le solidarisme climatique' (2021) 6 La Semaine juridique Générale JCP-G 139; Marta Torre-Schaub, 'Décryptage juridique de l'affaire du siècle' *The Conversation* (Melbourne, 10 February 2021) <https://perma.cc/95DT-D84B>; Marta Torre-Schaub and Pauline Bozo, 'L'affaire du siècle, un jugement en clair-obscur?' (2021)12 La Semaine Juridique Administrations et Collectivités territoriales 2088 at 31; Mathilde Hautereau-Boutonnet, 'L'affaire du siècle, de l'audace, encore de l'audace, toujours de l'audace!' (2021) 6 Recueil Dalloz 281; Marta Torre-Schaub, 'Climate Change Litigation in France' (n 24); Meryem Deffairi, 'Le préjudice écologique saisi par le juge administratif. Commentaire de la décision du Tribunal administratif de Paris du 3 février 2021, n°1904967, Notre affaire à tous' (2021) Droit administratif, comm. 28; Marta Torre-Schaub, 'Le contentieux climatique. Du passé vers le future' (2022) 1 Revue française de droit administratif 1; Marta Torre-Schaub, 'Dynamics, Prospects

In the recent judgment in France, *l'affaire du siècle*[45], the prevention principle[46] plays a core role in showing the way for the State to take responsibility for not having made enough efforts in the past to attend to the carbon-neutral goal set for 2050. This insufficient action by the State implies that in the years to come unless the trajectory is addressed, the considerable efforts that should be made to reduce emissions will be a significant burden and will become progressively more difficult to attain. Following this decision, to better ensure both a duty for the State to take climate obligations more seriously and, to better ensure a right to a future for all generations, long-term decisions have to be taken urgently and firmly to make it possible to achieve the target of carbon neutrality in the future.

2.3.2. How Duties and Rights Can Defend Future Interests

The obligation imposed by the 'duty of care', which appears explicitly in the 2015 *Urgenda* case, is reinforced in the decisions of 2018 by the Court of Appeals of The Hague and in 2019 in the final ruling by the Supreme Court. This principle is also present in two other lawsuits, the lawsuit against Shell[47] in the Netherlands, ruled in 2021, and the *Sharma* case, ruled in Australia the same year[48].

In *Millieudefensie against Shell* ruled in May 2021, plaintiffs used the argument of the 'duty of care' extended to private companies. They argued that given the Paris Agreement's goals and the scientific evidence regarding the dangers of climate change, Shell had a duty of care to take action to reduce its greenhouse gas emissions. Plaintiffs based this duty of care argument on Article 6:162 of the Dutch Civil Code and Articles 2 and 8 of the European Convention on Human Rights (ECHR), which guarantees the right to life (Article 2) and the right to private life, family life, home, and correspondence (Article 8). The plaintiffs' argument outlined the com-

and Trends in Climate Change Litigation. Making Climate Change a Priority in France' (2021) 22(8) German Law Review 1445; Julien Bétaille, 'Climate Litigation in France, a Reflection of Trends in Environmental Litigation' (2022) 22 *elni Review* 63; Marta Torre-Schaub, 'Climate Litigation in France. The High Administrative Court as Janus or Prometheus?' (2023) European Journal of Risk Regulation (forthcoming).

46 Marta Torre-Schaub, 'Le préjudice écologique au secours du climat, ombres et lumières' (2021) 11 La Semaine du Droit–Edition Générale 520.

47 *Milieudefensie et al. v Royal Dutch Shell* (Rechtbank Den Haag, No C/09/571932 / HA ZA 19–379, 26 May 2021).

48 *Sharma and others v Ministry of the Environment* (Federal Court of Australia 560, 27 May 2021).

pany's misleading statements on climate change and inadequate action to reduce climate change. They stand on Shell's unlawful endangerment of Dutch citizens and actions constituting hazardous negligence. Such behaviour will endanger both present and future generations. This duty implies the obligation of 'doing better in the future', and consequently conducting their activities making 'significant efforts' in reducing emissions. For the company, this implies paying special attention to future activities.

Even more illustrative of this trend is the *Sharma* case, filed on 8 September 2020 by eight young people before Australia's Federal Court to block a coal project. The lawsuit sought an injunction to stop the Australian Government from approving an extension of the Whitehaven Vickery coal mine. The plaintiffs claimed to represent all people under 18 and argued that the Federal Minister has a common law duty of care for young people. They further asserted that digging up and burning coal will exacerbate climate change and harm young people in the future. The plaintiffs sought an injunction to prevent the Minister from approving the project under the Environment Protection and Biodiversity Conservation Act (EPBC). The Court established a new duty of care to avoid causing personal harm to minors but declined to issue an injunction to force the Minister to block the coal mine extension. The applicants established that the Minister had a duty to take reasonable care to avoid causing personal injury to minors having the possibility, under s 130 and s 133 of the EPBC Act, to approve or not approve the project[49]. The judges, however, declined to issue an injunction, reasoning that the plaintiffs had not established that it was probable that the Minister would breach the duty of care in making the approval decision. This decision, even though the injunction was not approved, raised a number of questions about the scope of the duty, especially with regard to minors and future generations.

In the category of human rights[50] as a tool to protect future generations, a complaint filed by six young Portuguese people against 33 countries

49 *Sharma and others v Ministry of the Environment* (Federal Court of Australia 560, 27 May 2021).

50 Regarding the growing link between human rights and climate change litigation, see for example: Annalisa Savaresi and Joana Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (2021) Journal of Human Rights and the Environment 1759 ss; Joana Setzer and Catherine Highman, *Global Trends in Climate Change Litigation: 2021 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2021);

before the European Court of Human Rights on 2 September 2020[51] is to be noted. Invoking the European Convention on Human Rights, the plaintiffs claim that their right to life is threatened by the effects of climate change (such as forest fires in Portugal), that their right to privacy includes their physical and mental well-being and that it is threatened by heat waves that force them to spend more time inside their homes. These circumstances lead them to point to the violation of their human rights based on the said Convention. Their request also points to the violation of Article 14 ECHR, which establishes the right to non-discrimination. This right should be interpreted in a 'temporal' way as a new path for protecting future interests and consolidating trans-generational justice.

In the same vein, another case was recently filed by the Union of Swiss Senior Women for Climate Protection against the Swiss Federal Council and others[52]. Previously, the Swiss Federal Court had dismissed the case on the grounds that the protection of fundamental rights sought by the applicants could not be claimed as long as the long-term temperature objective of the Paris Agreement had not been achieved. In March 2021, the Strasbourg Court decided to grant the application. The appeal is based on Articles 6, 2 and 8 of the ECHR (i.e., the right to an effective remedy, the right to life and the right to private and family life).

The latest case is the aforementioned decision by the Montana court, which found that the various legislative provisions concerning fossil fuels in the state of Montana were contrary to the state constitution[53]. The plaintiffs, a group of young people between the ages of 6 and 20, alleged that these legislative provisions violated their constitutional rights, including the right to a healthy environment and a stable climate[54]. More specifically, the

Joana Setzer and Lisa Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) WIREs Climate Change 1; Setzer and Yoshida (n 35). About climate change litigation and human rights in the European Councel context, see: Kobylarz (n 31); Keller and Heri (n 41); Marta Torre-Schaub (n 41); Misonne and Torre-Schaub (n 41).

51 *Cláudia Duarte Agostinho et autres c le Portugal et 32 autres États* App No 39371/20 (ECtHR, 13 November 2020); Chloe Farand, 'Six Portuguese Youth File "Unprecedented" Climate Lawsuit Against 33 Countries' (*Climate Home News,* 3 September 2020) <https://perma.cc/L5M8-ZDSR>.

52 *Association Aînées pour la protection du climat c Suisse Klimat Seniorinnen* App No 53600/20 (ECtHR, 27 October 2020).

53 *Held v Montana*, Montana First Judicial District Court, Lewis & Clarck County, 14 August 2023, <https://perma.cc/WB4G-QCXX>.

54 ibid.

decision finds that the various legislative provisions in question do not meet the conditions necessary to preserve the principle of prevention and fairness for the young applicants[55].

Once again, even if a direct reference to protect future generations does not appear in the cases we have analysed, it is nevertheless implied.[56] Those decisions show the necessity to consider future generations more and in a better way. Those cases also illustrate the imperious necessity of thinking about climate action in the medium and long term, not just in the short term. The 'future' of future generations is clearly at stake when it comes to climate change's adverse effects.

The cases we have presented show the necessity of including future generations' rights in the law. Above all the cases cited here, we highlighted the need for more inclusive legal methods in order to better protect future generations and the continuity of Humankind.

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Concluding Remarks

Climate change litigation can contribute to enhancing the importance of protecting future generations. Even when it is not invoked directly, the emerging obligation of 'thinking on the future' and 'protecting the future' opens up a new pathway in several cases. Some environmental law principles are opening up and reaffirming themselves to rethink the future. The younger generation's interest in climate issues is growing. This interest can be seen in a number of ways. In some cases, these are classic mobilizations (strikes, demonstrations, exhibitions). In others, the action goes further and takes more active forms of protest (symbolic attacks on activities considered superfluous and contrary to a proactive commitment to climate protection). In other situations, youth smobilizations take the form of petitions for advisory opinions to international bodies dedicated to the protection of children (United Nations Committee of the Rights of

55 ibid., 102, point 9.

56 Marta Torre-Schaub, 'Les dynamiques juridiques et judiciaires de la gouvernance climatique. Libres propos autour de la construction d'un droit du changement climatique' (2021) 22 Revue juridique d'Assas 35; Marta Torre-Schaub, 'Dynamics, Prospects and Trends in Climate Change Litigation. Making Climate Change Emergency a Priority in France' (2021) 16(3) German Law Review 179.

the Child[57]). Finally, as we showed in our article, legal action is also a growing form of mobilization by the younger generation. Three new cases are particularly telling: the case brought by young Portuguese people before the European Court of Human Rights[58], the case brought by Swiss senior citizens[59], who are particularly vulnerable to global warming and the case brought before the Montana Disctrict Court[60]. Still pending is the *Aurora* case, brought before the Swedish courts by young Swedes accompanied by Greta Thunberg[61]. The last hope remains in the request for an opinion from the International Court of Justice (ICJ) by the State of Vanuatu and 105 other states to question the Court on the nature and extent of international climate obligations so that young people generations and the most vulnerable states can be protected.[62]

Despite these relevant advances, the decisions are not yet numerous enough to build a general theory in this field, and remedies are not always in accordance with the importance of providing a sustainable life to future generations. However, we feel that the issue is gaining in importance, firstly through the growing number of legal cases, and secondly through media coverage and the sympathy of the public and young people concerned by the climate emergency. Yet, the Law (International and national) must be able to respond to these legitimate concerns quickly enough to avoid the worst possible future for the younger generations.

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57 Greta Thunberg before United Nations Committee for the Rights of the child, <https://perma.cc/4VFN-CLVB>.

58 *Cláudia Duarte Agostinho et autres c le Portugal et 32 autres États* App No 39371/20 (ECtHR, 13 November 2020).

59 *Association Aînées pour la protection du climat c Suisse Klimat Seniorinnen* App No 53600/20 (ECtHR, 27 October 2020).

60 *Held v Montana* (n 53).

61 *Anton foley and others v Sweden (Aurora case,* introduced in 2022), pending. The plaintiffs argue that the state has failed to adopt sufficient and adequate procedural measures by not investigating, in line with the best available science. They also argue that the state has failed to take sufficient and adequate measures to implement Sweden's fair share, to reduce IPEJA emissions between 2019 and 2030, to reduce national IPEJA emissions between 2019 and 2030, to secure that GHG emissions reductions within one category is not achieved through increasing emissions in another category under any circumstances, and to compensate annual emissions that exceed the permissible emissions, by reducing the net emissions by an equivalent amount in the following period under any circumstances, starting in 2019. Ultimately, the case argues the violation of the European human Rights Convention.

62 United Nations, 'General Assembly Adopts Resolution Requesting International Court of Justice Provide Advisory Opinion on States' Obligations Concerning Climate Change' (29 March 2023) GA/12497 <https://perma.cc/BZ2L-36AJ>.