

## SYMPOSIUM ARTICLE

# *The Rights of Future Generations within the Post-Paris Climate Regime*<sup>†</sup>

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### Abstract

In recognition of the intrinsic links between climate change and human rights, many have argued that human rights should play a leading role in guiding state responses to climate change. A group whose human rights will inevitably be affected by climate action (or inaction) today are the members of future generations. Yet, despite their particular vulnerability, future generations so far have gone largely unnoticed in human rights analyses. An adequate response to climate change requires that we recognize and address the human rights consequences for future generations, and consider the legal, practical and theoretical questions involved. This article attempts to answer these questions with a particular focus on the Paris Agreement. It argues that the recognition of state obligations towards future generations is compatible with human rights theory, and that these obligations must be balanced against the duties owed to current generations. The article concludes with a number of suggestions for how this balance could be pursued.

**Keywords:** Climate change, Human rights, Future generations, Intergenerational equity, Paris Agreement

## 1. INTRODUCTION

There is widespread consensus that climate change already has, and will continue to have significant and varied impacts on the environment, and that these impacts threaten the enjoyment of human rights.<sup>1</sup> Climate change mitigation and adaptation

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<sup>1</sup> Much has been written on the relationship between human rights and climate change. See, e.g., S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016); D. Bodansky, ‘Climate Change and Human Rights: Unpacking the Issues’ (2010) 38(3) *Georgia Journal of International and Comparative Law*, pp. 511–25; S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2010); P. Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar, 2015); S. McNerney-Lankford, M. Darrow & L. Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank, 2011); M. Limon, ‘Human Rights and Climate Change: Constructing a Case for Political Action’ (2009) 33(2) *Harvard Environmental Law Review*, pp. 439–76; J. Knox, ‘Linking Human Rights and Climate Change at

measures also have the potential to violate human rights.<sup>2</sup> In recognition of the intrinsic links between climate change and human rights, many have argued that the international community should adopt a human rights-based approach to climate change, in which human rights play a leading role in guiding state responses.<sup>3</sup> One of the benefits of a human rights-based approach is that it focuses attention on those who are most affected by climate change, giving them a voice and equipping them with a language to help in articulating their claims.<sup>4</sup>

A group that is particularly vulnerable to the impacts of climate change, yet so far largely unnoticed within human rights analyses, are the members of future generations. It is now well understood that climate change will continue to cause significant environmental, economic and social impacts for generations to come, and that this would be the case even if greenhouse gas (GHG) emissions were to cease today.<sup>5</sup> Members of future generations are therefore vulnerable to the consequences of action taken (or not taken) by current generations. These consequences can be understood in terms of the ability of future generations to enjoy a number of their fundamental human rights, including the right to health, food, water, self-determination, economic security, and even the right to life itself.<sup>6</sup>

An adequate response to climate change requires that we recognize and address the human rights consequences for future generations, but this presents a number of questions. Firstly, to what extent are future generations already protected by current law relating to climate change and human rights and, in particular, are any new forms of protection to be found in the recently enacted

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the United Nations' (2009) 33(2) *Harvard Environmental Law Review*, pp. 477–98; Malé Declaration on the Human Dimension of Global Climate Change, 14 Nov. 2007, available at: [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf); Office of the High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 Jan. 2009 (OHCHR Report).

<sup>2</sup> O.W. Pedersen, 'The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation' (2011) 80(4) *Nordic Journal of International Law*, pp. 403–23; B. Lewis, 'Balancing Human Rights in Climate Change Policies', in O. Quirico & M. Boumghar (eds), *Climate Change and Human Rights: International and Comparative Law Perspectives* (Routledge, 2016), pp. 39–52.

<sup>3</sup> Knox, n. 1 above; Limon, n. 1 above, pp. 450–9; Bodansky, n. 1 above, p. 524.

<sup>4</sup> J. Barnett, 'Human Rights and Vulnerability to Climate Change', in Humphreys, n. 1 above, pp. 257–71; Bodansky, n. 1 above, p. 517; Limon, n. 1 above, pp. 450–1; O.W. Pedersen, 'Climate Change and Human Rights: Amicable or Arrested Development?' (2010) 1(2) *Journal of Human Rights and the Environment*, pp. 236–58, at 248.

<sup>5</sup> T.L. Frölicher, M. Winton & J.L. Sarmiento, 'Continued Global Warming After CO2 Stoppage' (2014) 4(1) *Nature Climate Change*, pp. 40–4.

<sup>6</sup> The Intergovernmental Panel on Climate Change (IPCC) predicts that global warming will lead to a range of environmental changes which have the potential to impact on livelihoods, health, housing, and social and cultural practices, all of which are protected under international human rights law. See C. Field et al. (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), Summary for Policymakers; International Covenant on Civil and Political Rights (ICCPR), New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>. For further discussion of the future human rights impacts of climate change, see B. Lewis, 'Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice' (2016) 34(4) *Netherlands Quarterly of Human Rights*, pp. 206–26.

Paris Agreement?<sup>7</sup> This information is required in order to identify appropriate steps for further action. Secondly, how can and should the human rights of future generations be conceptualized within human rights discourse? Does human rights theory recognize the rights of persons not yet born? Can current generations be said to owe obligations towards future generations? These theoretical questions need to be considered in order to determine how great a departure it is to argue for greater recognition of future generations within a human rights-based approach to climate change. A third and perhaps most challenging set of questions is how to balance the rights of future generations against those of current generations, and how states can calibrate their obligations towards these two groups when their interests are not aligned and available resources are limited.

This last question is especially daunting given the complex challenges which already beset attempts to fulfil the rights of current generations while taking effective action to address climate change. The international community presently does not adequately recognize the links between human rights and climate change, and failures in protecting the rights of current generations are common. The question of how to distribute the costs and benefits of climate action is already challenging, and becomes even harder to answer when the rights of future generations are added to the mix and inter- as well as intragenerational equity must be ensured.

If answers to these questions can be found, then it may also be possible to answer the more practical question of which, if any, specific measures are required to protect the rights of future generations in the context of climate change. Given that the ultimate goal of the climate change regime is to slow the process of global warming and alleviate its impacts, it could be argued that future generations will be the ultimate beneficiaries of action taken now and that they do not require any special attention. However, such an outcome ought not to be presumed, and it may be necessary to implement specific strategies to protect their rights given the particular vulnerabilities of future generations.

This article attempts to answer these questions with a particular focus on the developments since the 21<sup>st</sup> Conference of Parties (COP-21) to the United Nations Framework Convention on Climate Change (UNFCCC)<sup>8</sup> in Paris (France) in December 2015, and the adoption of the Paris Agreement. This analysis is situated within the discourse of human rights-based approaches to climate change, which require that climate action is guided by principles and norms of human rights. The article argues that human rights-based approaches to climate change should recognize the obligations of states to future generations, and that this position is compatible with human rights theory. It further argues that these obligations must be balanced against the duties owed to current generations.

The article begins by analyzing the extent to which the rights of future generations are protected in the Paris Agreement. It notes that explicit references to either human rights

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<sup>7</sup> Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php).

<sup>8</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: [http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php).

or intergenerational equity are limited to just one preambular provision,<sup>9</sup> with no specific mention of future generations. The analysis includes an examination of the negotiation history of the Agreement to ascertain why more explicit references were not included. It is concluded that although the post-Paris climate regime does place some obligations on states to consider the rights of future generations in formulating their climate change policies, a more explicit representation of the interests of future generations is required.

The article then considers the extent to which future generations are protected by current international human rights law. It identifies a number of key challenges in applying human rights law to future generations in the context of climate change, including the vital issue of how to prioritize potentially competing obligations towards current and future generations. It concludes by reviewing some possibilities for enhancing the protection of the rights of future generations, specifically with reference to climate change but also more broadly, and considers how these measures might assist in balancing the protection of their rights against the rights of current generations.

## 2. FUTURE GENERATIONS IN THE PARIS AGREEMENT

This section explores the extent to which the rights of future generations are protected within the global climate regime, focusing on the Paris Agreement, which entered into force as international law in November 2016. The following section then considers international human rights law, which supplements the climate obligations of states by setting minimum standards according to which those obligations must be implemented. The two bodies of law must work in tandem to facilitate a human rights-based approach to climate change, which is enabled by the fact that all parties to the UNFCCC and the Paris Agreement are also parties to at least one of the major United Nations (UN) human rights treaties.<sup>10</sup> As will be shown, the Paris Agreement provides one preambular reference to human rights and does not refer explicitly to future generations, but includes language which may be interpreted as bringing the rights of future generations within the scope of states' obligations. While this can be seen as progress when compared with the situation under previous climate instruments, it still falls short of the obligations required to adequately protect the rights of future generations.

The Paris Agreement is the latest pillar of the international climate regime, which also comprises the UNFCCC, its Kyoto Protocol,<sup>11</sup> and a number of less binding instruments, decisions and programmes. The process of negotiating the text of the Paris Agreement was lengthy and more detailed and complex than can possibly be described thoroughly in the scope of a single article.<sup>12</sup> A significant step towards the agreement was the adoption at

<sup>9</sup> Paris Agreement, n. 7 above, Preamble, para. 11.

<sup>10</sup> 'COP21: "States' Human Rights Obligations Encompass Climate Change – UN Expert"', OHCHR Press Release, 3 Dec. 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16836&LangID=E>.

<sup>11</sup> Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php).

<sup>12</sup> For a detailed discussion of the key features of the Paris Agreement and its context, see A. Savaresi, 'The Paris Agreement: A New Beginning?' (2016) 34(1) *Journal of Energy and Natural Resources Law*, pp. 16–26; D. Bodansky, 'The Paris Climate Change Agreement: A New Hope' (2016) 110(2) *American Journal of International Law*, pp. 288–30.

the 2014 Lima (Peru) COP of a draft negotiating text.<sup>13</sup> This text was subject to a series of further negotiations, including meetings of state representatives in Geneva (Switzerland) in February 2015<sup>14</sup> and in Bonn (Germany) in June<sup>15</sup> and October 2015.<sup>16</sup>

There are only limited and generalized references to intergenerational equity within the Paris Agreement, and no specific reference to future generations. Earlier drafts of the negotiating text had included stronger language regarding the interests of future generations, but these were ultimately removed prior to adoption of the final Agreement. For instance, the draft text of Article 2, which sets out the objective of the Agreement, had initially included options for language specifying that states should address climate change ‘for the benefit of present and future generations’.<sup>17</sup> This language is consistent with the principles articulated in Article 3 UNFCCC, which includes a provision that ‘the Parties should protect the climate system for the benefit of present and future generations of humankind’.<sup>18</sup>

However, at the meeting of state representatives in Bonn (Germany) in October 2015, the reference to action ‘for the benefit of future generations’ was removed, and instead it was proposed that ‘intergenerational equity’ be included as one of the principles which would need to be considered by states in implementing their obligations.<sup>19</sup> This reference to intergenerational equity persisted through a series of revisions, only to be deleted in the final phase of negotiations in Paris. In the final text of the Agreement, Article 2.2 states that ‘[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances’. The focus now seems to be much more squarely on intragenerational equity and the fair distribution of responsibility between members of current generations, rather than any specific consideration of the interests of future generations and any obligations conceivably owed towards them.

There is a reference to intergenerational equity in one of the preambular paragraphs, which states:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in

<sup>13</sup> UNFCCC Secretariat, Decision 1/CP.20, ‘Elements of a Draft Negotiating Text’, UN Doc. UNFCCC FCCC/CP/2014/10/Add.1 Annex, 2 Feb. 2015.

<sup>14</sup> Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the Contact Group on Item 3, Negotiating Text, Geneva (Switzerland), 12 Feb. 2015, available at: [https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf) (Geneva Negotiating Text).

<sup>15</sup> Ad Hoc Working Group on the Durban Platform for Enhanced Action, Streamlined and Consolidated Text, Bonn (Germany), 11 Jun. 2015, available at: [http://unfccc.int/files/bodies/awg/application/pdf/adp2-9\\_i3\\_11jun2015t1630\\_np.pdf](http://unfccc.int/files/bodies/awg/application/pdf/adp2-9_i3_11jun2015t1630_np.pdf).

<sup>16</sup> Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Bonn (Germany), 23 Oct. 2015, available at: <https://unfccc.int/files/bodies/application/pdf/ws1and2@2330.pdf> (Bonn Draft Agreement).

<sup>17</sup> Geneva Negotiating Text, n. 14 above, Section C, Art. 2.2.

<sup>18</sup> UNFCCC, n. 8 above, Art. 3.1.

<sup>19</sup> Bonn Draft Agreement, n. 16 above.

vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>20</sup>

As it is located in the Preamble, this passage does not have the same binding character as provisions in the operative part of the Agreement,<sup>21</sup> and intergenerational equity is listed as just one factor among many which state parties should respect.

A similar watering down process occurred with respect to human rights language. Proposals from some states (notably the Philippines, Mexico, Chile, Costa Rica, and a number of Pacific island states) for stronger language on human rights were not adopted.<sup>22</sup> The original negotiating text of February 2015 had included a provision which would have obliged states specifically to ensure respect for human rights, but this was removed during subsequent negotiations and human rights language was significantly cut back.<sup>23</sup>

The text which emerged from the negotiations in Bonn in October 2015 proposed that human rights be a part of the objectives in Article 2, with the outcome document suggesting the following language:

[This Agreement shall be implemented on the basis of equity and science, in [full] accordance with the principles of equity and common but differentiated responsibilities and respective capabilities[, in light of national circumstances] [the principles and provisions of the Convention], while ensuring the integrity and resilience of natural ecosystems, [the integrity of Mother Earth, protection of health, a just transition of the workforce and creation of decent work and quality jobs in accordance with nationally defined development priorities] and the respect, protection, promotion and fulfillment of human rights for all, including the right to health and sustainable development, [including the right of people under occupation] and to ensure gender equality and the full and equal participation of women, [and intergenerational equity].]<sup>24</sup>

Had it been included in the final operative text, a provision along these lines would have imposed an obligation on states to implement their climate change obligations in a manner which was consistent with the respect, protection, promotion and fulfilment of human rights. A failure to do so would have represented a breach not only of the relevant human rights treaties, but also of the Paris Agreement itself, and might have allowed for human rights-related violations to be handled by the compliance mechanism established in Article 15 of the final Agreement.<sup>25</sup> This provision further had potential to recognize specific rights, including labour rights, the right to health,

<sup>20</sup> Paris Agreement, n. 7 above, Preamble, para. 11.

<sup>21</sup> B. Mayer, 'Human Rights in the Paris Agreement' (2016) 6(1–2) *Climate Law*, pp. 109–17, at 113.

<sup>22</sup> A. Savaresi & J. Hartmann, 'Human Rights in the 2015 Agreement', Legal Response Initiative, Briefing Paper 2/15, available at: [http://legalresponseinitiative.org/wp-content/uploads/2015/05/LRI\\_human-rights\\_2015-Agreement.pdf](http://legalresponseinitiative.org/wp-content/uploads/2015/05/LRI_human-rights_2015-Agreement.pdf); ISSD Reporting Services, 'Summary of the Bonn Climate Change Conference', *Earth Negotiations Bulletin*, Vol. 12, No. 651, 26 Oct. 2015, available at: <http://www.iisd.ca/vol12/enb12651e.html>; Deconstructing Paris, 'Human Rights in the Paris Agreement', 10 Dec. 2015, available at: <http://parisext2015.com/2015/12/human-rights-in-the-draft-climate-change-agreement>.

<sup>23</sup> Geneva Negotiating Text, n. 14 above, Art. 12 *bis*.

<sup>24</sup> Bonn Draft Agreement, n. 16 above, Art. 2.2. The passages in square brackets were presented as alternative wording for state parties to consider.

<sup>25</sup> Art. 15 Paris Agreement establishes an expert committee to facilitate implementation of and promote compliance. The committee is to operate in a transparent, non-adversarial and non-punitive manner.

women's rights, and the rights of people under occupation, thus enhancing the protection for particularly vulnerable groups.

However, strong opposition to this approach emerged, most notably from Norway, the United States (US) and Saudi Arabia (with some reports including China and Australia among other opponents).<sup>26</sup> These states argued that the inclusion of human rights language within the operative provisions of the Agreement would risk creating legal liability for states who failed to address climate change adequately.<sup>27</sup> Some reports suggest that the strong opposition of these states was also an act of retaliation against developing states who were refusing to back down on the inclusion of loss and damage mechanisms within the Agreement.<sup>28</sup> Despite forceful arguments from some developing states and civil society,<sup>29</sup> the final text of Article 2.2 includes no reference to human rights. Consequently, human rights are not referred to directly in any of the operative provisions of the final Agreement.

Human rights are mentioned in the Preamble to the Paris Agreement, although this language also evolved somewhat during the negotiating process. As late as 9 December 2015, three days before the adoption of the final text, the Preamble had included a reference to the need for states to 'promote, protect and respect' human rights.<sup>30</sup> This language was altered in the final adopted text to read 'Parties should ... respect, promote and consider their respective human rights obligations'.<sup>31</sup> The deletion of the word 'protect' is significant, as the obligation to protect human rights is generally considered to entail a positive duty to take steps to prevent interference with human rights by private actors.<sup>32</sup> The remaining terms – 'respect, promote and consider' – connote a much lower level of obligation. The accepted version of the provision also makes reference to states' existing obligations relating to human rights, which was intended to reassure parties that the Agreement did not create any new human rights duties and merely reiterated their existing undertakings.<sup>33</sup> This reference to existing human rights obligations strengthens the link between the two bodies of law being examined in this article.

Despite the limited references to human rights and intergenerational equity, it may be argued that the Paris Agreement nonetheless makes space for the rights of

<sup>26</sup> Human Rights Watch, 'Human Rights in Climate Pact Under Fire: Norway, Saudis, US Blocking Strong Position', 7 Dec. 2015, available at: <https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire>; Deconstructing Paris, n. 22 above; Deconstructing Paris, 'Days 4–5 Negotiations Heating Up', 5 Dec. 2015, available at: <http://paristext2015.com/2015/12/days-4-5-negotiations-heating-up>; M. Rowling, 'Climate Talks Take a Wrong Turn on Human Rights, Campaigners Say', *Thomson Reuters Foundation News*, 4 Dec. 2015, available at: <http://news.trust.org/item/20151203224453-oysg5w>.

<sup>27</sup> Rowling, *ibid*.

<sup>28</sup> J. Vidal & A. Vaughan, 'Climate Talks: Anger over Removal of Human Rights Reference from Final Draft', *The Guardian*, 11 Dec. 2015, available at: <https://www.theguardian.com/global-development/2015/dec/11/paris-climate-talks-anger-removal-reference-human-rights-from-final-draft>.

<sup>29</sup> Rowling, n. 26 above; Human Rights Watch, n. 26 above; Deconstructing Paris, n. 22 above.

<sup>30</sup> Draft Text on COP-21 Agenda Item 4(b), Durban Platform for Enhanced Action (Decision 1/CP.17), Adoption of a Protocol, another Legal Instrument, or an Agreed Outcome with Legal Force under the Convention Applicable to all Parties, 9 Dec. 2015, Proposal by the President, Preamble, available at: <http://unfccc.int/resource/docs/2015/cop21/eng/da02.pdf>.

<sup>31</sup> Paris Agreement, n. 7 above, Preamble, para. 10.

<sup>32</sup> Atapattu, n. 1 above, p. 46.

<sup>33</sup> Savaresi, n. 12 above, p. 25.

future generations. The reference to human rights in the Preamble does not specify that it applies only to current generations. If we expand our understanding of human rights to encompass future generations then it may be possible to adopt a similarly expanded interpretation of the Paris Agreement. The theoretical implications of this proposition will be considered below in Section 4. As will be explained there, the fact that we know that humans will exist in the future is enough to affirm that those humans will possess rights. Following this approach, the passage in the Preamble which urges states to ‘respect, promote and consider their respective obligations on human rights’ could be understood to include human rights obligations owed to future generations. However, the preambular statement is vague – just what is required to ‘respect, promote and consider’ human rights obligations is not clear, but the language is not especially demanding – and its position in the Preamble leaves it without much legal force.

Future generations might also be viewed as the beneficiaries of sustainable development, which is referred to on a number of occasions in the Agreement.<sup>34</sup> Sustainable development has been defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>35</sup> While sustainable development does not explicitly adopt the language of human rights, it is understood as a guiding principle which shares common values and a mutually supportive relationship with human rights.<sup>36</sup> By including sustainable development as a guiding principle of the Paris Agreement, states are at least indirectly required to have regard to the future impacts of their policies, and this ought to have the effect of promoting and protecting the rights of future generations, even if it is not directly expressed in these terms.

At a broader level, the Paris Agreement is future focused and addresses many issues that require long-term solutions. This, too, might be viewed as implying an underlying principle of intergenerational equity and respect for the rights of future generations. The overall goal of the Agreement in limiting global warming to ‘well-below 2 degrees’<sup>37</sup> and the objective of balancing emissions and the removal of carbon by the second half of the 21<sup>st</sup> century<sup>38</sup> are both mid- to long-term objectives. Future generations are therefore the implicit beneficiaries of mitigation and adaptation actions designed to achieve these broad objectives.

A number of more specific issues contained in the Agreement might also imply a recognition of the interests of future generations. These include food security,<sup>39</sup> just

<sup>34</sup> Paris Agreement, n. 7 above, Preamble, paras 8, 16; Arts 2, 4, 5, 6, 7, 8, 10.

<sup>35</sup> Report of the World Commission on Environment and Development, ‘Our Common Future’, UN Doc. A/42/427, 4 Aug. 1987; Report of the UN Conference on Environment and Development, ‘Rio Declaration on Environment and Development’, UN Doc. A/Conf.151/26, 14 Jun. 1992.

<sup>36</sup> E.g., the 2030 Agenda for Sustainable Development refers specifically to human rights among its guiding principles: UN General Assembly Resolution on the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21 Oct. 2015, especially paras. 10 and 19, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).

<sup>37</sup> Paris Agreement, n. 7, Art. 2.

<sup>38</sup> *Ibid.*, Art. 4.

<sup>39</sup> *Ibid.*, Preamble, para. 8.



transitions to renewable energy production,<sup>40</sup> conservation of biodiversity,<sup>41</sup> technology development,<sup>42</sup> and capacity building.<sup>43</sup> By their very nature these concepts are all oriented towards securing benefits for future generations. Food security, for example, is a concept which is defined as ‘people, at all times, [having] physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life’.<sup>44</sup> It correlates with the right to food and to an adequate standard of living in international human rights law,<sup>45</sup> and encompasses notions of stability and sustainability, which extend to future generations.

Similarly, the aspiration of ‘just transitions to renewable energy production’ encompasses the notion that successive generations have needs relating to access to energy, employment and social security reflected in human rights.<sup>46</sup> These rights are at risk during economic transitions to renewable energy sources, and governments must ensure they are safeguarded through appropriate policies. However, while objectives like these implicitly involve the rights of future generations, they are not explicitly acknowledged as stakeholders let alone beneficiaries of obligations. The suitability of relying on protection through such indirect means is therefore questionable.

In addition to referring to intergenerational equity, the Preamble refers also to ‘the importance for some of the concept of “climate justice”’.<sup>47</sup> Climate justice is a human-centred approach to climate change which aims to share the burdens and benefits of climate change and its impacts equitably and fairly, with a particular focus on safeguarding the interests of vulnerable groups.<sup>48</sup> It therefore overlaps with the principle of intergenerational equity, discussed in more detail below. While not solely concerned with the rights and interests of future generations, climate justice clearly has the potential to include them among its beneficiaries. However, the Preamble’s language of ‘the importance for some’ reflects the difficult negotiating process through which the Agreement was drafted and undermines its influence. It leaves the concept of ‘climate justice’ in a position where it is unlikely to have any significant influence on any state party not already invested in or sympathetic to the concept.

By cutting back references to human rights and intergenerational equity through the negotiation of the Paris Agreement, the result is an instrument which only

<sup>40</sup> Ibid., Preamble, para. 9.

<sup>41</sup> Ibid., Preamble, para. 13.

<sup>42</sup> Ibid., Art. 10.

<sup>43</sup> Ibid., Art. 7.

<sup>44</sup> Rome Declaration on World Food Security, Rome (Italy), 13–17 Nov. 1996, available at: <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>; H. Johnson & R. Walters, ‘Food Security’, in M. Gill (ed.), *The Handbook of Security* (Springer, 2014), pp. 404–27, at 405.

<sup>45</sup> ICESCR, n. 6 above, Art. 12.

<sup>46</sup> Ibid., Arts 6, 9, 11.

<sup>47</sup> Paris Agreement, n. 7 above, Preamble, para. 12.

<sup>48</sup> Mary Robinson Foundation, ‘Principles of Climate Justice’, available at: <http://www.mrfcj.org/principles-of-climate-justice>. See also R. Maguire & B. Lewis, ‘The Influence of Justice Theories on International Climate Policies and Measures’ (2012) 8(1) *Macquarie Journal of International and Comparative Environmental Law*, pp. 16–35.

indirectly supports the rights of future generations. This is in spite of the fact that the future impacts of climate change are fundamental concerns driving the global climate change regime, and the widespread recognition that our actions (or inaction) today will determine the extent to which future generations will be able to enjoy their rights, and the burden they will have to bear in dealing with a radically altered environment.<sup>49</sup> The next section turns to the framework of international human rights law to analyze the extent to which it may supplement the climate regime and facilitate a human rights-based approach to climate change which accommodates future generations.

### 3. THE RIGHTS OF FUTURE GENERATIONS IN HUMAN RIGHTS LAW

The applicability of human rights law to climate change has been the subject of much analysis over recent decades. It is now widely accepted that the effects of climate change may impinge significantly upon the enjoyment of human rights such as the right to health, food, water, housing, self-determination, and even the right to life.<sup>50</sup> A number of key international human rights agencies have identified the consequences of climate change for human rights and have advocated the international recognition of climate change as a human rights issue.<sup>51</sup>

In spite of this widespread support for framing climate change in human rights language, a number of legal, practical and political challenges remain to be overcome before international human rights law can be employed effectively to address climate change. These challenges exist when the rights holders concerned are members of contemporary generations, but are even more problematic when attempting to extend the application of the law to future generations.

The first challenge relates to the problem of establishing that a duty bearer (usually the state) owes an obligation to a member or members of future generations. Under international human rights law, states typically owe obligations towards individuals who are within their territories or subject to their jurisdiction or control.<sup>52</sup> This has been noted as one of the key challenges in adopting human rights approaches to climate change, given that the effects of climate change are widespread and not limited by territorial boundaries.<sup>53</sup> Similar issues exist at a temporal level. Human rights law, as it is currently framed, does not easily accommodate the notion of duties currently owed by a state towards people not yet in existence and hence outside the

<sup>49</sup> See, e.g., E. Brown Weiss, 'Climate Change, Intergenerational Equity and International Law' (2008) 9(3) *Vermont Journal of Environmental Law*, pp. 615–27; H. Shue, 'Changing Images of Climate Change: Human Rights and Future Generations' (2014) 5 *Journal of Human Rights and the Environment*, pp. 50–64; Lawrence, n. 1 above; L. Horn, 'Climate Change Litigation Actions for Future Generations' (2008) 25(2) *Environmental and Planning Law Journal*, pp. 115–35.

<sup>50</sup> See, e.g., Atapattu, n. 1 above; Humphreys, n. 1 above; Limon, n. 1 above.

<sup>51</sup> OHCHR report, n. 1 above; Knox, n. 1 above; McInerney-Lankford, Darrow & Rajamani, n. 1 above.

<sup>52</sup> ICCPR, n. 6 above, Art. 2.

<sup>53</sup> Bodansky, n. 1 above, p. 522; Knox, n. 1 above, p. 487.

usual scope of its jurisdiction and control. Even if it did, proving a violation of those duties remains highly problematic, as will be discussed below.

Is it possible then to extend the obligations owed by states under international human rights law to future generations? Assistance may be found in some of the work which has been done to define extraterritorial human rights obligations in the climate change context. The Human Rights Committee in its General Comment 31 on the nature of legal obligations under the International Covenant on Civil and Political Rights (ICCPR)<sup>54</sup> clarified that a person ‘subject to the jurisdiction’ of a state is any person within that state’s power or control, even if he or she is outside the territory.<sup>55</sup> This ‘power or control’ test has been used to extend the application of the ICCPR in circumstances where a state has responsibility for the rights of individuals even when they are outside its borders – for example, in the cases of occupied territories,<sup>56</sup> offshore processing of refugees,<sup>57</sup> and extradition cases.<sup>58</sup> Scholars such as Knox and Boyle have argued that human rights law, in affirming that states owe obligations to persons ‘subject to their jurisdiction’, allows for obligations to be owed to persons who are affected by the exercise of a state’s legal authority.<sup>59</sup>

In relation to the human rights impacts of transboundary environmental harm, Boyle has argued that jurisdiction could be established by emphasizing authority over the person affected rather than simply focusing on territorial control.<sup>60</sup> He contends that where it is possible for a state to take effective measures to prevent or mitigate transboundary harm to human rights then ‘the argument that the state has no obligation to do so merely because the harm is extra-territorial is not a compelling one’.<sup>61</sup> Rather, he suggests that the fundamental principle of non-discrimination in human rights would require a polluting state to treat extraterritorial environmental nuisances no differently from domestic nuisances.<sup>62</sup>

A similar argument could potentially be made for future generations, on the basis that where a state has the power to prevent harm then there is no reason to excuse it from an obligation to do so simply because the victims of that harm have

<sup>54</sup> N. 6 above.

<sup>55</sup> Human Rights Committee, General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CPR/C/21/Rev.1/add13, 20 Mar. 2004, para. 10; R. McCorquodale & P. Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights’ (2007) 70(4) *The Modern Law Review*, pp. 598–625, at 602; J. Knox, ‘Climate Change and Human Rights Law’ (2009–10) 50(1) *Virginia Journal of International Law*, pp. 163–218, at 202.

<sup>56</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004), p. 136; A. Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) *European Journal of International Law*, pp. 613–42, at 636.

<sup>57</sup> A. Francis, ‘Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing’ (2008) 20(2) *International Journal of Refugee Law*, pp. 273–313.

<sup>58</sup> Knox, n. 55 above, p. 203.

<sup>59</sup> *Ibid.*, pp. 203–4; Boyle, n. 56 above, p. 638.

<sup>60</sup> Boyle, n. 56 above, p. 638.

<sup>61</sup> *Ibid.*, p. 639.

<sup>62</sup> *Ibid.*, p. 640. Knox has argued that states have at least a duty to respect the rights of people in other states: Knox, n. 55 above, p. 201.

not yet been born. Adapting this approach, if we acknowledge that states have the capacity to affect future generations through their actions on climate change now, then a corresponding obligation could be said to be owed to those generations. This is consistent with the theoretical work of Bell, Caney and others, which demonstrates that it is possible for future generations to be conceived of possessing rights and for current generations to owe duties to future generations.<sup>63</sup> However, applying this theory in the context of human rights law poses significant challenges.

A key question to address is exactly what the obligations owed to future generations would comprise. Human rights law is generally understood to involve three levels of obligation: the duties to respect, protect, and fulfil human rights.<sup>64</sup> Each of these can be considered in the context of climate change and future generations in an effort to identify more specific requirements.<sup>65</sup>

The duty to *respect* human rights is understood as the duty to refrain from acting in a way that would interfere with the enjoyment of human rights.<sup>66</sup> It is therefore construed as a negative duty. Applied to future generations it could encompass a duty not to act now in a way which would prevent them from being able to enjoy their rights at a future time. In the context of climate change it would require states to consider the impact on the rights of future generations of any mitigation or adaptation action and not to implement measures that would be likely to have a negative impact on those rights. This might include, for example, denying approval for a new development in the fossil fuel industry on the basis that the resultant GHG emissions would exacerbate the negative consequences of climate change for future generations. Alternatively, it might require a state not to implement a particular adaptation measure if it led to shortages of land, water or other resources on which future generations need to rely for subsistence.

The duty to *protect* human rights requires states to take steps to prevent private actors from interfering with the enjoyment of human rights.<sup>67</sup> Applied to future generations, it would require states to regulate the actions of corporations and other private actors to prevent or at least minimize the negative future consequences of their activities. In the context of climate change, it ensures that wherever a state delegates

<sup>63</sup> See, e.g., D. Bell, 'Does Anthropogenic Climate Change Violate Human Rights' (2011) 14(2) *Critical Review of International Social and Political Philosophy*, pp. 99–124; S. Caney, 'Cosmopolitan Justice, Rights and Global Climate Change' (2006) 19(2) *Canadian Journal of Law and Jurisprudence*, pp. 255–78; S. Caney, 'Human Rights, Climate Change and Discounting' (2008) 17(4) *Environmental Politics*, pp. 536–55; J. Feinberg, 'The Rights of Animals and Unborn Generations', in E. Partridge (ed.), *Responsibilities to Future Generations: Environmental Ethics* (Prometheus, 1981), pp. 139–50; E. Partridge, 'On the Rights of Future Generations', in D. Scherer (ed.), *Upstream/Downstream: Issues in Environmental Ethics* (Temple University Press, 1990), pp. 40–66; L. Meyer, 'Past and Future: The Case for a Threshold Notion of Harm', in L. Meyer, S. Paulson & T. Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003), pp. 143–59; R. Macklin, 'Can Future Generations Correctly Be Said to Have Rights?', in Partridge (ed.), *ibid.*, pp. 151–6.

<sup>64</sup> Atapattu, n. 1 above, p. 46; H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context* (Oxford University Press, 2007), pp. 185–9.

<sup>65</sup> O. Quirico, J. Brohmer & M. Szabo, 'States, Climate Change and Tripartite Human Rights: The Missing Link', in O. Quirico & M. Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2016), pp. 7–38.

<sup>66</sup> Atapattu, n. 1 above, p. 46.

<sup>67</sup> *Ibid.*

its mitigation or adaptation obligations to a private actor, it must ensure that the same standards of human rights protection are maintained.<sup>68</sup>

The duty to *fulfil* human rights is the highest level of obligation and requires a state to take positive steps to ensure that individuals and groups are able to enjoy their human rights.<sup>69</sup> In the context of climate change, this translates into an obligation to take positive steps to address the future consequences of climate change, which is arguably the most significant responsibility vis-à-vis future generations. It implies an obligation to reduce GHG emissions, to put in place appropriate long-term adaptation measures, and to take steps towards capacity building to assist future generations. It therefore reinforces the obligations contained in the UNFCCC and Paris Agreement, and provides additional motivation for states to comply with their emissions reduction targets.

While it is possible to flesh out the range of obligations that states bear with respect to future generations in a climate change context, the issue of proving that a state has violated one of these obligations under international human rights law is far from straightforward. Moreover, although a human rights-based approach to climate change may not be limited to proving a violation of human rights law, the potency of human rights language is lessened if the achievements and failings of states cannot be expressed in such terms.

GHG emissions do not fit the pattern of cause and effect typically associated with claims for human rights violations, as the impacts of climate change are the cumulative response of the actions of many agents over time.<sup>70</sup> This presents a challenge to traditional human rights enforcement. If no single entity is responsible, it may be difficult to prove that any given duty bearer has breached its duty.<sup>71</sup>

There is also uncertainty as to exactly what the future impacts of climate change will be. We have increasingly detailed modelling of the range of environmental impacts, but less detail about who will suffer the effects of future climatic impacts.<sup>72</sup> It is therefore difficult to say which groups might suffer violations of their human rights and what form such violations might take, at least to the degree of certainty that would normally be required to establish a breach under international human rights law. The complexity of environmental and climatic systems also contributes significantly to the challenge of establishing causation.

The interaction between different obligations is also problematic. In the context of climate change, it is easy to foresee situations where obligations to current and future generations may not be compatible. In particular, the action that might be best for future generations (immediately cutting all GHG emissions) could curtail the human rights of current generations (such as impeding their right to development, to work,

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Bell, n. 63 above, p. 113.

<sup>71</sup> Ibid.

<sup>72</sup> T.F. Stocker et al. (eds), *Climate Change 2013: The Physical Science Basis – Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013); Field et al., n. 6 above.

and to the highest attainable standard of living). In situations where rights conflict, human rights law allows that limitations on certain rights may be justified when they are necessary to advance some other right.<sup>73</sup> A justification based on a contemporary human rights need may therefore be a legitimate defence to a legal claim that a state has violated the rights of future generations. Human rights law, as it currently stands, therefore does not adequately protect the rights of future generations, and new approaches are necessary. The following section examines some of the theoretical considerations associated with an expansion of human rights law to include future generations, before options for improving protection are considered in Section 5.

#### 4. THEORETICAL CONSIDERATIONS REGARDING THE RIGHTS OF FUTURE GENERATIONS

Neither the Paris Agreement nor human rights law provide adequate protection of the rights of future generations. More deliberate action is therefore required to effectively protect their rights. This section briefly addresses the question of whether an expanded recognition of the rights of future generations would be compatible with human rights theory and discourse. Theoretical incompatibility would not in itself be a reason to defer further action; states would be free to employ stronger measures provided they comply with other obligations. However, a finding that there is no theoretical impediment to greater recognition of the rights of future generations, and particularly to the notion that states currently have obligations to protect those rights, would deny states a significant reason to delay such action and strengthen calls for stronger measures.

Human rights discourse includes a range of theoretical justifications for why certain interests, claims or freedoms ought to be labelled as ‘rights’ and have corresponding duties attached.<sup>74</sup> It is beyond the scope of this article to canvass all of these theories, but it is argued here that the ‘interest theory’ of human rights can be used to support the protection of the rights of future generations.<sup>75</sup> This section also asserts that the principles of intergenerational equity are consistent with human rights and support an approach which extends to the rights of future generations.

The interest theory of rights holds that human rights are derived from human interests. To use the explanation of Raz, a person has a right to X when X is a fundamental interest that is weighty enough to impose obligations on others.<sup>76</sup> Caney articulates a similar theory, explaining that ‘we ascribe rights to protect highly valued interests (such as liberty of conscience, association, and expression) and our standard

<sup>73</sup> See, e.g., Arts 18 and 19 ICCPR (n. 6 above), which permit limitations on the rights to freedom of thought, conscience and religion, and information and expression where such restrictions are necessary to protect the fundamental rights or freedoms of others.

<sup>74</sup> See, e.g., J. Finnis, *Natural Law and Natural Rights*, 2<sup>nd</sup> edn (Oxford University Press, 2011); J. Donnelly, ‘Human Rights as Natural Rights’ (1982) 4(3) *Human Rights Quarterly*, pp. 391–405; H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudential and Political Theory* (Clarendon Press, 1982).

<sup>75</sup> J. Raz, *The Morality of Freedom* (Clarendon Press, 1986); Feinberg, n. 63 above.

<sup>76</sup> Raz, *ibid.*, p. 166.

ascription of rights is guided by our account of what persons' most important interests are'.<sup>77</sup> From this understanding of rights, Caney argues that we can conceive of the members of future generations as possessing human rights, since we can conceive of their having interests.<sup>78</sup> Applying this approach to climate change, Caney posits that future generations have interests in health, subsistence and a decent standard of living, which will be negatively affected by climate change. These interests can be understood as rights, which generate an obligation upon current generations to take effective action to address climate change.<sup>79</sup> Caney concludes that climate change represents a violation of our obligations towards future generations, as it threatens to impede their ability to enjoy their fundamental rights.<sup>80</sup>

Bell also argues that anthropogenic climate change constitutes a violation of the human rights of future generations. He defends this claim by establishing first that obligations are owed to future generations.<sup>81</sup> Bell's work confronts the claims of philosophers such as Macklin and Gosseries, who insist that only persons who currently exist can be said to possess human rights. According to Macklin, once a person becomes an 'actual person' he or she is entitled to human rights, but cannot possess them beforehand.<sup>82</sup> This reflects what Gosseries has called the 'right-bearer contemporaneity' requirement.<sup>83</sup> Another argument against the notion that future generations possess human rights is the 'non-identity problem', articulated by Parfit.<sup>84</sup> According to this perspective, our actions today not only determine the circumstances that will exist in the future, but also the specific identities of the people who will come into existence. Accordingly, we cannot say that our actions will negatively affect any future person because, were we to act differently, those persons would not come into existence. According to these arguments, future generations do not possess rights, and current generations cannot be said to owe correlative obligations to future generations.<sup>85</sup>

Bell argues, however, that it makes no difference that the identities of these future persons are unknown or that they are subject to change, because rights flow from the fact of our humanity: 'the indeterminacy of the identity of true persons does not offer any grounds for denying that they will have human rights'.<sup>86</sup> Feinberg similarly claims that 'the identity of the owners of these interests is now necessarily obscure, but their interest-ownership is crystal clear, and that is all that is necessary to certify

<sup>77</sup> Caney (2006), n. 63 above, pp. 255, 259; Caney (2008), n. 63 above.

<sup>78</sup> Caney (2006), *ibid.*, pp. 264–5.

<sup>79</sup> *Ibid.*, p. 268.

<sup>80</sup> *Ibid.*, p. 278.

<sup>81</sup> Bell, n. 63 above, p. 107. See also Feinberg, n. 63 above, p. 148; Partridge, n. 63 above, p. 56; Meyer, n. 63 above, p. 146.

<sup>82</sup> Macklin, n. 63 above, p. 152.

<sup>83</sup> A. Gosseries, 'On Future Generations' Future Rights' (2008) 16(4) *Journal of Political Philosophy*, pp. 446–74, at 456.

<sup>84</sup> D. Parfit, *Reasons and Persons* (Clarendon Press, 1984), p. 351.

<sup>85</sup> *Ibid.*; Macklin, n. 63 above, p. 152.

<sup>86</sup> Bell, n. 63 above, p. 107; see also Feinberg, n. 63 above, p. 148; Partridge, n. 63 above, p. 56; Meyer, n. 63 above, p. 146.

the coherence of present talk about their rights'.<sup>87</sup> The obligation owed by present generations is therefore not to act in a way that will adversely affect the interests of future generations, even if we do not know their identities, because we can be certain that persons will exist in the future.<sup>88</sup> Adopting an interest theory account of human rights, it is rational to say that future generations possess human rights, and current generations can be said to owe corresponding duties to uphold those rights.

Another theoretical approach which supports the rights of future generations is developed upon the principle of intergenerational equity. While not a theory of rights in a strict sense, it nonetheless provides a justification for recognizing the interests of future generations in rights terms and attaching corresponding duties to them. It can therefore be seen as an extension of interest theory and an articulation of the specific obligations that current generations owe towards future generations. The quintessential definition of intergenerational equity comes from Brown Weiss, who argues that present generations are obliged to leave the planet in no worse condition than that in which they received it, in order to ensure that future generations have equitable access to its resources.<sup>89</sup> This has obvious parallels with the definition of sustainable development outlined above, and the two objectives have much in common.

Brown Weiss derives three key principles from this general proposition of intergenerational equity:

- comparable options, which requires the conservation of diversity in the natural and cultural resource base;
- comparable quality, which requires that we leave the planet in no worse condition than we found it; and
- comparable access, which requires equitable access to the use and benefits of the planet's resources.<sup>90</sup>

The principle of intergenerational equity supports the notion that current generations owe obligations with respect to the human rights of future generations, and help to articulate more clearly how these obligations ought to be performed. With respect to climate change, Brown Weiss has argued that the requirements of intergenerational equity compel us to take action to prevent or mitigate damage from climate change and to assist countries in adapting to its effects.<sup>91</sup> She also notes the links between inter- and intragenerational equity, and the reality that persons living today cannot be expected to fulfil obligations towards future generations if their own basic needs are

<sup>87</sup> J. Feinberg, 'The Rights of Animals and Future Generations', paper presented at the Fourth Annual Conference on Philosophy, University of Georgia, Athens, GA (US), 18 Feb. 1971; see also Feinberg, n. 63 above; R. Elliot, 'The Rights of Future People' (1989) 6(2) *Journal of Applied Philosophy*, pp. 159–70.

<sup>88</sup> Elliot, *ibid.*, p. 162; Bell, n. 63 above, p. 105; Feinberg, n. 63 above, p. 147; Partridge, n. 63 above, p. 53.

<sup>89</sup> E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational, 1989).

<sup>90</sup> Brown Weiss, n. 49 above, p. 616.

<sup>91</sup> *Ibid.*, p. 623.



not being met.<sup>92</sup> The principles of human rights law and intergenerational equity are therefore intrinsically linked, and human rights law ought to be interpreted so as to make space for the rights of future generations.

Having established a theoretical basis for protecting the rights of future generations, it is argued that a human rights based-approach to climate change can encompass future generations and indeed *must*, given the significant impact which climate change threatens to have on people in the future. The current legal frameworks that address climate change and human rights do not adequately protect their rights, and more must be done to address this shortcoming. In particular, specific measures are required to guide states in balancing the rights of current and future generations and achieving intergenerational equity. The following section presents some suggestions for how this could be achieved.

## 5. SUGGESTED OPTIONS FOR IMPROVED PROTECTION OF THE RIGHTS OF FUTURE GENERATIONS

The challenge of balancing the rights of current and future generations is clearly extremely complex and no single solution is available which can adequately address it. This section argues, however, that a number of avenues could be pursued which might offer at least a step in the right direction. These include suggestions for how to improve the interpretation and application of existing legal principles, as well as some more concrete and targeted initiatives.

One practical step would be to strive for a clearer identification and articulation of the needs of future generations, so that decisions which affect them can be made in an informed and open manner.<sup>93</sup> This is obviously limited by our ability to predict their circumstances and needs, but a better understanding of the impacts of each action on future generations would assist in weighing up the relative costs. Arguably, small gains for present generations should not be pursued where they would be likely to result in major losses for future generations.<sup>94</sup> Shue advocates prioritizing ‘subsistence rights’ over ‘luxury rights’.<sup>95</sup> Under this approach, current generations may be expected to tolerate some lowering (or at least levelling off) of their standard of living where it is considered necessary to safeguard the fundamental needs of people in the future. However, such an approach is of little assistance where the competing rights are of a comparable level of importance.

An alternative approach would be to look to the level of duty within the tripartite scheme outlined earlier, and to prioritize the obligations to *respect* and *protect* rights over the obligation to *fulfil*. This would ensure that a base level of protection of rights is established, and that steps to develop more advanced levels of enjoyment are taken only once minimum protection is in place, and not at the expense of the fundamental

<sup>92</sup> Ibid., p. 618.

<sup>93</sup> Report of the UN Secretary-General, ‘Intergenerational Solidarity and the Needs of Future Generations’, UN Doc. A/68/x, 5 Aug. 2013, p. 13.

<sup>94</sup> Ibid.

<sup>95</sup> H. Shue, ‘Subsistence Emissions and Luxury Emissions’ (1993) 15(1) *Law and Policy*, pp. 39–60; Shue, n. 49 above.

needs of future generations. A risk with this approach is that governments may seek to defer action on costly rights – such as health, education and social security – on the basis that resources need to be conserved for the benefit of future generations.

States should be encouraged to seek options to fulfil human rights which have long-term benefits, so that their actions benefit both current and future generations, thus removing any conflict or need to balance priorities.<sup>96</sup> This clearly suggests pursuing deeper emissions reductions, but doing so in a way that does not infringe the rights of current generations. Lawrence has proposed an approach along these lines – what he calls the ‘structural reform’ approach – under which states are encouraged to take steps to bring about long-term systemic reform while maintaining minimum standards of protection for current generations.<sup>97</sup> Lawrence’s proposal would place an onus on states to implement sustainable development in a way that minimizes harm to future generations.

The precautionary principle could also be used to guide decision making to produce a better balance between the rights of current and future generations.<sup>98</sup> A decision that is likely to produce irreversible harm to ecosystems ought to be avoided, even if it may yield benefits for current generations, and states should take a precautionary approach where the future risks of an action are reasonably foreseeable. The fact that future damage is not certain ought not to be a reason to refrain from taking precautionary measures where those measures would safeguard rights and interests.<sup>99</sup>

A practical measure which could help to achieve a more equitable balance between the rights of current and future generations, and which facilitates the sort of rethinking advocated above, would be to establish an international body or officer mandated to advocate on behalf of future generations, such as a UN High Commissioner for Future Generations – an idea put forward at the Rio+20 Conference on Sustainable Development.<sup>100</sup> Similar agencies exist in a number of domestic jurisdictions, where it is recognized that future generations deserve representation in governmental decision making.<sup>101</sup> Such a position could ensure that the interests of future generations are represented in negotiations for future cooperative action on climate change, and offer an important way of evaluating

<sup>96</sup> Report of Secretary-General, n. 93 above, pp. 13, 18.

<sup>97</sup> Lawrence, n. 1 above, p. 78.

<sup>98</sup> The precautionary principle requires that where there is a credible threat of serious or irreversible harm to the environment, scientific uncertainty should not be used as a reason for postponing action to prevent that harm: Rio Declaration, n. 35 above, Principle 15.

<sup>99</sup> Report of Secretary-General, n. 93 above, p. 18.

<sup>100</sup> *Ibid.*; Report of the United Nations Conference on Sustainable Development, Rio de Janeiro (Brazil), 20–22 June 2012, UN Doc. A/CONF.216/16.

<sup>101</sup> Fundamental Law of Hungary, 25 Apr. 2011, Art. P; N. Teschner, ‘Official Bodies that Deal with the Needs of Future Generations and Sustainable Development: Comparative Review’, The Knesset Research and Information Center, 30 Apr. 2013, p. 5, available at: <https://www.knesset.gov.il/mmm/data/pdf/me03194.pdf>; M. Szabó, ‘National Institutions for the Protection of the Interests of Future Generations’ (2015) 5 *E-Publica: Revista Electronica de Direito Publico*, pp. 16–8, available at: <http://e-publica.pt/en/national-institutions.html>; A. Harrington et al., ‘National Policies and International Instruments to Protect the Rights of Future Generations: A Legal Research Paper’, Report of the World Future Council and Centre for International Sustainable Development Law, available at: [http://www.futurejustice.org/wp-content/uploads/2010/03/World\\_Future\\_Council\\_-\\_Representation\\_Future\\_Generations.pdf](http://www.futurejustice.org/wp-content/uploads/2010/03/World_Future_Council_-_Representation_Future_Generations.pdf).

states' commitments and performance from the perspective of future generations. It could also feed into the evaluation of states' nationally determined contributions (NDCs) and the global stocktake established in the Paris Agreement.<sup>102</sup> Such measures could assist in striking an appropriate balance between the needs of current and future generations. Without a strong voice to speak on their behalf, the rights and interests of future generations may be devalued, postponed or ignored, as a result of being overshadowed by the more visible and tangible demands of present generations. An advocate for future generations would be able to ensure that decision makers are equipped with the necessary information about future impacts to better enable them to make decisions which are just and balanced.

## 6. CONCLUSION

The precise location, timing and extent of future climate change impacts are unknown, but it is clear that future generations will endure a range of environmental, social, economic and cultural impacts and will bear the burdens of our past and current inaction. It is equally clear that they will experience significant disruption in their enjoyment of fundamental human rights. Future generations lack a strong voice at the international level to advocate on their behalf and possess no bargaining power to negotiate for a better outcome. As the 'Our Common Future' report of 1987 observed, '[we] act as we do because we can get away with it: future generations do not vote, they have no political or financial power, they cannot challenge our decisions'.<sup>103</sup> This powerlessness is evident in the Paris Agreement: despite the efforts of some civil society groups,<sup>104</sup> proposed references to future generations and intergenerational equity were reduced down to one mention in the Preamble.

Human rights language in the Paris Agreement text was similarly pruned, with the final text referring only to existing human rights duties and steering clear of creating any possible new obligations. While arguably an improvement on previous instruments, the connection of climate obligations to existing human rights law is still inadequate to protect the rights of future generations, given the limited space that human rights law currently gives to the rights of future generations and the significant challenges of using human rights law to address the future effects of climate change.

This article has proposed some suggestions for how to rethink the relationship between human rights and climate change so as to give more focus to the rights of future generations, and ensure that their interests are adequately represented. While proposals for the establishment of a High Commissioner (or a similar position) are in their infancy, such an innovation is worthy of serious consideration. Given that the Paris Agreement and international human rights law provide only limited scope for recognizing the rights of future generations in the context of climate change, further action in this area is clearly required. Future generations cannot afford for us to delay any longer.

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<sup>102</sup> Paris Agreement, n. 7 above, Arts 13, 14.

<sup>103</sup> 'Our Common Future', n. 35 above, para. 25.

<sup>104</sup> See, e.g., the Young and Future Generations Participation Day at COP-21, 3 Dec. 2015, available at: [http://unfccc.int/cooperation\\_support/education\\_outreach/overview/items/9191.php](http://unfccc.int/cooperation_support/education_outreach/overview/items/9191.php).