Our Obligations to Future Generations

A human rights approach in the case of *Neubauer et al. v Germany*

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Abstract

Climate change presents profound changes to the Earths' system and has the potential to impact human rights around the world, both now and in the future. This is becoming a more prominent area of research among legal scholars as litigation becomes a popular tool for enforcing human rights across jurisdictions. As the worst effects of the climate crisis threaten to become a reality beyond 2030 and 2040, the rights and freedoms of future people are more likely to be affected than our own for a problem caused by our actions - or inaction. This presents an issue for intergenerational justice and forces us to ask the question - what are our legal obligations towards the future? In international instruments, intergenerational justice is a common theme, yet most are silent on the rights of future generations. In this thesis, I will consider current theories of intergenerational justice and the rights of future generations, and using a recent successful case *Neubaeur et al. v Germany,* I will analyse the legal obligations towards future generations and whether they offer sufficient protection. Turning to international law, I may suggest how the rights of future people are to an extent already in existence and their development can be an effective tool for achieving a future-oriented approach and striving towards intergenerational justice.

Key words: *climate change, environment, human rights, intergenerational justice, rights of future generations, Paris Agreement.*

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I. Introduction

The global climate crisis presents an immense change to the Earth's system and has brought it into a new geological age - 'The Anthropocene'. Human activity has altered the Earth's system so profoundly and extensively that it can no longer be considered as part of the Holocene. The Intergovernmental Panel on Climate Change (IPCC) has produced several reports on the consequences of the changing climate and global heating which pose significant risks to human health and survival.[1] With these consequences forthcoming, climate change presents a challenge to intergenerational justice as generations to come will suffer the effects of the climate crisis more intensely than generations past. A judge in a recent case in the Australian Courts commented that the climate crisis 'is to fairly be described as the greatest intergenerational injustice ever inflicted by one generation of humans upon the next'.[2] Intergenerational justice, a question of distributive justice between generations existing at different times, has come to the fore in the debate on climate and has relevance for human rights as the link between them is becoming increasingly apparent.[3] The potential risk of human rights violations depends on the actions we take now to reduce our carbon emissions which raises questions as to what our responsibilities and legal duties are towards future generations. Intergenerational justice can be interpreted in different ways and can be achieved through different means, however, given the impact on human rights, it is submitted that the rights of future generations within a concept of intergenerational justice warrants investigation. The rights of future humans are being tried in litigation across the world, a handful of them with success,[4] often with the aim of forcing the hands of governments to take stronger action to mitigate

[1] V Masson-Delmotte and others, 'IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC) <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf> accessed 15 March 2022; HO Pörtner and others, 'IPCC, 2022: Summary for Policymakers' in HO Pörtner and others (eds), *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022) <https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf>. For this thesis, I will assume that the predictions of the IPCC are correct.

[2] *Sharma v Minister for the Environment* [2021] Federal Constitutional Court 560. Judge Broomberg at [292]

[3] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37.

[4] *Andrea Lozano Barragdán et al v Presidencia de la Republica et al* [2018] Corte Suprema de Justicia de Colombia 11001 22 03 000 2018 00319 00, STC4360-2018; *Urgenda Foundation v The Netherlands- Ministry of*

the climate crisis.[5] Civil and human rights litigation is becoming a more popular method of achieving state action on climate change and the protection of future generations proved a successful argument in the recent European case *Neubauer et al v Germany*.[6] Following *Urgenda Foundation v State of the Netherlands*,[7] it is the second successful European case on intertemporal rights in the context of the climate crisis.

The aim of this thesis is to analyse the legal reasoning in *Neubauer* and how exactly the Court was able to protect future generations and its implications for strengthening protection internationally. In order to do this, I will review the existing literature on the rights of future generations, discussing Caney's interest theory, and references to future rights in international and domestic law. I will use this background to assess the language of rights in the German case. The conclusion can be made that future generations were not afforded rights in this instance but that their future freedoms were protected by the Court thus indirectly providing protection and taking a step towards achieving intergenerational justice. I will then go on to consider the influence of the case on developments in international law and whether this protection can be found in the Paris Agreement and be implemented internationally.

Infrastructure and the Environment [2015] Chamber for Commercial Affairs of the Hague District Court No. C/09/456689 / HA ZA 13-1396; *Ashgar Leghari v Federation of Pakistan* [2015].

[5] Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases' (2021) 22 *German Law Journal* 1484.

[6] *Neubauer, et al v Germany* [2021] Federal Constitutional Court BvR 2656/18/1. (Hereinafter Neubauer)

[7] *Urgenda Foundation v The Netherlands- Ministry of Infrastructure and the Environment* (n 4).

II - Conceptualising the rights of future humans within intergenerational justice in the context of climate change

A. Human rights and climate change

To establish the rights of future generations in the context of climate change and before embarking on a discussion of intergenerational justice, it is first necessary to establish the link between human rights and climate change in a general sense. In its 2009 report, the Office of the High Commissioner for Human Rights, the leading UN body for human rights, confirmed that the climate crisis may indeed have an impact on human rights.[8] Environmental degradation in the form of air pollution from the increased emission of greenhouse gases (GHGs), worsening soil quality, loss of biodiversity, all contribute to events such as extreme weather (droughts, floods, storms), rising sea levels, lack of available food and drinking water, and the increase in the spread of disease.[9] These consequences of climate change have the capacity to interfere with an array of rights. These include, but are not limited to, the right to life and human dignity, right to property, health, privacy, water and food.[10] The effects of the climate crisis by themselves are not enough to constitute a violation of human rights as it cannot be said that the state has a duty of absolute prevention of such extreme weather events and its consequences for human health. However, it can be argued that the state has a duty to take action to do as much as possible to prevent catastrophic effects of climate change by adopting a strong climate policy to limit the emission of greenhouse gases. In this sense, the state has a positive obligation to take action on climate change to protect human rights.[11] The Paris Agreement, concluded at the 2015 Conference of the Parties, makes special reference in the Preamble to the protection of human rights in climate policy.[12]

[8] John H Knox, 'Linking Human Rights and Climate Change at the United Nations Symposium' (2009) 33 *Harvard Environmental Law Review* 477. At 477

[9] As stated in the IPCC report, Masson-Delmotte and others (n 1). At 18

[10] Bridget Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7 *Transnational Environmental Law* 69; Knox (n 8). At 486

[11] Knox (n 5) at 491; *Neubauer, et al. v. Germany* (n 4). [157]

[12] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 (hereinafter The Paris Agreement).

Human rights based cases are becoming the popular subject of climate litigation and, with the use of the IPCC reports and interdisciplinary review by the judiciaries, the connection between GHG emissions and the declining quality of life for humans is becoming widely apparent and accepted as a human rights issue.[13] Human life is dependent on certain basic conditions, or 'natural foundations'.[14] They have been articulated as the right to life, to health, and subsistence[15] since it is not possible to enjoy other civic and political rights such as the right to freedom of expression, the right to property, the right to education etc. if these basic rights are not fulfilled first.

Climate change is of special relevance to the rights of future people because it has been established that as the climate warms, the potential effects and impacts on human rights worsen. With every marginal temperature increase, we come closer to so-called 'tipping points' which have the potential to cause irreversible 'major shifts in the climate system'.[16] The IPCC establishes that 'beyond 2040 and depending on the level of global warming, climate change will lead to numerous risks to natural and human systems.'[17] These risks include direct flood damage, lack of available drinking water, undermining of food security and nutrition, increases in the frequency and intensity of droughts, floods and heatwaves, and continued sea level rise.[18] As these are mid to long term effects, the people suffering the consequences are the generation who are at present children and not yet born. This means that there will be an uneven distribution of environmental burdens and benefits with implications for human rights if significant action is not taken now.[19] The climate crisis therefore presents an unprecedented relationship of dependency between current generations

[13] IPCC reports are being increasingly relied on to show the effects of the climate crisis on human rights.
[14] As described in the German Constitution.
[15] Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar Publishing 2014) available at <https://pure.uvt.nl/ws/portalfiles/portal/4393432/Lawrence_Justice_28_10_2013_emb_tot_29_10_2014.pdf>.
[16] O Hoegh-Guldberg and others, 'Impacts of 1.5ºC Global Warming on Natural and Human Systems' in V Masson-Delmotte and others (eds), *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018) <https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Chapter3_Low_Res.pdfkal> accessed 6 April 2022. At 257
[17] ibid.
[18] Pörtner and others (n 1). At 11
[19] Simon Caney, 'Cosmopolitan Justice, Rights and Global Climate Change' (2006) 19 *Canadian Journal of Law and Jurisprudence* 255; Henry Shue, 'Changing Images of Climate Change: Human Rights and Future Generations' (2014) 5 *Journal of Human Rights and the Environment* 50. At 58

and future ones given their vulnerability and exposure to the problem.[20] This is true for both the conditions of life future generations will inherit, and the more general sacrifices future generations will have to make to reduce their carbon footprint and switch to renewable energy sources.[21]

Intergenerational justice is found as a basic principle of distributive justice in many international treaties and underpins the principle of sustainable development in international law. The formulation of the principle of sustainable development internationally was first established in the Brundtland report defining it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[22] By definition, sustainable development imposes limits on the actions of the current generation as a principle of intergenerational justice. The principle is further explicitly recognised in Principle 3 of the 1992 Rio Declaration on Environment and Development where it is stated 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'[23] Finally in 2002, intergenerational equity was considered in the United Nations summit on sustainable development as a principle of international law. Principle 2 of the New Delhi Declaration states:

> 'The principle of equity is central to the attainment of sustainable development. It refers to both inter-generational equity (the right of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources)'.[24]

As climate change becomes an increasing focus for legislation in both soft and hard law mechanisms and is becoming increasingly judicialised, we are forced to consider the legal rights of future people and its relevance for intergenerational justice.[25]

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[20] Lewis (n 10). At 70
[21] Shue (n 19). At 62
[22] 'Our Common Future: Report of the World Commission on Environment and Development' (United Nations 1987) Chapter 2.1 The Concept of Sustainable Development, available at <are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html> accessed 9 January 2022.
[23] Rio Declaration on Environment and Development 1992., UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992)
[24] ILA New Delhi Declaration of principles of international law relating to sustainable development 2002 (A/CONF199/8). Available at http://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-070850.pdf
[25] Peel and Osofsky (n 3). At 49

Brown Weiss' planetary trust thesis was a pioneer on intergenerational justice.[26] It relies on the basis that human beings, whether part of one generation or another, are interconnected and this in turn generates an obligation that both the quality of our institutions and environmental resources are fit for function. Her theory does not base itself on the individual but on the collective and the responsibility that we have as guardians of the planet to preserve it for future people in a condition as good as how we found it.[27] The planetary trust thesis is built on the premise that each generation must recognise that it is part of the natural system which comes with rights and obligations[28] meaning that each generation is both a trustee and a beneficiary.[29] She argues that the rights and duties are not limited to one successive generation but extend to all future generations as we are all members of the same human family obligating 'each generation to preserve diversity of the resource base and pass the planet to future generations in no worse condition than it receives it'.[30] This connection creates a planetary trust in which the natural and cultural heritage is passed from one generation to the next incurring rights and obligations. The argument is unwilling to be restricted temporally and extends to all succeeding generations and not just the one immediately to come.[31] To achieve the conditions of the planetary trust and intergenerational *equity*, she claims there are three requirements: the conservation of ecological options, conservation of the quality of the planet, and conservation of equitable resource.[32] The conservation of options speaks to conserving biodiversity of both the natural and cultural resource base so that future generations may solve their own problems according to their own values. The second, conservation of quality of the planet, refers to the quality of the environment including the air, water, soil etc. The final condition is the conservation of access to the planetary legacy. It is fair to say that Weiss' theory is broad and puts a high threshold on reaching intergenerational equity. This thesis seeks to focus

[26] Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1983) 11 *Ecology Law Quarterly* 495.
[27] Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8 *American University Journal of International Law and Policy* 19. At 21
[28] ibid
[29] Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1983) 11 *Ecology Law Quarterly* 495. 507
[30] ibid. At 500
[31] Zena Hadjiargyrou, 'A Conceptual and Practical Evaluation of Intergenerational Equity in International Environment Law' (2016) 18 *International Community Law Review* 248. At 251
[32] Brown Weiss (n 28).

only on the basic rights of future people, that is their right to live and survive in a world and therefore is better aligned with a principle of justice rather than equity. Egalitarianism is something to strive for, however, given the urgency of the climate crisis, I submit that attributing human rights is the most appropriate first step to achieve some level of intergenerational equity as it is a prerequisite for ensuring environmental burdens and benefits are spread evenly.

After establishing the undeniable link between human rights and climate change and its relevance for intergenerational justice, it is necessary to assess what rights for future people or foundational principles exist in international law.

B. Overview of existing international law on the rights of future people

Extending human rights temporally is not something novel. It has been brought before the International Court of Justice (ICJ) in several cases such as *Denmark v Norway*[33] on maritime boundaries and the 1995 *Nuclear Tests Case (New Zealand v France)*[34] where the dissenting Judge Weeramantry argued that the ICJ has the duty to protect the rights of future generations. He based his argument on the Stockholm Declaration on the Human Environment[35] and declared that the nuclear case would have been an appropriate moment to enforce these principles and '[make] a contribution to some of the seminal principles of the evolving corpus of international environmental law'.[36] If we consider the rights of future people and the concept of intergenerational justice in international legal instruments, many references can be found. They first emerged internationally in the International Convention for the Regulation of Whaling in 1946[37] and have been consistently referenced since then. The Secretary-General's report on Intergenerational Solidarity and the Needs of Future Generations lists 31 instruments (now 32 on

[33] *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Reports 38 (International Court of Justice). Separate opinion Judge Weeramantry available at https://www.icj-cij.org/public/files/case-related/78/078-19930614-JUD-01-08-EN.pdf

[34] *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Reports 457 (International Court of Justice). Separate opinion of Judge Weeramantry available at https://www.icj-cij.org/public/files/case-related/97/097-19950922-ORD-01-05-EN.pdf

[35] Stockholm Declaration on the Human Environment 1972., Adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972; see U.N. General Assembly Resolutions 2994/XXVII, 2995/XXII and 2996/XXII of 15 December 1972)

[36] *Nuclear Tests Case (New Zealand v France)* (n 34). at 362

[37] 1946 International Convention for the Regulation of Whaling 161 UNTS 72, 62 Stat. 1716

the inclusion of the Paris Agreement 2015), among them the United Nations Charter, the United Nations Framework Convention on Climate Change, and the European Charter on Fundamental Rights.[38]

The inclusion of the principle in myriad international soft law instruments demonstrates the international community's recognition of the importance of preserving the Earth's resources and conditions for the survival of future generations. However, it must be noted that its reference is largely confined to the preambles of these texts and as a consequence, there is no internationally binding document that affords rights to future generations and obligations towards them.[39] The recent report by the Secretary-General stops short of attributing rights and limits its recommendations to the creation of a High Commissioner or a Special Envoy for the protection of future generations' welfare and to advocate for intergenerational solidarity which refers only to the social cohesion between generations[40] with little development on how to address the needs of future people. In recent international agreements, it has been highlighted that there has even been a conscious effort on behalf of some contracting parties to exclude the mention of future generations (and to limit the use of human rights language generally).[41] It is likely this is done to limit the liability of states in the failures to take effective action on the climate crisis.

Despite this soft approach in international law, various domestic laws and jurisprudence has recognised the importance of intergenerational justice and some have taken the step to attribute human rights to future people. Up to 2018, 20 countries, spanning across 4 continents, had legal cases that discussed intergenerational equity or the rights of future generations in their decisions.[42] Brown Weiss states that as of 2016, 55 states have included references to future generations in their constitutions with varying protections of future generations ranging from real rights to the

[38] Secretary-General, 'Intergenerational Solidarity and the Needs of Future Generations: Report of the Secretary-General' (United Nations 2013) A/68/322 available at <https://digitallibrary.un.org/record/756820> accessed 3 February 2022. At 10

[39] ibid. At 10

[40] ibid. at 16-18

[41] Lewis (n 10); Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?' (2018) 7 *Transnational Environmental Law* 17. At 26

[42] See Edith Brown Weiss, 'Intergenerational Equity in a Kaleidoscopic World' (2019) 49 *Environmental Policy and Law* 3. At 6-7

recognition of interests in the context of sustainable development[43] and a plethora of others use other mechanisms such as institutions dedicated to the future and supervisory ombudsmen to represent the interests of future generations and promote intergenerational equity.[44] Countries with these organisations have established a transnational network, *The Network of Institutions for Future Generations*, to share knowledge and best practices.[45] Developments in national law and jurisprudence may push international law towards recognising future generations using the foundational principle of intergenerational justice found in many international instruments. International law 'does not exist in a vacuum'[46] and is greatly influenced by the changes in the international and national communities. Despite such progression, it has been highlighted that some of these national institutions have been 'short-lived' and have not proven to be effective[47] suggesting that both nationally and internationally the rights of future generations require strengthening.

The prevalence of references to the rights of future generations at multiple levels of governance and law demonstrates the strength of the principle. This is perhaps because there is an argument to say that it is a principle of natural law. It is a clear part of human behaviour - to preserve the environment for one's children. To quote an indigenous proverb: we do not inherit the world from our ancestors; we borrow it from our children. The principle of conservation makes up a core part of human rights law, constitutional law, and environmental law for the reason that without thinking about the future and implementing practices to protect the lives of future people, we jeopardise today's society and undermine the heritage we have received. On the basis that the climate crisis presents an existential threat to this principle, codification of rights is necessary to achieve any

[43] Some examples: Constitution of South Africa Article 24; Constitution of Japan Article 11; Constitution of Norway Article 112, Brazilian Constitution Article 225; German Constitution Article 20a; Constitution of Kenya Preamble and Article 42; Constitution of Ecuador Article 395; and Constitution of Bolivia Articles 9, 33, 108; Constitution of Argentina Article 41; Constitution of the Dominican Republic Article 67.

[44] Canada's Commissioner of the Environment and Sustainable Development, Finland created the permanent parliamentary body Commission for the Future, Ombudsman for future generations in Hungary, Israel's Commission for the Future (now abolished), New Zealand created a Parliamentary Commissioner for the Environment with responsibilities towards future generations and Wales enacted legislation titled "Well-being of Future Generations".

[45] 'About - Network of Institutions for Future Generations - AJBH' (*Network of Institutions for Future Generations*) <https://futureroundtable.org/web/network-of-institutions-for-future-generations/about> accessed 28 April 2022.

[46] Rachel Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation' (2016) 21 *Tilburg Law Review* (Gaunt) 31.

[47] Hadjiargyrou (n 31). At 275

kind of intergenerational justice. This next section will consider what these rights are and how they are justified in legal theory.

C. An interest theory of the rights of future generations

The rights of future people first of all benefit from a presumption based on the universality principle - universal human rights extend across time to future generations as all humans and generations form part of the human family.[48] The issue with the rights of future humans is that there are strong objections against this presumption such as the rights of people living now are more important. However, when argued from the approach of human dignity and interest theory, such objections can be overcome. The interest theory, formulated by Joseph Raz, and applied to the climate crisis context by Caney in his paper *Cosmopolitan Justice, Rights and Global Climate Change* provides a powerful argument.[49]

Before discussing this theory, it is important to highlight the importance of dignity as a grounding argument. Human dignity underpins human rights and it has been argued that it provides the moral force necessary 'to frame the normative boundaries of international law' and extend rights to future generations.[50] Using the argument of dignity frames human rights from an anthropological perspective and enforces the argument that future humans are in the same position as current humans in terms of the importance and relevance of their dignity and human rights.[51] This is an adequate way to describe our relationship with future humans. It makes clear that our actions now are not limited temporally and demonstrates that future people have the same right to survival as the current generation based on their capacity to hold human dignity.

Kant's theory on qualitative freedom is of relevance here and is worth mentioning. Applying his theory, the obligation is characterised not towards future people but to ourselves 'to humankind –

[48] Caney (n 18) at 265; Elina Pirjatanniemi, 'Pathways for Future Generations in Existing Legal Human Rights Provisions' in Gerhard Bos, Marcus Düwell and Naomi van Steenbergen (eds), *Towards the Ethics of a Green Future* (Routledge 2018). At 73

[49] Caney (n 19).

[50] Stephen Riley, 'Architectures of Intergenerational Justice: Human Dignity, International Law, and Duties to Future Generations' (2016) 15 *Journal of Human Rights* 272. At 276

[51] ibid. at 286

in view of a possible futurity.'[52] If we take the opposite argument - that we have no obligation towards the future or human rights of future people, it can be revealed as a self-contradictory argument. This is because it 'presupposes the (past and present) respect of others for our free deliberation and decision making, and yet argues against the maintenance of the general conditions thereof'.[53] If we do not have a right to destroy future freedoms, this translates to a negative right not to interfere with their freedoms. It can be argued that we have a duty to use our freedom in a way that does not limit the freedoms of future generations.[54] In the context of anthropogenic climate change, we therefore must mitigate our carbon emissions to ensure future freedoms are not disproportionately impacted and left with a planet that is ecologically unable to support human life. However, it is submitted that the concept of 'dignity' and 'respect for freedom' is too vague to rely on judicially. It leaves open the question as to what exactly the requirements are for states and requires further development. Here is where Caney's interest theory can add some teeth.

In his paper, Caney elaborates on 'interest theory' initially developed by Raz in the context of anthropogenic climate change.[55] It is as follows:

> 'If we hold that persons have a right to X if X is an interest that is weighty enough to generate duties on others (assumption (1)), and if we hold that global climate change jeopardises fundamental interests (assumption (2)) and that the latter interests are weighty enough to generate obligations on others (assumption (3)), it logically follows that (Conclusion) Persons have a right not to suffer from the ill-effects associated with global climate change.'[56]

Caney argues that we should accept that certain rights are grounded in interests that are 'weighty enough to generate duties on others'.[57] The argument relies on the fact that 'global climate change damages persons' fundamental interests'.[58] Caney concludes that people have a right to not suffer

[52] Claus Dierksmeier, 'John Rawls on the Rights of Future Generations' in Joerg Chet Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar Publishing 2006) at 82 available at <https://www.intergenerationaljustice.org/wp-content/uploads/2020/05/Handbook_of_Intergenerational_Justice.pdf>. accessed 7th February
[53] ibid.
[54] Riley (n 50). at 282
[55] Caney (n 19).
[56] ibid.
[57] ibid. at 261
[58] ibid. at 262

the ill-effects of climate change since there is a 'weighty enough interest in life, health, and subsistence' to create obligations on present generations[59] given that the needs are basic to survival, the interest in X is 'incontestable'.[60] The right afforded imposes a correlative duty on the state (or more specifically those in charge of the energy policy of states when referring to the obligation to reduce the consumption of fossil fuels)[61] to ensure future generations do not suffer the ill-effects of climate change. In this context, the state has a positive obligation since taking no action and non-interference (a negative obligation) would cause a violation by omission. Protecting these basic conditions (life, health, and subsistence) is the obligation imposed as these are what are necessary for future people to lead autonomous lives and have their freedoms respected.

The rights of future generations based on dignity and basic human needs, relies on the presumption that all humans, by the fact of being human regardless of space or time, are deserving of these rights which imposes a corresponding obligation. It is argued that there are three conditions that must be satisfied for the presumption to hold.[62] The first is that we must have knowledge that future people will exist - this is easily satisfied as it is unquestionable that humans will continue to produce the next generation.[63] There may be some apocalyptic event but it would be reckless to continue on the basis that such an event is likely to occur. The second is that future humans will require the same basic needs as us.[64] Again, this is easily satisfied as it is almost without doubt future humans will require oxygen, water, and food to survive. The rights of future generations could not extend to further rights that speak to values as we cannot be sure that they share the same values as us. But in any case this issue is irrelevant as we know that future humans will come into existence and continue to live on the same ecological basis as us.[65] The final condition depends on the fact that our actions today have the ability to influence their fundamental rights - or a link of

[59] ibid. at 263
[60] Tracey Skillington, 'Changing Perspectives on Natural Resource Heritage, Human Rights, and Intergenerational Justice' (2019) 23 *The International Journal of Human Rights* 615.
[61] Shue (n 19). At 58
[62] Marcus Düwell and Gerhard Bos, 'Why "Rights" of Future People?' in Gerhard Bos, Marcus Düwell and Naomi van Steenbergen (eds), *Towards the Ethics of a Green Future* (Routledge 2018). At 17-18
[63] ibid.
[64] ibid.
[65] Joel Feinberg, 'The Rights of Animals and Unborn Generations' in Russ Shafer-Landau (ed), *Ethical Theory: An Anthology* (2nd edn, 2013).

causation.[66] This is a scientific issue and I will assume the predictions of the IPCC are correct and therefore the condition can be satisfied. The accumulation of greenhouse gases in the atmosphere contributing to the changing climate means that the quality of life of future generations is dependent on the actions we take today. As explained by the Court in *Neubauer* the actions we take or do not take now will 'have to be taken in the future - possibly under more unfavourable conditions - and will then curtail the exact same needs and freedoms but with far greater severity'.[67]

In consideration of these conditions, the rights of future generations are limited to the fulfilment of their 'basic needs' to ensure they are able to enjoy other rights if they wish based on their values. This is in alignment with Article 20a of the German Constitution which affords protection based on the 'natural foundations of life'. There is a critical reason for this restriction. It ensures that the rights are only used to protect human life and not to protect our generations' values. If the rights were broadened beyond basic needs and instead were grounded on solely human dignity, they would be susceptible to an extremely broad interpretation which could encompass unwanted and unforeseeable consequences. They could be used as a political tool to ensure certain institutions or cultural values remain intact. However, the purpose of these rights is to ensure future people have the capacity to choose their values, not negatively impacting the right to self-determination. Attributing basic rights to future generations is a relatively low threshold. Acknowledging the importance of the concept and given the urgency of the climate crisis, codifying the rights of future generations seems only a logical and basic step in seeking intergenerational justice. These basic rights reflect the urgency of the climate crisis and are a powerful argument to trigger states into action since it is based on the instinctive survival of humanity. The principle of distributive justice regarding the fair distribution of environmental burdens and benefits of the release of GHGs can be grounded in a human rights approach. Justice has dignity at its core and the right to survive and not to be disproportionately affected by the actions of others. Justice gives meaning to these rights and allows states to strive towards a more just future based on a principle already existent in international law. Attributing rights to future people based on the interest theory is a crucial element to achieving intergenerational justice.

[66] Düwell and Bos (n 62).
[67] *Neubauer, et al. v. Germany* (n 6). [120]

Following this discussion, it can be established that there is a basis of intergenerational justice in international law from which the protection of the rights of future generations can be developed. These rights are based on human dignity and their interests to live on this planet which necessarily incurs a positive obligation on the current generation to ensure our actions do not disproportionately interfere with those rights. In the context of climate change, this translates to a positive duty to reduce our carbon emissions to safe levels. Caney's interest theory closely aligns with the German Court's judgement and has proven to provide this starting point for attributing basic rights. The rights of future generations have more chance of being grounded if limited to the protection of their basic needs for life based on justice with a view to be able to live autonomously free from an undue burden of suffering from the effects of the climate crisis. How then, did the German Court protect these rights?

III. *Neubauer et al. v Germany* - the human rights approach in practice

A. Reconciling theory and practice

Neubauer has proved itself a landmark case for climate litigation and the rights of future generations with the Federal Court finding in favour of a group of youth claimants from Germany, Nepal, and Bangladesh who claimed that the German state 'failed to create a legal framework sufficient for reducing greenhouse gases' in their adoption of the German Federal Climate Change Act of 12 December 2019 (KSG). The reason this case was selected to analyse the rights of future generations is that it can be considered a 'prototypical case'[68] in that it successfully protects the interests of future generations in this evolving area of research and can shed light on where these rights may have space to grow and how they may be strengthened. The case concerned both obligations regarding both *inter*generational and *intra*generational (global justice between people in the same generation living in a different space) justice and Germany's obligations internationally. The German state adopted the KSG in light of its obligations under the Paris Agreement in 2015. The principal claim was that the 'legislator has violated the claimants'

[68] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' [2005] *American Journal of Comparative Law* 125. At 142

fundamental rights by not taking sufficient measures to reduce greenhouse gas emissions and limit global warming'[69] to '[provide] a future consistent with human dignity and a fundamental right to an ecological standard of living'.[70] The claimants relied on Article 20a of the Basic Law[71] in conjunction with Articles 1(1), 2(2), and 14(1) asserting a violation of the fundamental right to a future consistent with human dignity, the protection of life and physical integrity, and the fundamental right to property. The principal concern for the rights of future generations is Article 20a of the German Constitution which states;

> 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.'

The Court found that the relevant parts of the KSG (§3(1) second sentence and §4(1) third sentence) were unconstitutional because they did not spread out the carbon budgeting in a 'forward-looking manner that respects fundamental rights' in line with the principle of proportionality and their duty under Article 20a of the Basic Law.[72]

The Court helpfully expands on the meaning of Article 20a in the judgement. It explains that the provision imposes an obligation on the state to take climate action in line with a 1.5°C temperature rise.[73] It is a 'justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations'.[74] It has an objective character[75] meaning that risks to future freedom and fundamental rights would be unjustifiable under constitutional law.[76] The objective dimension contains two elements; one is that the state must protect the natural foundations of life for future generations and the other is ensuring that the environmental burdens are spread in such a way that future generations are 'not forced to engage

[69] *Neubauer, et al. v. Germany* (n 6). [92]
[70] ibid. [38]
[71] German Constitution, Article 20a, English translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf
[72] *Neubauer, et al. v. Germany* (n 6). [243]
[73] ibid. [197]
[74] ibid. [197] and [204]
[75] ibid. [193]
[76] ibid. [190]

in radical abstinence'.[77] The first element can be considered as ensuring certain conditions are fulfilled - 'basic needs' of future generations. The Court states that this is the principal aim of the provision.[78] The second element is a clear formulation of intergenerational justice as it deals with distributing burdens and benefits across generations.

The objective dimension aligns with Caney's interest theory of rights. Even though the German Court states that future generations have no objective rights, they provided them with the protection needed to ensure the 'basic conditions of life' (or the natural foundations of life) fulfilled. The Basic Law imposes the obligation that the natural foundations of life are to be treated with 'such care and to leave them in such a condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence'.[79] The Court does not expand on what the natural foundations of life are but this seems to be unnecessary for it to reach its conclusion and it proceeds to deal only with GHGs making the obligation narrow, however, it leaves room for the obligation to be broadened to apply to protecting biodiversity, for example. In this instance, future generations were deemed to have a weighty enough interest in the reduction of emissions to be awarded protection in order to protect their freedoms. The Court ensures to clarify that the claimants are invoking their own rights since neither unborn persons nor future generations enjoy 'subjective fundamental rights'. This means that future generations do not have 'defensive rights against state interference'.[80] Under Article 20a, there is only an objective dimension 'to afford intergenerational protection.'

The second element of Article 20a speaks to freedoms rather than rights and has significance for the principle of intergenerational justice. The Court suggests a violation of fundamental freedoms due to the fact that the Federal Climate Change Act 'offloads significant portions of the greenhouse gas reduction burdens …onto the post-2030 period'.[81] They assert that many fundamental freedoms, contained in Article 2(1) of the Constitution, can be impacted by the effects of climate change since 'practically all aspects of human life involve the emission of greenhouse gases' and

[77] ibid. [193]
[78] ibid. [193]
[79] ibid. [193]
[80] ibid. [109] and [146]
[81] Ibid. [117]

that freedom 'may be jeopardised in a constitutional manner.'[82] In order to protect these fundamental freedoms, the CO_2 budget must be distributed to not impose a disproportionate burden on future freedom.[83] However, it notes that the Article is not absolute and requires balancing with other fundamental interests.[84] Furthermore, it leaves the legislator with a margin of appreciation to decide how to satisfy its constitutional obligations.[85] It is nonetheless a powerful restriction of the actions of current generations as it requires that the carbon budgets taken in accordance with Article 20a are proportional and do not incur a breach of the fundamental freedoms of future people.

The second element focused on intergenerational justice is made impossible without the first 'objective protection mandate'.[86] The Court establishes that Article 20a requires that the German state manages CO_2 emissions in a 'forward looking' way[87] which therefore requires the consideration of the interference of the rights and freedoms of future generations. The two elements of the provision are therefore inseparable making the rights of future generations critical to achieving intergenerational justice as the Court deems is necessary. It can be argued that Article 20a in both its objective and subjective element (in the context of freedom and the ability to live one's life autonomously)[88] entails the duty not to interfere disproportionately with the rights of future generations based on their right to live with dignity.

B. Contesting the objections

There are both practical and philosophical objections to attributing rights to future generations. Dealing firstly with the philosophical, there is significant debate on whether future generations and future people are capable of having legal rights. Authors such as Beckerman and Pasek argue that the 'interests of future generations cannot be brought within any theory of justice'[89] because

[82] ibid. [117]
[83] ibid. [188]
[84] ibid. [197]
[85] ibid. [206]
[86] ibid. [192 - 193]
[87] ibid. [192 - 194]
[88] ibid. [122]
[89] Wilfred Beckerman and Joanna Pasek, 'The Rights of Future Generations', *Justice, Posterity, and the Environment* (Oxford University Press 2001) available at

future people cannot have rights which creates an 'insuperable obstacle'.[90] Since future people do not exist, it can mean that only 'imperfect obligations' are owed meaning there is no real justiciable duty.[91] There is certainly a moral or ethical obligation towards future generations and this is something shared throughout history but they argue attributing legal rights cannot be done.[92] However, this can be contested. It is not argued that future generations have present rights. Rather, it is the *future rights to future people* that are at issue.[93] Since our actions have an impact on the future and there is a *direction of causation*, it is possible 'to have a current obligation correlative to a right that *will* exist.'[94] It is an established practice for the law to protect future rights and freedoms. For example, the right to marry, the right to education, and trust law.[95] This demonstrated well by Gosseries as he shows the concept already actually exists in law and gives the example of baby food regulation.[96] He explains that at the time it is bottled, the future consumer of the product does not exist and yet the regulation is made on the basis that they will exist and when they do they will have rights that necessarily require protection. This measure is designed to protect an individual from harm and perhaps for this reason it is easier to legislate to protect them from harm but it is this same preventative measure that the rights of future generations must be based on. The nature of the right is the same: a right of defence with a future-focused preventative nature where no right at the time has actually been violated since the individuals themselves do not exist. The difference is that the rights of future people are much broader and entails more severe consequences for states which does not mean that it is impossible to attribute such rights.

Interestingly, the German Court shared the view that future people cannot have rights and did not protect them because it noted that no fundamental rights have actually been violated at that point in time.[97] This may seem like a contradiction in the Court's argument but they were able to protect

<https://oxford.universitypressscholarship.com/10.1093/0199245088.001.0001/acprof-9780199245086-chapter-2> accessed 21 December 2021. At 43

[90] ibid.

[91] ibid.

[92] Secretary-General (n 38). At 2

[93] Axel Gosseries, 'On Future Generations' Future Rights*' (2008) 16 *Journal of Political Philosophy* 446. At 455

[94] ibid. at 456

[95] Marcus Düwell and Gerhard Bos, 'Human Rights and Future People — Possibilities of Argumentation' (2016) 15 *Journal of Human Rights* 231. 238

[96] Gosseries (n 93). At 457

[97] *Neubauer, et al. v. Germany* (n 6). [195]

rights indirectly by concluding that the 'risk of serious impairments of fundamental rights in the future' constituted a violation of constitutional law as insufficient action had been taken by the legislature to contain and reduce the risk.[98] It can be said therefore that the German Court is taking on a 'future rights of future people'[99] conception of the rights of future generations and protects their interests on this basis. It is clear that Article 20a has an intertemporal nature aimed at constricting political decision-making and forcing it to take a long-term view of ecological interests with a constitutional level of protection.[100] In the Court's opinion, future generations do not have any present rights but it is the capability of them exercising their rights in the future that matters and necessarily puts an obligation on the state not to restrict those freedoms.[101] This makes the future fundamental rights of future generations especially strong in restricting political action and novel in the context of human rights.

There are also practical obstacles that the rights of future generations must overcome which the German Court was able to break down. The first is that since future people do not exist there is no one to adequately represent their interests. However, as established, the interests to be represented are basic and only involve the right to life, health and subsistence meaning there is little scope for debate especially if IPCC science is relied upon. Therefore, there are many options for their representation: children, Ombudsmen or NGOs which are already taking on this role as we saw above in the institutions of some national jurisdictions and taking cases to court. Successful cases demonstrate that children and NGOs are more than capable of representing the future interests in the preservation of the basic conditions of life.[102] The German case shows that children are worthy representatives capable of bringing these cases to Court.[103]

Furthermore, it is not a requirement that a person necessarily exists at the time of their interests being represented, trusts being the most obvious example.[104] A final argument on representation

[98] ibid. [195]
[99] Gosseries (n 93). At 455
[100] *Neubauer, et al. v. Germany* (n 6). [205]
[101] Caney (n 19). at 268
[102] Johnston (n 46). At 40 and see relevant case law.
[103] ibid.
[104] ibid. at 39

is that if we consider future people to be a vulnerable group who are incapable of representing their basic needs, it can be argued there is a necessity to grant standing. As explained by Gonzalez-Ricoy and Rey, the Indian Supreme Court extended rights to future generations on this argument as they are vulnerable and cannot protect themselves not dissimilar to those affected by poverty, lack of knowledge of the law or general incapacity.[105] A central purpose to the guarantee of human rights is to protect vulnerable people. Future people are unequivocally in this category meaning representation of their interests cannot be a barrier since we allow for the protection of children, those with mental disabilities, and even the interests of the deceased. Why not extend protection to the future?

Causation is often put forward as an obstacle in assigning responsibility to the state. The Earth systems' natural disasters occur without human interference but their frequency and intensity has increased due to our GHG emissions. Distinguishing those caused by government inaction on climate change and those caused naturally is legally difficult since it is likely neither holds full responsibility.[106] It is argued that this objection can be overcome by relying on IPCC evidence and building a dialogue between scientific bodies and the law which is the approach employed by the German Court. This dialogue allowed for a clearer understanding of what levels of greenhouse gases, and indeed other activities such as the protection of biodiversity, are legally safe for future people and the planet. The Court states that there is 'direct causal link between anthropogenic climate change and concentrations of human-induced greenhouse gases in the Earth's atmosphere' with particular relevance for CO_2 emissions.[107] It highlights the lack of necessity of absolute certainty stating that if there is uncertainty with environmental relevance, this imposes a 'special duty of care' on the legislator especially in regard to irreversible consequences of climate change.[108] Increasing reliance on science is an important strategy when dealing with human rights and climate change. This is a general trend in climate change cases according to the literature.[109]

[105] Iñigo González-Ricoy and Felipe Rey, 'Enfranchising the Future: Climate Justice and the Representation of Future Generations' (2019) 10 *WIREs Climate Change* e598.
[106] Lawrence (n 15). At 166
[107] *Neubauer, et al. v. Germany* (n 6). [119]
[108] ibid. [229]
[109] Johnston (n 46). At 40

Causation threatens to cause another barrier to protecting the rights of future generations in the realm of extraterritoriality and historical emissions. Here there is not the space to develop these arguments fully, however, it is important to note that neither do they represent insurmountable obstacles. The issue with historical emissions is that they have clearly contributed to the climate crisis yet were not illegal at the time the GHGs were being emitted.[110] Litigation on future generations is by definition a forward-looking argument and should not require the evaluation of historical emissions rather it assesses current climate policy directed at the future. Cases should be able to rely on current obligations, for example in the Paris Agreement which have already been adjusted to represent the abilities of states to reduce their GHGs. The rights are inherently preventative, meaning that the state must reduce its carbon emissions to a level that will allow for the Earth to continue to support human life and given the nature of this case, a domestic one, the German Court was not required to consider the emissions of other countries. In fact, as we shall see, when it did so, it made reference to Germany's obligations internationally to other states rather than using the global dimension of climate change to argue against national contributions.

The German case proves to show that the obstacles to protecting the rights of future generations are not unsurpassable. The Court was able to protect the future interests *ex ante* as a preventative measure without any rights having been violated at that point in time. The case can be categorised as a future class action case as it protected the interests of future generations as a whole and was able to incorporate the principle of intergenerational justice as a distributive issue without taking issue with standing, causation or their ability to be subjects of protection.[111] The judgement does, however, have significant limitations.

C. Addressing the limitations

The limitations of the judgement are foreseeable ones. Whilst the Court was able to change the perspective of the government from present to future by forcing them to incorporate the future rights of future people in climate policy, it stopped at fulfilling the basic needs of humanity meaning it is limited in the way its potential for intergenerational justice is limited. Recognising the rights of future generations under a framework of intergenerational justice is a strong starting

[110] ibid. At 40
[111] Gosseries (n 93). At 468

point for ensuring governments think long-term as it puts human rights and basic needs at the centre. However, it is unable to say anything further on quality of life or the quality of the environment.

The link the Court recognised between human rights and the environment was key to the final decision. Such a recognition demonstrated the futility of the right to an ecological minimum standard of living as 'other fundamental rights already make it obligatory to maintain a minimum ecological standards that are essential for fundamental rights'.[112] As a consequence, it is 'obligatory to afford protection against environmental degradation'.[113] By engaging in a 'planetary perspective' and recognising the effects of tipping points and impacts on future generations, the link between the environment and human life is undeniably strong and is a novel concept legally.[114] The heavy reliance on IPCC reports and understanding Earth science in relation to climate change makes this 'planetary perspective' possible. This is a welcome recognition of the interconnectedness of human life, the environment and the climate crisis **and** the importance of a forward looking lens when making climate policy and the impact on fundamental rights of the future. Kotzé argues this is a step towards understanding climate change from a planetary perspective as it has established a meaningful link between science, climate policy and the law.[115] This link is also essential to understand the rights of future generations.

However, it is argued that the Court fails to effectively address the connection between international law, climate change, and the rights of future generations. The Court recognises that the German state cannot solve climate change on its own and therefore imposes obligations on the state to promote and take international action.[116] Yet it fails to incorporate the Paris Agreement and the obligation to protect the interests and freedoms of future generations. It is well established that climate change is a transboundary issue and so is the protection of future people as one of the

[112] *Neubauer, et al. v. Germany* (n 6). [114]
[113] ibid. [114]
[114] Paola Andrea Acosta Alvarado and Daniel Rivas-Ramirez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court Analysis' (2018) 30 *Journal of Environmental Law* 519.
[115] Louis J Kotzé, 'Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?' (2021) 22 *German Law Journal* 1423. at 1436-7
[116] *Neubauer, et al. v. Germany* (n 6). [199 - 200]

impacts of climate change. Acknowledging this with reference to the Paris Agreement would have been a step further to recognising the link between international law and future generations and the existence of the intergenerational justice principle. In reference to a discussion on the constitutionality of the 1.5℃ temperature limit, the Court states that the explicit reference to the Paris Agreement in the passing of the act is 'closely related to the obligation to take climate action arising from Article 20a' of the Basic Law.[117] The Paris Agreement therefore has special relevance for the KSG and the meaning of Article 20a. The Court further highlights the reasoning for the 1.5℃ target is to reduce the probability of reaching 'tipping points being crossed'.[118] They recognise that the crossing of these points would incur far worse consequences for future generations than the temperature rise itself as highlighted by the various IPCC reports.[119] Given the importance of the Paris Agreement in current climate policy and the reference it gives to human rights, it should be considered when discussing the rights of future generations.

It is possible that the Paris Agreement, and other soft-law measures found in international law on sustainable development, environmental law and human rights law, will be useful as an interpretative tool to demonstrate that legal systems should protect the future rights of future people. A provision such as Article 20a is likely to be necessary for this kind of argument to succeed in other jurisdictions, however, combined with the growing willingness to protect future generations in international law,[120] it may be possible to argue that states must have respect for the rights of future generations when adopting their climate policy. The judgement is a clear step towards recognising principles of intergenerational justice and the decision effectively protects the rights and freedoms of future people yet it does so without concretising any real rights or with reference to the Paris Agreement. Its significance is therefore limited. However, it promotes a framework in which the state must respect future generations in its climate policy regarding GHGs. In what follows, I will consider the Paris Agreement and whether there is room for the rights of future generations in international law.

[117] ibid. [209]
[118] ibid. [161]
[119] ibid. [161]
[120] Shue (n 19). At 60

IV. The support for the rights of future generations in the Paris Agreement and emerging fragmentation

As highlighted, the Paris Agreement makes a brief reference to the rights of future generations in the Preamble. It is the first multilateral climate agreement to do so and recognises the link between human rights and the environment.[121] As mentioned previously, there seem to have been efforts to exclude human rights from the Paris Agreement as in a previous Draft Article 2 demanded 'respect, protection, promotion and fulfilment of human rights for all,... and intergenerational equity'.[122] Comparing this to the final text in the Preamble:

> *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 vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.*

The similarities are plain and the intention clear that the contracting states did not want their obligations on human rights or future generations recognised or codified.[123]

Soft-law and 'aspirational' measures have been insufficient to adequately protect the rights of future generations and to ensure states fulfil their obligations towards them in international law.[124] The fact that international law does not protect the basic needs of future generations in neither the branch of international human rights law nor environmental law, can be considered a failure of the legal system.[125] Firstly, it means that international law does not protect the rights of people who will eventually become dependent on that same system resulting in its downfall as international

[121] Adelman (n 41). At 17
[122] ibid. at 26
[123] ibid. at 27. The US, Norway, and Saudi Arabia made public objections to the inclusion of human rights in the agreement.
[124] Hadjiargyrou (n 31). at 276
[125] Riley (n 50).

law cannot succeed without the support of future people. It is contradictory, and arguably self-destructive, that international law does not build this protection for future people into its framework. Furthermore, if international law is based on human rights, and human rights is designed to protect the vulnerable, the lack of protection for future generations is a failure.[126] As Shue argues, 'the best protections for human rights are protections that endure' encompassing 'laws, political procedures, and social practices'.[127] This becomes a more persuasive argument in the context of climate change as no single state can provide the necessary protection for future generations on their own. Climate change is an issue for all states meaning that the obligation should be explicit in the international context.

Despite it being an arduous task given no mention of human rights in the operative text, some authors have strived to find support in the agreement. As Lewis argues, the Paris Agreement can be understood to afford protection to the human rights of future generations due to its reference in the Preamble,[128] supported by the fact that it is a 'future focused agreement' and has future people as its ultimate beneficiaries.[129] Being the beneficiaries, it is possible to argue that rights protection of future people is the ultimate goal of the agreement even if not explicitly stated. Being an internationally agreed treaty, it forms an important part of international climate change law and is having an effect on domestic litigation.[130] It provides support to the rights of future generations in the Preamble and to human rights more generally. It has 'people and impact' at its core and 'links the obligations and efforts of states to potentially affected individual legal positions' which some authors argue 'implicitly [promotes] access to review of impacts on the individual under existing rights mechanisms'.[131]

However, the protection is weak given it forms no part of the operative text. If there is no real protection for future generations in the Paris Agreement, it can be argued that it forms part of the

[126] Shue (n 19). At 59
[127] ibid. at 60
[128] Lewis (n 10). At 76
[129] ibid. at 76
[130] Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 *Transnational Environmental Law* 17.
[131] ibid. at 31

fabric which puts intergenerational justice at the core of international environmental law[132] and is beginning to form an important part of international human rights law as a 'fundamental norm considering its inherent relationship with the principle of sustainable development.[133] This argument can only be strengthened by the support of domestic legal systems. The German Court arguably does this in its judgement stating that Article 20a has an international dimension and uses the Paris Agreement to find obligations upon the state.[134] Intergenerational justice and the rights of future generations is a developing concept within the law and has space to develop in international law but given the German example the domestic context has considerable potential for success. It has been argued elsewhere that international law fails in its protection of future generations and serious reform of international law would be the avenue to addressing this failure.[135] However, *Neubauer* serves as an example that goals envisaged by parts of the international community can be brought to realisation or at least be progressed through domestic action.[136]

Despite this, it is true that due to increasing interest in these rights, the concept is becoming fragmented. The German case could only be brought because it was reliant on a positive law provision, Article 20a, in the German Constitution. A recent Australian case[137] decided quite the opposite finding that the state had no duty of care towards future generations whilst Colombia decided in a similar fashion to the German Federal Court. The Colombian case[138] relied on the interpretation of constitutional law and environmental law together viewing fundamental rights as they are connected with the environment.[139] The Colombian Court arguably goes a step beyond as it engages with 'decolonial thinking'[140] seeking to 'place the environment as one of the gravitational centres where society, individuals, and nature intersect'.[141] Whilst there have been an

[132] Johnston (n 46). At 42
[133] Brown Weiss (n 42). At 4
[134] *Neubauer, et al. v. Germany* (n 6). [199]
[135] Riley (n 50). At 288
[136] Wegener (n 130). At 32
[137] *Minister for the Environment v Sharma* [2022] Federal Court of Australia VID 389, [2022] FCAFC 35.
[138] *Andrea Lozano Barragdán et al. v Presidencia de la Republica et al.* (n 4).
[139] Acosta Alvarado and Rivas-Ramirez (n 114). at 524
[140] ibid. At 523
[141] ibid. at 523

increasing number of cases of human rights based climate litigation, each case must be assessed in its socio-legal context.[142] The current success of protecting the rights of future generations relies on whether protection is provided in the constitutions of states and whether judges are open to interpreting the Constitution in such a progressive and 'planetary' way. These cases have further been described as 'stop-gap' strategic litigation which arguably undermines their legitimacy as the rights are being used as a tool for some other means. The subject is currently a political one which represents a barrier to their effective protection as it creates a fragmented picture of the rights of future people. The Paris Agreement is primarily a political treaty with (some) legal obligations.

Given the expansion of the concept in constitutions and in international law, the rights of future people will undoubtedly become fragmented. This undermines their protection since climate change is an international crisis where contributions from all states are critical to its mitigation. There is therefore a need to establish common values on intergenerational justice and incorporate them into international law in a stronger way which, as this thesis shows, could come in the form of protecting the rights of future people based on their basic needs. The concretising of rights adds weight and significance to the duty and provides purpose within an anthropogenic context to the natural law principle rather than maintaining a vague soft law 'aspiration'[143] ensuring that governments approach the climate crisis with a future-focused lens. The Courts and the law have a clear role to play in securing intergenerational justice and the German Court could serve as the prototype once its limitations are addressed.

[142] Peel and Osofsky (n 3). At 48
[143] Gosseries (n 93). At 453

V. Conclusion

From this discussion, it is clear that the rights of future humans form an important element of intergenerational justice and can be successfully protected in the Courts. The German Court effectively protected these rights, without needing to afford them real rights, and brought Germany a step closer to achieving justice between generations. The use of the Paris Agreement is clearly limited, despite its central role in dealing with climate change, [144] as there are 'loose links' between state obligations and the overall goal of the agreement.[145] Other soft-law measures in international law clearly build towards a value of protecting the world for future people and demonstrate it to be a fundamental value among humanity yet there is no legal and powerful enforcement mechanism to be relied on in international law. The concept has always existed and is intertwined with international law, its institutions, and national bodies and courts. It is possible therefore that attributing basic rights does not represent any fundamental change. The rights of future generations in domestic jurisdictions have the potential to centre the intersection of environmental law and human rights law to a key purpose - protecting the vulnerable from actions of the powerful. Judgements such as *Neubauer* are welcome and an important step in recognising the rights of future generations and contribute to this understanding of the importance of the rights of future people and the need to provide protection in the context of the climate crisis.

The purpose of this thesis was to analyse the literature on intergenerational justice, its presence in international law and discuss a recent successful case on the rights of future generations to determine its influence on future litigation and the relevance in international law. From the first chapter, international law, national constitutions, and other soft law instruments were identified to demonstrate that the principle has long existed across many levels of law. Caney´s interest theory provided a strong theoretical legal basis for attributing these rights. In the second chapter, the German judgement was analysed, and it was found that the Court successfully protected the rights of future people aligning closely with Caney´s theory. The main conclusion to be drawn is that attributing rights to future generations is not an insuperable task and can be done effectively by

[144] Wegener (n 130) at 34
[145] Ibid at 36

obligating states to ensure the natural foundations of life are secured and there is not an undue burden on future people to reduce their carbon emissions and engage in 'radical abstinence'. It can also be seen from these chapters that the rights of future people are a key element for achieving intergenerational justice and the recognition of these basic rights domestically is a strong starting point for their development and support in international law. The concept is present in international climate change treaties and constitutions meaning as states continue to litigate on human rights, the rights of future people will become a more prevalent and pressing subject. The final chapter dealt with possibilities of interpreting these obligations from the Paris Agreement – a key piece of international climate change legislation. It can be seen that it has a limited role in protecting the rights of future people and that in order to allow some development from the German case, further commitment and recognition of the rights of future people based on their basic needs in international law will be necessary.

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