

## Reflections On The Call for Inputs:

### *Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice*

This Submission is contributed by a Working Group<sup>1</sup> of the Global Network of Human Rights and the Environment (GNHRE) (<https://gnhre.org/>). A number of GNHRE members are submitting comments on various aspects of climate change legislation and litigation in their own capacity. As a result, this comment is limited to the narrow issue of the definition of the principle of intergenerational justice and its implementation within climate litigation.

#### **A. Advancement of the Principle of Intergenerational Justice**

A justice approach to climate change has revealed that climate change is not merely the common concern of humankind, but rather that the impacts of climate change are felt differently by different parts of our human society. Climate vulnerability is subject to social, political, economic and geographical determinants, and marginalised, oppressed communities face the greatest hardships associated with climate change while contributing the least to its causes. Climate justice understands climate harms as social, multi-dimensional and intersectional. We believe that this same understanding should be brought to the concept of intergenerational justice.

Just as we recognise that humankind is diverse, complex and made up of many communities with differing levels of access, power and vulnerability, so we should recognise that each generation is equally diverse and complex. Intergenerational justice is commonly understood as a matter of the duties and obligations of current generations to future generations (usually with a focus on distributional justice and access to resources and a liveable climate). Law and literature on the duties of current generations to future generations, however, often fails to take into account that who we are within our generation, changes our relationships to, and our duties to, future generations and changes the needs of those who will constitute future generations. Ensuring intergenerational justice demands attending to the needs and interests of different social, political, economic and geographic groups within each generation and their relationships to each other.

In light of this approach, we briefly outline three dimensions of the concept of intergenerational justice in the context of human rights and climate change. These are 1) the Global South and inter- and intra-generational justice; 2) gender and intergenerational justice; and 3) old

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age and intergenerational justice. It is important to note that in our understanding of intergenerational justice, we are not just concerned with duties to future people, not yet living. We see intergenerational justice as also concerned with duties of one generation to another and, in light of climate change, duties to youth and children already living (or about to be born) whose current and future lives are detrimentally impacted by our rapidly changing environmental conditions.

## 1. The Global South and inter- and intra-generational justice

Within the climate arena, the connection between adults and children may be viewed as an explicit example of intergenerational equity between the past, present, and future generations of children, youth, and adults.<sup>2</sup> Most social equity debates<sup>3</sup> on renewable resources, such as the ocean, have focused on inter-generational time and space dimensions.<sup>4</sup> However, in the context of human rights and climate change, there is also the dimension of intra-generational equity from the perspective of those alive today, and within future generations across scales,<sup>5</sup> as intra-generational equity is fundamental to many contemporary (and future) environmental concerns about common resources.<sup>6</sup>

This is especially true for those most environmentally vulnerable<sup>7</sup> from climate change<sup>8</sup> and more so those in the Global South, in small island developing states (SIDS), low-income states

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<sup>2</sup> Weiss, Edith Brown, 'In Fairness to Future Generations' (1990) 32 (3) *Environment: Science and Policy for Sustainable Development* 19, 20.; Kate Wilkinson Cross, A Critical Evaluation of Inter-generational Equity and its Application to the Climate Change Context' in Cathi Albertyn *et. al. Feminist Frontiers in Climate Justice : Gender Equality, Climate Change and Rights* (Edward Elgar, 2023) 40

<sup>3</sup> Okereke, Chukwumerije, 'Global Environmental Sustainability: Intragenerational Equity and Conceptions of Justice in Multilateral Environmental Regimes' (2006) 37(5) *Geoforum* 725; Okrent, David, 'On intergenerational Equity and Its Clash with Intragenerational Equity and on The Need for Policies to Guide the Regulation of Disposal of Wastes and Other Activities Posing Very Long-term Risks' (1999) 19(5) *Risk Analysis* 877; Belzer, Richard B, 'Discounting Across Generations: Necessary, Not Suspect' (2000) 20 (6) *Risk Analysis* 779; Arrow, Kenneth J., et al. *Intertemporal Equity, Discounting, and Economic Efficiency* (Cambridge, UK, New York and Melbourne: Cambridge University Press, 1996); Weiss, Edith Brown. "Our Rights and Obligations to Future Generations for the Environment." (1990) 81 (1) *American Journal of International Law* 198; Kverndokk, Snorre, Eric Nævdal, and Linda Nøstbakken, 'The Trade-Off Between Intra-and Intergenerational Equity In Climate Policy' (2014) 69 *European Economic Review* 40

<sup>4</sup> Holden, Erling, Kristin Linnerud, and David Banister, 'Sustainable Development: Our Common Future Revisited' (2014) 130 *Global Environmental Change* 26; Maggio, Greg, and Owen J. Lynch. 'Inter-Generational Equity in Case Law' (1997) Center for International Environmental Law, Human Rights, Environment and Economic Development: Existing and Emerging Standards in International Law and Global Society; Vojnovic, Igor. 'Intergenerational and Intragenerational Equity Requirements for Sustainability' (1995) 22 (3) *Environmental Conservation* 223; 225.

<sup>5</sup> Kverndokk, S. and Rose, A., *Equity and Justice in Global Warming Policy* (2008)

<sup>6</sup> Xu, Jiuping, et al. 'Intergenerational Equity-based Optimal Water Allocation for Sustainable Development: A Case Study on the Upper reaches of Minjiang River, China' (2019) 568 *Journal of Hydrology* 835, 836

<sup>7</sup> Shelton, Dinah. 'Intergenerational Equity' in Rüdiger Wolfrum and Chie Kojima, *Solidarity: A Structural Principle of International Law*. (Berlin, Heidelberg: Springer Berlin Heidelberg, 2010), 123, 125; Vojnovic (n. 4)

<sup>8</sup> Rayner, Steve, and Elizabeth L. Malone. 'Climate Change, Poverty, and Intragenerational equity: The National Level' (2001) 1 (2) *International Journal of Global Environmental Issues* 175

(LICs) and lesser developed countries (LDCs), as the vulnerability of these states and their populations is acute and their access to and share of common resources is rapidly diminishing in the face of climate change and entrenched global political and economic inequalities.

Intra-generational equity has been a key element of the agenda of the Global South under the rubric of the new international order since the 1970s<sup>9</sup> and is central to the ongoing attempts at climate justice by developing countries and SIDS.

In understanding both intra-generational equity and intergenerational justice, attention should be paid to the importance of interstate obligations and duties, including those arising from historical and ongoing colonial injustices. This includes claims for compensation and reparations in respect of the European colonial conservation regimes,<sup>10</sup> the London Convention of 1933, the Africa Convention of 1968, Bering Fur Seal Regime, and the whaling regime. Inter- and intra-generational justice is a matter of environmental justice,<sup>11</sup> as highlighted in *Certain Phosphate Lands in Nauru*.<sup>12</sup> The argument by Nauru for compensation from the U.K., because of the despoliation and devastation of the environment for lucrative phosphate mining which rendered seventy-five percent of the island uninhabitable,<sup>13</sup> mirrors the arguments which are now being raised by SIDS in regard to climate change and its impacts at the ocean-climate nexus.

## 2. Gender and intergenerational justice

Intergenerational justice is deeply gendered. It is bodies with uteruses that will carry future generations, and bodies with breasts that will feed them. Women and girls still bear a disproportionate burden of care of child rearing, and it is women and girls who are tasked with raising, feeding, and educating future generations. While intergenerational justice suggests obligations on current generations to ensure access to adequate resources for the survival and well-being of future generations, it is women and girls who will have to help those generations survive if current generations fail in their duties (equally women and girls will have to realise those duties if we succeed).

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<sup>9</sup> C. Singh, 'International Environmental Law Agenda for Sustainable Development, The Indian Perspective' (Indian Law Institute, New Delhi 1992) 9 – 11

<sup>10</sup> Lynch, Owen, and Kirk Talbott. "Balancing Acts." *Community-based Forest Management and National Law in Asia and the Pacific* (1995); Lindley, 1926

<sup>11</sup> Williams, Alan. "Intergenerational equity: an exploration of the 'fair innings' argument." *Health economics* 6.2 (1997): 117-132.

<sup>12</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240

<sup>13</sup> C. Weeramantry, 'Nauru. Environmental Damage Under International Trusteeship' (1992)

Despite the fact that the care of future generations, not to mention their very existence, depends on women and girls, the gendered dimensions and demands of intergenerational justice are rarely made explicit in law, policy or scholarship and the gendered dimensions of intergenerational justice have not featured in climate litigation arguments to date.

Securing intergenerational justice demands greater protection for the autonomy and authority of gendered groups over their own bodies (including their rights to bodily integrity and to safe abortions), that the work of women is recognised and compensated, and that gendered groups are empowered and recognised in their agency. In his recent report, UN Special Rapporteur David Boyd noted that “The benefits of gender-transformative environmental and climate interventions are experienced not only by women, girls and gender-diverse persons, but by all of humanity and nature as well.”<sup>14</sup> We would add to that the benefits of gender transformative climate interventions benefit future generations too and are a prerequisite to ensuring intergenerational justice.

### 3. Old age and intergenerational justice

Intergenerational justice by definition imposes duties (morally, if not legally) on living generations to ensure justice (grounded in human dignity) for future generations and those that live concurrently. When human rights are viewed in terms of protecting against a vulnerabilities framework,<sup>15</sup> thereby protecting human dignity, they do not serve those at “the polar extremes of life” including the elderly.<sup>16</sup> The failure of rights to address and respond to the vulnerabilities and needs of older people is apparent in the decision of the Swiss Federal Administrative Court to reject the appeal in the *KlimaSeniorinnen* case.<sup>17</sup> The Court held that Swiss women over 75 years of age are not exclusively affected by climate change impacts. This is despite the fact that climate change has been proven to exacerbate existing vulnerabilities. Older people are subject to intersecting vulnerabilities - the compound vulnerabilities suffered include those experienced by all vulnerable social groups in addition to those specific to the group at this polar extreme of life.

Older people are already doing the work of ensuring intergenerational justice and care. In much the world, older generations are often still carers, taking care of grandchildren and providing ongoing financial and other support to younger generations. Intergenerational justice depends on

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<sup>14</sup> “A/HRC/52/33: Women, girls and the right to a clean, healthy and sustainable environment - Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment” 05 January 2023

<sup>15</sup> Quinn-Butler, Rosalind M, “The case for special protection for older people in international law”, PhD Thesis, 2018, available at <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.752390>.

<sup>16</sup> Marth Albertson Fineman, 'Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 Elder LJ 71.

<sup>17</sup> Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others - “Verein KlimaSeniorinnen Schweiz v. Bundesrat” 2016, A-2992/2017.

the ongoing labour of older people and both the importance of this labour, and the additional risks and vulnerabilities it creates, need to be recognised in any articulation of intergenerational duties and in our understanding of intergenerational justice.

Talk of duties to and justice for future generations has to take into account who the burden of rights and justice falls on, how marginalised communities' existing vulnerabilities are exacerbated by these burdens, and what measures are necessary to support these differentiated populations within each generation. In addition, intergenerational justice should not be understood in isolation of intragenerational justice, including the demands of intragenerational justice to address historic harms between states.

### **B. Has the concept of intergenerational justice been incorporated into climate change litigation?**

The concept of intergenerational justice has been centrally important in a number of cases in the context of climate change litigation. One example is the 2018 Colombian case *Future Generations v the Ministry of the Environment and Others*,<sup>18</sup> where 25 youth plaintiffs filed a constitutional petition against the government and several corporations to protect their fundamental and human rights. Plaintiffs argued that the government failed to comply with its international commitments to prevent Amazon deforestation and this impacted the youth in disproportionate ways. The Supreme Court found that the government was responsible by recognizing a substantial link between the plaintiffs rights to life, health, human dignity and the right to a healthy environment, and deforestation and GHG emissions.

The Court called for an innovative remedy in requesting Colombia to adopt an intergenerational pact that would address the issue of deforestation in Amazonia. However, the decision has faced significant barriers in its implementation. While 5 years have passed since the ruling from the Court, Colombia has yet to comply with the bold mandates it adopted. These challenges are often observed in the Global South, where, despite activists courts calling for innovative measures to address the climate crisis, their governments lack the capacity to implement them.

Regarding intergenerational justice, the Colombian Supreme Court invoked the principle of solidarity. The Supreme Court reasoned that humans of every generation are entitled to environmental rights and that failing to tackle environmental damage compromises future generation's access to resources and the enjoyment of their rights. Hence, the Supreme Court based

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<sup>18</sup> Corte Suprema de Colombia, *Demanda Generaciones Futuras v. Minambiente*, (Colombia) 5 April 2018 [www.elaw.org/system/files/attachments/publicresource/Colombia%202018%20Sentencia%20Amazonas%20cambio%20climatico.pdf](http://www.elaw.org/system/files/attachments/publicresource/Colombia%202018%20Sentencia%20Amazonas%20cambio%20climatico.pdf).

its decision on the concept of environmental intergenerational equity, which rests, in the Court's opinion, on the ethical duty of solidarity and nature's intrinsic value.<sup>19</sup>

Furthermore, within the emerging area of just transition litigation,<sup>20</sup> some cases have brought up issues of distributive justice with regard to intergenerational equity. Cases like *Julia Habana et al. v Mexico*,<sup>21</sup> *Nuestros Derechos al Futuro y Medio Ambiente Sano et al., v. Mexico*,<sup>22</sup> and *Idheas Litio Estrategico v. Centro Nacional de Control de Energía (CENACE) and Secretaría de Energía (SENER)*,<sup>23</sup> plaintiffs are arguing that future generations are at risk to suffer the most from fossil fuel activities. In these cases, the right to a healthy environment of future generations (alongside present generations) takes a center-stage in the call for moving away from fossil fuel and towards a just energy transition.<sup>24</sup>

### C. Conclusion

As a principle, intergenerational justice deals with issues of distributive justice. It relies on the duty of solidarity of present generations towards future generations. Intergenerational justice calls for climate action now, as a way to protect future generations from experiencing the worst effects of climate change. Climate litigation has proven to be, albeit imperfect, an ideal scenario to push forward the recognition of intergenerational justice as a vital component in the action against climate change.

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<sup>19</sup> Maria A. Tigre, Natalia Urzola and Alexandra Goodman, *Climate litigation in Latin America: is the region quietly leading a revolution?* 14(1) J. HUM. RTS. & ENV'T. (2023) doi: <https://doi.org/10.4337/jhre.2023.01.04>

<sup>20</sup> Savaresi, A. and Setzer, J. 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13 J Human Rights & Env't 7  
<https://www.elgaronline.com/view/journals/jhre/13/1/article-p7.xml>

<sup>21</sup> *Julia Habana et al. v. Mexico*, Mexico District Court, petition 24 March 2021, <http://climatecasechart.com/non-us-case/julia-habana-et-al-v-mexico-unconstitutionality-of-the-reform-to-the-electricity-industry-law/>. This case was dismissed on procedural grounds (lack of standing) and is currently on appeal pending decision.

<sup>22</sup> *Nuestros Derechos al Futuro y Medio Ambiente Sano et al. v. Mexico*, Mexico District Court, petition 24 March 2021, <http://climatecasechart.com/non-us-case/nuestros-derechos-al-futuro-y-medio-ambiente-sano-et-al-v-mexico-unconstitutionality-of-the-reform-to-the-electric-industry-law/>.

<sup>23</sup> *Idheas v. Centro Nacional de control de Energía and Secretaría de Energía*, Judgment 19 April 2021, <http://climatecasechart.com/non-us-case/idheas-litigio-estrategico-v-centro-nacional-de-control-de-energia-cenace-and-secretaria-de-energia-sener/>

<sup>24</sup> Maria Antonia Tigre, Lorena Zenteno, Marlies Hesselman, Natalia Urzola, Pedro Cisterna-Gaete, and Riccardo Luporini, *Just Transition Litigation in Latin America: An initial categorization of climate litigation cases amid the energy transition* (Sabin Center for Climate Change Law, January 2023)