

SYMPOSIUM ARTICLE

# Children and Future Generations Rights before the Courts: The Vexed Question of Definitions<sup>Ψ</sup>

Aoife Nolan 

School of Law, University of Nottingham, Nottingham (United Kingdom (UK))  
Email: [aoife.nolan@nottingham.ac.uk](mailto:aoife.nolan@nottingham.ac.uk)

## Abstract

Recent years have seen a sharp increase in the number of cases being brought before national courts addressing the constitutional rights of children and future generations (FG) in the context of environmental protection. These cases have required courts to devote increasing attention to a wide-ranging and complicated array of constitutional rights claims involving the short- and longer-term impacts of environmental harm on children and FG. This article argues that both litigation and judicial efforts in this area have been hampered by the lack of precision of definitions of ‘future generations’ under comparative constitutional and international human rights law, in particular vis-à-vis children. This lack of precision poses a major challenge to both the delineation and enforcement of rights claims in the context of such litigation. After outlining how these cases are being brought and how courts are addressing (or not) the complexities involved in defining children and FG respectively, the article highlights the lack of authoritative definitions of FG in comparative constitutional law – a lacuna that, the author argues, is exacerbated by the ongoing lack of a clear definition of FG in the international human rights law context. The article concludes by identifying key challenges faced by litigators and courts seeking to engage with the rights of children and FG that result from this definitional gap.

**Keywords:** Future generations’ rights; Children’s rights; Climate litigation; Courts; Intergenerational justice; Constitutional law

## 1. Introduction

Recent years have seen a sharp increase in the number of cases being brought before national courts addressing the constitutional rights of children and future generations (FG) in the context of environmental protection. An ever-more frequent element of climate justice litigation, examples range from Colombia,<sup>1</sup> Germany,<sup>2</sup>

<sup>Ψ</sup> This contribution is part of a collection of articles growing out of the ELTE-Aarhus Joint Workshop on ‘Future Generations Litigation’, held at the ELTE University in Budapest (Hungary) on 8–9 June 2023.

<sup>1</sup> *Andrea Lozano Barragán et al. v. Presidencia de la República et al.*, Corte Suprema de Justicia [Supreme Court of Justice], 5 Apr. 2018, STC4360-2018 (*Future Generations v. Ministry of the Environment & Others*).

<sup>2</sup> Bundesverfassungsgericht (German Federal Constitutional Court), Judgment of 24 Mar. 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (*Neubauer*); see also *Steinmetz et al. v. Germany*, currently pending before the German Federal Constitutional Court.

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Canada,<sup>3</sup> Pakistan,<sup>4</sup> the United States (US),<sup>5</sup> Norway,<sup>6</sup> Sweden,<sup>7</sup> Korea,<sup>8</sup> and Brazil.<sup>9</sup>

These cases have required courts to devote increasing attention to a wide-ranging and complicated array of constitutional rights claims involving the short- and longer-term impacts of environmental harm on children and FG. This article argues that both litigation and judicial efforts in this area have been hampered by the lack of precision of definitions of ‘future generations’ under comparative constitutional and international human rights law, in particular vis-à-vis children. This lack of precision poses a major challenge to both the delineation and enforcement of rights claims in the context of such litigation.

After outlining how these cases are being brought and how courts are addressing (or not) the challenges in terms of defining children and FG respectively, this article highlights the lack of authoritative definitions of FG in comparative constitutional law – a lacuna that, I argue, is exacerbated by the ongoing lack of a clear definition of FG in the international human rights context. The article concludes by identifying some key complexities faced by litigators and courts seeking to engage with the rights of children and FG. Some would exist even if the definition of FG was clearer (for instance, the challenge posed by the relative indeterminacy of FG rights harms far in the future vis-à-vis those faced by currently living children). However, others are created and/or severely exacerbated by the current confusion, with perhaps the most serious of these being the constrained ability of courts (and litigators) to specify

<sup>3</sup> See *Mathur et al. v. His Majesty the King in Right of Ontario*, Ontario Superior Court of Justice, Court File No. CV-19-00631627; progress updates for this ongoing litigation are available at: <https://ecojustice.ca/case/genclimateaction-mathur-et-al-v-her-majesty-in-right-of-ontario>; *La Rose v. Her Majesty the Queen*, T-1750-1; progress updates for this ongoing litigation are available at: <http://climatecasechart.com/non-us-case/la-rose-v-her-majesty-the-queen>.

<sup>4</sup> *Rabab Ali v. Federation of Pakistan*, Supreme Court of Pakistan, Constitutional Petition \_ /1 of 2016.

<sup>5</sup> See, e.g., the ongoing litigation of Our Children’s Trust, *Juliana v. United States*; progress updates available at: <https://climatecasechart.com/case/juliana-v-united-states>. See also the ongoing litigation in *Genesis B. v. United States Environmental Protection Agency*; progress updates available at: <https://www.ourchildrenstrust.org/genesis-v-epa>.

<sup>6</sup> *Greenpeace Nordic Association v. Ministry of Petroleum and Energy*, Høyesterett Norwegian Supreme Court, HR-2020-2472-P, Case No. 20-051052SIV-HRET.

<sup>7</sup> *Anton Foley & Others v. Sweden*, Nacka District Court, Case T 8304-2225, Nov. 2022.

<sup>8</sup> *Do-Hyun Kim and 18 Teenagers (Members of Youth 4 Climate Action) v. The National Assembly of the Republic of Korea and President of the Republic of Korea*, Constitutional Court of the Republic of Korea, pending case filed on 13 Mar. 2020; progress updates available at: <https://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea>. The Constitutional Court handed down its decision in this case, consolidated with three other constitutional complaints, on 29 August 2024, finding that Art. 8(1) of the Framework Act on Carbon Neutrality and Green Growth for Coping with the Climate Crisis (as enacted by Act No. 18469 on 24 September 2021) does not conform to the Constitution, but dismissing other aspects of the arguments made in the complaints. At the time of going to press, there was not yet an authoritative English translation of the judgment so the decision is not reflected in this article. The Constitutional Court press release is available at: <https://www.ccourt.go.kr/site/eng/ex/bbs/View.do>.

<sup>9</sup> *Six Youths v. Minister of Environment and Others*, 14<sup>th</sup> Federal Civil Court of São Paulo, Ação Popular n° 5008035-37.2021.4.03.6100, 28 May 2021. The relevant complaint was framed in terms of ‘youth’ up to the age of 29 rather than children (see founding complaint, p.19, available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210413\\_Acao-Popular-no-5008035-37.2021.4.03.6100\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210413_Acao-Popular-no-5008035-37.2021.4.03.6100_complaint.pdf)). However, it was clear that ‘youth’ was understood to include children under 18.

clearly, and address, the potential inconsistency, divergence, and conflict between the constitutional rights and interests of children and FG that may arise in climate justice cases.

## 2. The ‘Child Rights’ and ‘Future Generations’ Turn in Climate Justice Litigation

We are witnessing a dramatic increase in the number of constitutional cases focused on the rights of children and FG.<sup>10</sup> This is in large part attributable to growing awareness of the intergenerational impacts of climate change and their implications for those at the ‘hard end’ of the temporal spectrum.<sup>11</sup> In response, litigators and other advocates have designed legal efforts that seek to preserve the natural foundations of life for children and FG, as well as to ensure the fair distribution of environmental burdens between different generations, whether not yet living, living children, or otherwise.<sup>12</sup>

There are several additional reasons why the rights of children and FG are increasingly litigated together in constitutional cases. Firstly, it is strongly arguable that under a number of constitutional frameworks children qualify as FG rights holders for the purpose of constitutional protection.<sup>13</sup> One example of this is *Do-Hyun Kim et al. v. South Korea*, a case before the South Korean Constitutional Court arguing that the greenhouse gas (GHG) target envisaged in South Korea’s Framework Act on Carbon Neutrality and Green Growth for Coping with the Climate Crisis is insufficient to keep global warming below 2 degrees Celsius (°C).<sup>14</sup> The complainants asserted that

<sup>10</sup> This trend is also evident from the Sabin Center Climate Change Litigation Database (available at: <https://climatecasechart.com>), and discussed in M. Tigre et al., ‘The Significance and Transformative Potential of Youth-Led Climate Litigation’, paper presented at the ‘Future Generations Litigation and Transformative Changes in Environmental Governance Joint Workshop’ organized by ELTE University and Aarhus University, Budapest (Hungary), 8–9 June 2023. See also L. Parker et al., ‘When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World’ (2022) 13(1) *Journal of Human Rights and the Environment*, pp. 64–89.

<sup>11</sup> There is a vast body of literature on the intergenerational impacts of climate change, focusing on both children and FG. For an ongoing evaluation of the impact of climate change on the lives of living children and FG in the light of potential different mitigation measures see the Intergovernmental Panel on Climate Change (IPCC) Assessment Reports, available at: <https://www.ipcc.ch/reports>.

<sup>12</sup> For an articulation of these aims in the context of national constitutional law see the German Federal Constitutional Court’s discussion of Art. 20a GrundGesetz (German Basic Law) in *Neubauer*, n. 2 above, paras 193–4.

<sup>13</sup> See, e.g., the arguments made in this regard in *Future Generations v. Ministry of the Environment & Others*, n. 1 above, Original Complaint of 29 Jan. 2018, Section 4.3.2, available (in Spanish) at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180129\\_11001-22-03-000-2018-00319-00\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180129_11001-22-03-000-2018-00319-00_complaint.pdf). This was also asserted in the complainants’ appeal, available (in Spanish) at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180216\\_11001-22-03-000-2018-00319-00\\_appeal.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180216_11001-22-03-000-2018-00319-00_appeal.pdf). The argument appeared to be accepted by the Superior Court of Justice, which stated that ‘[i]n terms of intergenerational equity, the transgression is obvious, as the forecast of temperature increase is 1.6 degrees in 2041 and 2.14 in 2071; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero’: *Future Generations v. Ministry of the Environment & Others*, n. 1 above, para. 11.2.

<sup>14</sup> Framework Act on Low Carbon, Green Growth (as amended 31 Dec. 2019). The complainants submitted an application to add Art. 8(1) of the Carbon Neutrality Framework Act (n. 8 above) to the subject matter of review on 16 February 2022. They made a further application to add Art. 3(1) of the Enforcement Decree of the Carbon Neutrality Framework Act to the subject matter of review on 8 June 2022.

‘[t]he Petitioners *who are the future generation*, as citizens of the Republic of Korea equally have the right to life, right to health, environmental right, and pursuit of happiness under the Constitution as much as the current generation does’.<sup>15</sup>

In this instance, the litigators argued that the ‘future generation’ for the purposes of the action is not an abstract group of individuals, but living and existing persons fully entitled to the claimed rights (aka the child complainants).<sup>16</sup>

In another example, the Brazilian case of *Six Youths v. Minister of Environment and Others*, the complaint suggested that its youth (including child) authors acted in relation to FG in several different ways. As ‘members of organizations formed and led by young people’ and ‘the successors of the current generation’, the complainants presented themselves as guaranteeing ‘the future of their lives, but also those of their children, grandchildren and great-grandchildren’.<sup>17</sup> Here, children asserted FG rights on behalf of both themselves as FG, and with regard to not yet living FG.

In other situations, the constitutional rights of children can be leveraged directly to address intergenerational justice on their own terms, encompassing issues of FG rights. For instance, Article 1 of the Austrian Federal Constitutional Act on the Rights of Children provides that ‘each child shall be entitled to the protection and care that is necessary for his/her well-being, to optimal development and self-realisation as well as to the protection of his/her interests *with regards to intergenerational equity*’.<sup>18</sup> In spring 2023, 12 children launched a case challenging the ineffectiveness of Austrian GHG reduction measures. The case focused on the rights of children, who were equated to ‘younger generations’.<sup>19</sup> It was based, inter alia, on ‘the best interests of the child in the sense of individual rights to protection and care, to the best possible development and to the safeguarding of their interests, in particular from the point of view of intergenerational justice’.<sup>20</sup> In doing so, the complaint argued that future impairments of the best interests of the child are to be included in the assessment of the current violation of fundamental rights.<sup>21</sup>

<sup>15</sup> *Do-Hyun Kim et al. v. South Korea*, n. 8 above, 3<sup>rd</sup> Supplemental Brief, p. 27, unofficial English translation available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210415\\_NA\\_na.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210415_NA_na.pdf). The notion that the ‘future generation’ enjoys constitutional rights protection draws on the language of the preamble to the Constitution: *ibid.*, Original Complaint, p. 2.

<sup>16</sup> For more on this see the presentation of Sejong Youn, the lead lawyer in this case at a workshop on ‘Advancing Child Rights Strategic Litigation: Ways Forward’, held at the University of Nottingham (UK), 6 June 2023, available at: [https://mediaspace.nottingham.ac.uk/media/ACRISLA+Ways+Forward+%28Putting+Children%27s+Rights+at+the+Heart+of+Climate+Justice%29/1\\_p4yh4hk1](https://mediaspace.nottingham.ac.uk/media/ACRISLA+Ways+Forward+%28Putting+Children%27s+Rights+at+the+Heart+of+Climate+Justice%29/1_p4yh4hk1).

<sup>17</sup> *Six Youths v. Minister of Environment and Others*, n. 9 above, Founding Complaint, p. 21. For more on the role of the complainants in relation to ‘future generations’, see *ibid.*, pp. 19–21.

<sup>18</sup> Federal Constitutional Act on the Rights of Children (Children’s Rights Act) (BGBl. 4/2011), Art. 1 (emphasis added).

<sup>19</sup> *Children of Austria v. Austria*, Founding Complaint, Section 1, available at: <https://climatecasechart.com/non-us-case/children-of-austria-v-austria>. The complaint describes the claimants as ‘a group of children with Austrian citizenship living in Austria who are of different ages, but none of whom has reached the age of 18’: *ibid.*, Section 3.

<sup>20</sup> *Ibid.*, Section 5.1.

<sup>21</sup> *Ibid.*, Section 5.1.1(a).

It is true that this complaint did not assert the rights of the child as ‘future generations’, focusing instead on the rights of ‘children living today in the future’,<sup>22</sup> and this was how the complaint was construed by the Constitutional Court as well.<sup>23</sup> Yet, the arguments made with regard to the principle of the generation-appropriate use of resources,<sup>24</sup> which drew on both the Federal Constitutional Act and the Federal Sustainability Act,<sup>25</sup> clearly have potential implications for FG rights in the climate litigation context.

More generally, there are significant common or mutual (in the sense of shared) interests of children and FG in the environmental protection context. This means that children may be regarded as appropriate representatives or ‘proxies’ of FG for the purposes of standing to bring complaints focused on those shared interests. There is clear evidence that some courts at least are prepared to allow children to serve as representatives of FG on this basis.

An appreciation of these mutual interests is evident in the 2018 decision of the Colombian Supreme Court of Justice in the *Future Generations v. Ministry of the Environment & Others* decision. Here, the Court found that the deforestation of the Amazon – caused by a range of impugned actions – provoked ‘in the short, medium and long term, imminent and serious harm to the children, adolescents and adults who are bringing this action, and in general, to all the inhabitants of the national territory, for both present and future generations’.<sup>26</sup>

Alternatively, even where children are not deemed to constitute FG, litigation involving children can serve as a springboard for judicial consideration of FG interests. In the German *Neubauer* case, the Federal Constitutional Court declared that the legislator had violated fundamental rights by failing to take sufficient precautionary measures in terms of the 2019 Federal Climate Protection Act<sup>27</sup> to manage the obligations to reduce emissions in ways that respect fundamental rights. The Court found that Article 20a of the German Constitution ‘is aimed first and foremost at preserving the natural foundations of life for future generations’<sup>28</sup> and imposes a special duty of care on the legislator including a responsibility for FG.<sup>29</sup> Despite its identification of these constitutional obligations in relation to FG, the Court was clear that the child complainants in this case had standing to lodge constitutional complaints because they might be faced with substantial burdens to reduce GHG emissions from the year 2031 onwards, with this ‘advance effect on [their] future

<sup>22</sup> Ibid., Section 6.1.2(a).

<sup>23</sup> *Children of Austria v. Austria*, Constitutional Court of Austria, G 139/2021-11, 27 June 2023, unofficial English translation available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230627\\_na\\_decision-5.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230627_na_decision-5.pdf).

<sup>24</sup> Ibid., Section 5.2.1.

<sup>25</sup> The Federal Constitutional Law on Sustainability (s 1) contains a constitutional commitment to ‘the principle of sustainability in the use of natural resources in order to ensure the best possible quality of life for future generations’.

<sup>26</sup> *Future Generations v. Ministry of the Environment & Others*, n. 1 above, p. 34.

<sup>27</sup> Federal Climate Protection Act of 12 Dec. 2019 (BGBl. I S. 2513).

<sup>28</sup> *Neubauer*, n. 2 above, para. 193.

<sup>29</sup> Ibid., para. 229.

freedom' potentially violating enjoyment of their fundamental rights later in their lifetimes.<sup>30</sup> In the words of the Court, the complainants were invoking their own fundamental rights, 'not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights'.<sup>31</sup> As such, the children were not FG, albeit that the litigation in which they were involved resulted in the identification of the constitutional obligation to afford intergenerational protection.<sup>32</sup>

There are strategic reasons – beyond those related to legal argumentation – for why children are increasingly the focus of climate litigation that incorporates intergenerational rights concerns. Firstly, child claimants in the here and now serve to provide a 'face' for the claims of what is otherwise potentially an abstract group who (and whose interests) courts may struggle to conceptualize. Secondly, there is growing enthusiasm on the part of environmental protection-focused litigation more generally for involving child plaintiffs.<sup>33</sup> While this trend is undoubtedly motivated by a genuine concern for securing rights protection for children and others, litigators are certainly not unaware of the association between child litigants and increased media (and hence public or political actor) interest in a case.<sup>34</sup> Another advantage of children serving as representatives of FG in the context of environmental litigation, flagged by Donger, is that having child claimants can mitigate the potential unintended implications for reproductive rights that might result from enhanced protection for as yet unborn/not yet living FG as a free-standing group.<sup>35</sup>

<sup>30</sup> Ibid., paras 116–7; see also para. 108.

<sup>31</sup> Ibid., para. 109.

<sup>32</sup> Ibid., para. 146.

<sup>33</sup> While often uncritically described as 'child' or 'youth-led' litigation, a wide-ranging study of child rights strategic litigation (CRSL) globally found only a very small number of examples of child-led or initiated litigation in the sense of cases in which children brought a theme or issue to adult CRSL practitioners who then acted on the basis of that choice of theme/issue. This was true of all areas of CRSL. However, as the study notes, this language of child or youth-led litigation has been a particular feature of climate justice work; see A. Nolan, A. Skelton & K. Ozah, *Advancing Child Rights-Consistent Strategic Litigation Practice* (ACRiSL, 2022), p. 51, available at: <https://www.acrisl.org/resources>.

<sup>34</sup> For discussion of litigator awareness of media interest in child claimant-related climate change/justice litigation see Nolan, Skelton & Ozah, *ibid.*, p. 95.

<sup>35</sup> E. Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization' (2022) 11(2) *Transnational Environmental Law*, pp. 263–89, at 273–4. It should be noted, however, that in at least one case in which the rights of children and FG are being asserted, unborn foetuses were also cited as claimants for the purposes of the litigation; see I. Kaminski, 'Foetus Fronts Legal Challenge over Emissions in South Korea', *The Guardian*, 24 June 2023, available at: <https://www.theguardian.com/world/2022/jun/24/foetus-heads-legal-challenge-carbon-emissions-south-korea#:~:text=A%2020%2Dweek%2Dold%20foetus,enough%20to%20cut%20national%20emissions> (this complaint was addressed by the South Korean Constitutional Court in its decision discussed in n. 8 above). For an example of an FG-focused initiative that responds explicitly to the issue of the potential implications of FG rights recognition for reproductive rights see Maastricht Principles on the Human Rights of Future Generations, adopted on 3 Feb. 2023, Principle 4(c), available at: <https://www.rightsoffuturegenerations.org> ('Nothing in these Principles recognizes any rights of human embryos or foetuses to be born, nor does it recognize an obligation on any individual to give birth to another. These Principles may not be construed as accepting any interferences with the bodily autonomy of women, girls, and others who can become pregnant, including their actions and decisions around pregnancy or abortion and other sexual and reproductive health and rights'). The Maastricht Principles are discussed further in Section 3.

In addition, there is clear concern on the part of children to secure environmental protection not just for themselves in their lifetime but for FG. To quote Sophia Mathur, one of the claimants in the Canadian *Mathur* litigation – which argues that Ontario’s failure to set a more stringent target for the reduction of GHG emissions and a more exacting plan for combating climate change over the coming decade violates the constitutional rights of youth (including children) and FG – upon the launch of the case:

The climate crisis is going to impact everyone, both now and into the future. It is important for me to be part of this case because we need to stand up for the generations to come and make sure they have a safe and liveable planet.<sup>36</sup>

Where litigators collaborate with children and youth climate justice advocacy groups in terms of agenda setting around litigation, this should entail recognition of the agendas and concerns of children and young people,<sup>37</sup> including their desire to advance the interests of FG in the environmental protection context.<sup>38</sup> In turn, Wewerinke-Singh and co-authors have flagged that where litigation focused on FG results in court decisions that recognize solidarity between children and FG, this can serve to bring children – ‘informed, diverse and hitherto silenced or unheard stakeholders’ – into the conversation around climate justice.<sup>39</sup>

In sum, the reasons for the increased litigation and adjudication of the constitutional rights of children and FG are many and multifaceted. However, as we will see in the next section, the issue of defining FG and the overlap (or not) between FG and children remains a key conceptual challenge for courts and litigators working in this space.

### 3. Children and Future Generations: The Challenge of Definition

The existing constitutional jurisprudence demonstrates that in addressing the impact of harm to the environment on living children and not yet living or living FG, litigation and adjudication have focused on a wide range of rights impacts. Courts have looked (both in isolation and in tandem) at (i) the short-term impacts of environmental harm on the rights of living children in the here and now; (ii) the longer-term impact of environmental harm on the rights of living children as future adults (sometimes designated as ‘already born’, ‘living’ or ‘existing’ FG); and/or (iii) the impacts of environmental harm on the rights of not yet living FG.

<sup>36</sup> Ecojustice, ‘Young Ontarians in Court for Historic Charter Climate Case’, 12 Sept. 2022, available at: <https://ecojustice.ca/news/young-ontarians-in-court-for-historic-charter-climate-case>.

<sup>37</sup> See A. Nolan, A. Skelton & K. Ozah, *Child Rights Strategic Litigation: Key Principles for Climate Justice Litigation* (ACRiSL 2023), available at: <https://www.acrsl.org/resources>.

<sup>38</sup> For a nuanced discussion of why children might adopt what she terms ‘the intergenerational burden’ in the context of representing FG in climate litigation and advocacy see K. Doza, ‘Shouldering the Burden of Intergenerational Justice: Children Representing Future Generations in Climate Politics, Law and Litigation’ (2023) *European Yearbook of Human Rights*, pp. 29–51.

<sup>39</sup> M. Wewerinke-Singh, A. Garg & S. Agarwalla, ‘In Defence of Future Generations: A Reply to Stephen Humphreys’ (2023) 34(3) *European Journal of International Law*, pp. 651–68, at 662.



This is unsurprising given the diversity of ways in which these claims have been brought.<sup>40</sup> A further factor that contributes to this multiplicity of approaches, however, is the issue of definition – specifically, the frequent failure of constitutions or courts to define precisely what a future generation is for the purpose of constitutional protection. This situation contrasts sharply with the position with regard to ‘children’ in constitutional law terms, where it is generally clear who is accorded protection either by virtue of the text of the constitution itself<sup>41</sup> or through its interpretation using other relevant domestic or international standards that provide guidance on this point.

It is thus not always obvious to whom the constitutional rights of ‘future generations’ adhere or who is entitled to assert those rights, whether on their own behalf or on behalf of others. Relatedly, the extent to which living children in the here and now overlap with FG for the purposes of constitutional rights protection is frequently (albeit certainly not inevitably) unclear;<sup>42</sup> that is, whether they qualify for rights on the basis or status of their membership of two groups: namely, children in the here and now (and hence current child rights bearers) and as members of existing ‘future generations’.

This is a seriously under-explored issue in constitutional scholarship, despite the increasing focus on FG and intergenerational justice in that literature. A frequently

<sup>40</sup> See Section 2 above.

<sup>41</sup> See, e.g., Constitution of the Republic of South Africa, 1996, s. 28(1)(3) (‘In this section “child” means a person under the age of 18 years’). This provision has been raised in an *amicus curiae* application brought by the Centre for Child Law in relation to the Court of Appeal hearing in the climate change/justice case of *Trustees for the time being of Groundwork Trust and Another v. Minister of Environmental Affairs and Others*, 18 Mar. 2022, 39724/2019, [2022] ZAGPPHC 208, as well as in the Gauteng High Court hearing in the ‘Cancel Coal Litigation’ (*Africa Climate Alliance et al. v. Minister of Mineral Resources & Energy et al.*, Case No. 56907/21). More details available at: <https://cer.org.za/programmes/pollution-climate-change/litigation/cancel-coal-legal-challenge-of-governments-plan-for-new-coal-fired-power-capacity>.

<sup>42</sup> This is certainly not true of all constitutions and constitutional systems, of course; e.g., where there is a reference to both present/current generations and future generations in constitutional provisions, then it can be understood that children fall within the former rather than the latter group. See, e.g., s. 24(b) of the Constitution of South Africa, 1996, which includes a discrete provision on children’s rights (s. 28) as well as s. 24(b), which states that everyone has the right ‘to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures’. At least one court has been clear that in terms of s. 24, future generations is ‘a broad concept which can mean posterity, or those whose birth is imminent’: *Trustees for the time being of Groundwork Trust*, n. 41 above, para. 82.4. It seems clear, however, that children would qualify as members of ‘present generations’, which are also referred to in s. 24. (For a discussion of the most important existing South African case law in terms of s. 24, see S. Liebenberg, ‘The Wild Coast Seismic Survey Judgments: A Case Study on Integrating the Principles of Sustainable Development in Law’, in M. Madlanga et al. (eds), *Enforcing Accountability, Consolidating Democracy and Compelling Sustainable Development in the 21<sup>st</sup> Century* (Juta, 2024). For a similar constitutional approach to s. 24 see Art. 42 of the Constitution of Kenya, 2010, as discussed in R. Mwanza, ‘The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya’s Legal Context: An Appraisal’ (2020) 22(3) *Environmental Law Review*, pp. 184–97. See also Art. i IX, s. 1 of the Montana Constitution, as argued by litigators and addressed by the Montana First Judicial District Court in *Held v. Montana*, No. CDV-2020-307, 1<sup>st</sup> Dist. Ct. Mont., 14 Aug. 2023. However, as made clear in the earlier discussion of the *Six Youths v. Minister of Environment* complaint, text at n. 17 – which focused on Art. 225 of the 1988 Brazilian Constitution which refers to both present and future generations – it is not inevitable that all commentators will construe children as falling under the ‘present generation’.



cited paper by Araújo and Koessler serves as a useful example. Here, the authors assert that nearly half of all constitutions refer to ‘future generations’. In doing so, they regard ‘constitutional provisions mentioning future generations to be those that explicitly refer to a group of individuals who will live in the future whose interests should be taken into account’.<sup>43</sup> They do not, however, address the complexities of how different constitutions engage (or not) with the relationship between FG and existing children. The latter may also be understood to ‘live in the future’ and/or regarded as forming part of ‘future generations’ from the perspective of national constitutional protection in some instances, including where constitutions also contain child-specific provisions.

This lack of clarity around FG is reflected in legal argumentation. Those who bring such cases highlight the challenge of defining ‘future generations’ in relation to standing and age-related (particularly birth cohort) discrimination, in particular.<sup>44</sup> However, even where litigators provide detailed argumentation on why children constitute FG for the purposes of constitutional law protection, courts do not necessarily engage with this in a meaningful way. This has resulted in findings that children are – or represent – FG, without providing a reasoned justification for that conclusion. The Colombian *Future Generations* case constitutes a useful example: while the original complaint focused in-depth on why children were FG, the Court did not engage explicitly with the issue. The judgment simply mentions in passing that the children are FG.<sup>45</sup>

In contrast, the Ontario Superior Court of Justice in the *Mathur* case carried out a careful analysis of the relationship between children and FG. The issue arose in relation to whether the child and youth claimants in *Mathur* had legal standing to represent FG. FG were treated by the courts (both in the context of the state’s effort to strike out the application and at the full judgment stage) and the parties as people ‘who do not yet exist’.<sup>46</sup> In a preliminary finding that the claimants ‘should be given standing for their generation, as well as for future generations’,<sup>47</sup> the Court applied the three-part test for granting discretionary standing in Canadian public law cases: (i) whether the case raised a serious justiciable issue; (ii) whether the party bringing the action had a real stake or a genuine interest in its outcome; and (iii) whether, having

<sup>43</sup> R. Araújo & L. Koessler, ‘The Rise of the Constitutional Protection of Future Generations’, LPP Working Paper No. 07-2021, p. 5, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3933683](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933683). For thoughtful, critical engagements with empirical methodology in the field of comparative constitutional law more broadly (which is a key element of Araújo and Koessler’s paper), see N. Petersen & K. Chatziathanasiou, ‘Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or All Smoke and Mirrors?’ (2021) 19(5) *International Journal of Constitutional Law*, pp. 1810–34, and M. Khosla, ‘Is a Science of Comparative Constitutionalism Possible?’ (2021) 135(8) *Harvard Law Review*, pp. 2110–48.

<sup>44</sup> This was a point made repeatedly by participating litigators from Africa, Europe, and the Americas at a closed online workshop of child rights climate justice litigators hosted by the Advancing Child Rights Strategic Litigation Project and the Climate Litigation Network on ‘Child Rights-Based Argumentation in Climate Justice Litigation’, 19 Jan. 2023, available at <https://www.acrisl.org/events>.

<sup>45</sup> See n. 26 above.

<sup>46</sup> *Mathur v. Ontario*, Superior Court of Justice of Ontario, 2020 ONSC 6918, paras 244–53.

<sup>47</sup> *Ibid.*, para. 253.

regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

The Court concluded, among other things, that the case was of public interest in that it transcended the interests of all Ontario residents, ‘not just the Applicants’ generation or the ones that follow’,<sup>48</sup> as well as that, ‘given their age’, the applicants brought a useful and distinctive perspective to the resolution of the issues on this application as ‘young Ontarians’.<sup>49</sup> Further thought was given to the distinction between children and FG in the full decision of the Court, which concluded (in the context of the claimants’ arguments on Section 15 on equality rights) that, in contrast to the situation pertaining to children, the distinction regarding FG was not based on the enumerated ground of age but on the ground of ‘generational cohort’.<sup>50</sup>

Moving beyond the constitutional law context, the intergenerational theory literature is of limited assistance in terms of providing a clear steer with regard to the specific definition of ‘future generations’ – including whether or not this should include living children. There is a preponderance of focus in that literature on FG from what Weston describes as a ‘distant or remote future persons perspective’, but this is not uniform.<sup>51</sup> This issue remains despite growing recognition of the nuances posed by children relative to not yet living FG in that literature,<sup>52</sup> including in the context of judicial action.<sup>53</sup> Nor, despite the multiple references to intergenerational equity and/or FG in international environmental law treaties and other documents,<sup>54</sup> does that body of law provide a conclusive definition of FG (or indeed intergenerational justice) that

<sup>48</sup> *Ibid.*, para. 250.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Mathur v. His Majesty the King in Right of Ontario*, Superior Court of Justice of Ontario, 2023 ONSC 2316, para. 182.

<sup>51</sup> B. Weston, ‘Climate Change and Intergenerational Justice: Foundational Reflections’ (2008) 9(3) *Vermont Journal of Environmental Law*, pp. 375–430, at 383.

<sup>52</sup> E.g., the foundational scholar in intergenerational equity terms, Edith Weiss Brown, has moved from apparently regarding children as subsumed into the current/present generation to constituting the ‘first embodiment of the interest of future generations’ (discussed in A. Daly, ‘Intergenerational Rights Are Children’s Rights: Upholding the Right to a Healthy Environment through the UNCRC’ (2023) 41(3) *Netherlands Quarterly of Human Rights*, pp. 132–54, at 139–40).

<sup>53</sup> For an (excellent) example of (the still limited number of) explicit engagements with children vis-à-vis future generations on the part of intergenerational justice scholars, including in the context of judicial action, see A. Santos Campos, ‘The Semi-Future Constitution: Entrenching Future-Oriented Constitutional Interpretation’ (2023) 14(3) *Jurisprudence*, pp. 374–95.

<sup>54</sup> See, e.g., Charter on Economic Rights and Duties of States, New York, NY (US), 6 Nov. 1974, Art. 30, available at: [https://legal.un.org/avl/pdf/ha/cerds/cerds\\_ph\\_e.pdf](https://legal.un.org/avl/pdf/ha/cerds/cerds_ph_e.pdf); UN Framework Convention on Climate Change (UNFCCC), New York, NY (US), 9 May 1992, in force 21 Mar. 1994, Art. 3(1), available at: <https://unfccc.int>; Paris Agreement, Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, Preamble, para. 11, available at: [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf); UN Educational, Scientific and Cultural Organization (UNESCO), Declaration of Ethical Principles in relation to Climate Change, Paris (France), 13 Nov. 2017, Principles 4, 5 and 6, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000260129>; UN Convention on Biological Diversity (CBD), Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, Preamble, available at: <http://www.cbd.int/convention>; Principle 4 of the Rio Declaration on Environment and Development (Rio Declaration), adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992, Principle 3, available at: <https://www.un.org/esa/dsd/agenda21/Agenda%2021.pdf>.

can be relied on by courts seeking to flesh out this concept in the constitutional rights context.<sup>55</sup>

International human rights law (IHRL) does not provide much assistance to litigators and courts in teasing out the specific relationship between children and FG either. IHRL is relatively clear as to who qualifies as a child and children's rights can generally be understood to adhere to born people under 18.<sup>56</sup> The definition of 'child' in terms of the United Nations (UN) Convention on the Rights of the Child (CRC)<sup>57</sup> has played a key role in shaping national law approaches to the question of who qualifies as a child for the purposes of constitutional rights protection, both through judicial interpretation of constitutional standards in the light of the CRC and through the direct incorporation of that instrument or its contents into constitutional law.<sup>58</sup>

The same level of clarity around definition does not pertain to FG. Indeed, there remains considerable controversy about whether FG should be recognized as rights holders under IHRL – and even whether FG should be a focus of international law framings at all.<sup>59</sup> Humphreys, for instance, has criticized 'future generations discourse' for being 'ambiguous as to where "present" stops and "future" starts'.<sup>60</sup> He argues in that regard that children operate as an example of the way in which temporal generations resist clarification, as 'our living children or grandchildren are not "future" persons at all', whereas actual future persons are constantly transiting into the present.<sup>61</sup> In response, Lawrence has pointed out that the fact that the category of

<sup>55</sup> The same is true with regard to other areas where concerns about the interests of FG have been prominent, including sustainable development, cultural heritage, and nuclear waste management. For more see S. Liebenberg et al., 'Commentary to the Maastricht Principles on the Human Rights of Future Generations' (2024 forthcoming). For an excellent treatment of definitional shortcomings in terms of the rights of FG in the biomedical science context see R. Yotova, 'Anticipatory Duties under the Human Right to Science and International Biomedical Law' (2023) 28(3) *The International Journal of Human Rights*, pp. 397–415, at 405–8.

<sup>56</sup> For more see A. Nolan, 'Children's Rights', in D. Moeckli et al. (eds), *International Human Rights Law* (Oxford University Press, 4<sup>th</sup> edn, 2022), pp. 339–58.

<sup>57</sup> New York, NY (US), 20 Nov. 1989, in force 2 Sept. 1990, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>58</sup> For an example of the age-based definition of Art. 1 CRC being used to support the limitation of children's constitutional rights to persons under 18 see Hardiman J in the Irish Supreme Court education rights decision in *Simott v. Minister for Education* [2001] IESC 63, para. 309. An example of the way in which the CRC definition of 'child' has been incorporated into national constitutional hierarchy is afforded by s. 75(22) of the Constitution of Argentina, 1994.

<sup>59</sup> See, e.g., the *EJIL:Debate!* on this topic: S. Humphreys, 'Against Future Generations' (2023) 33(4) *European Journal of International Law*, pp. 1061–92 (Humphreys (2023a)); Wewerinke-Singh, Garg & Agarwalla, n. 39 above; P. Lawrence, 'International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys' (2023) 34(3) *European Journal of International Law*, pp. 669–82; and S. Humphreys, 'Taking Future Generations Seriously: A Rejoinder to Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla, and Peter Lawrence' (2023) 34(3) *European Journal of International Law*, pp. 683–96.

<sup>60</sup> Humphreys (2023a), *ibid.*, p. 1066.

<sup>61</sup> *Ibid.* Ultimately, despite referring to climate litigation involving child rights (p. 1065, at n. 9) and asserting that an 'implicit effect' of FG discourse 'is to invoke children – our children, our children's children or just "the children" – a visceral rhetorical flourish that marries virtue and pride, altruism and sacrifice' (p. 1062), Humphreys does not engage in an in-depth way with the complexity of the relationship between children and FG.

children ‘is also constantly changing as persons fall within or outside the definition’ does not prevent children from functioning as a legal category and serving as the basis of group-specific rights.<sup>62</sup>

The specific scope of FG and the extent to which they benefit from protection under IHRL has always been unclear. Some understandings of ‘future generations’ posited by academics working in the IHRL space explicitly encompass already existing/living/current/born generations, and hence children in the here and now. Skogly speaks about the concept of FG as ‘referring to the rights of current youth and children when they grow into adulthood, as well as other people who will live in the future’.<sup>63</sup> On such an understanding, living children qualify for rights on the basis or status of their membership of two groups: namely, children in the here and now (and hence current child rights bearers) and as adults in the future.

Other commentators regard the groups as wholly separate and have conceptualized FG as ‘those yet to be born’<sup>64</sup> – generations that will be born in the future. Here, living children and FG are discrete groups with child rights bearers (living children) not falling within the category of ‘future generations’ for the purpose of rights protection upon reaching adulthood. Others stress the linkage between existing and future rights claims when considering the potential interactions of children and FG rights. Knox suggests defining a future generation ‘as those people who will be alive at a specific time in the future, such as the year 2100’.<sup>65</sup> In terms of this approach, ‘many people who will be living then have already arrived and inherited their full allotment of human rights’ and the focus should be on ensuring their rights throughout their lives – both as children and as future adults.<sup>66</sup>

There have been a number of references to FG in the outputs of UN treaty bodies, with the work of the Committee on Economic, Social and Cultural Rights (CESCR) being particularly notable.<sup>67</sup> Since 2021, there has been a significantly increased focus on the issue of FG as a result of efforts on the part of the UN Committee on the Rights of the Child and the CESCR on their draft general comments on children

<sup>62</sup> Lawrence, n. 59 above, p. 676.

<sup>63</sup> S. Skogly, ‘The Right to Continuous Improvement of Living Conditions and Human Rights of Future Generations: A Circle Impossible to Square?’, in J. Hohmann & B. Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Hart, 2021), pp. 147–64, at 148.

<sup>64</sup> A. Daly, ‘Youth Climate Activism and Its Impact on International Human Rights Law’ (2022) 22(2) *Human Rights Law Review*, article ngac011. Daly’s view on this has since shifted; see Daly, n. 52 above.

<sup>65</sup> J. Knox, ‘Constructing the Human Right to a Healthy Environment’ (2020) 16(1) *Annual Review of Law and Social Science*, pp. 79–95, at 92.

<sup>66</sup> *Ibid.*

<sup>67</sup> See, e.g., CESCR, ‘General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)’, 30 Apr. 2020, UN Doc. E/C.12/GC/26, para. 56; CESCR, ‘General Comment No. 19 on the Right to Social Security (Art. 9)’, 4 Feb. 2008, UN Doc. E/C.12/GC/19, para. 11; CESCR, ‘General Comment No. 15 on the Right to Water (Art. 11 and 12 of the Covenant)’, 2 Jan. 2003, UN Doc. E/C.12/2002/11; CESCR, General Comment No. 12 on the Right to Adequate Food’, 12 May 1999, UN Doc. E/C.12/1999/5, para. 7.

and the environment and sustainable development and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>68</sup> respectively.<sup>69</sup>

Moreover, September 2022 saw a Human Rights Committee decision in which that body found, inter alia, that Australia had violated Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR),<sup>70</sup> which sets out the right of children to such measures of protection as are required by their status as a minor. This resulted from Australia's failure to take adequate steps to 'protect the rights of future generations of the authors' community, including the six named children, who are the most vulnerable and affected by climate change'.<sup>71</sup> Elsewhere in its decision, however, the Committee appeared to treat children and FG as discrete groups.<sup>72</sup> Therefore, the specific relationship between rights of children and those of FG in terms of the ICCPR remains unclear.<sup>73</sup>

The expert Maastricht Principles on the Human Rights of Future Generations state that 'future generations are those generations that do not yet exist but will exist and who will inherit the Earth. Future generations include persons, groups and Peoples'.<sup>74</sup> The Principles recognize that:

States must recognise and respect that present children occupy a proximate position to future generations, and must protect their rights to be heard and other participatory rights, including when advocating for human rights on behalf of themselves and future generations.<sup>75</sup>

<sup>68</sup> New York, NY (US), 16 Dec. 1966, in force 3 Jan 1976, available at: <https://www.ohchr.org/sites/default/files/cescr.pdf>.

<sup>69</sup> See, e.g., CRC, 'Draft General Comment No. 26 on Children and the Environment with a Special Focus on Climate Change', Aug. 2022, available at: [https://childrightsenvironment.org/wp-content/uploads/2022/11/First-Draft\\_General-Comment-No.-26\\_November-2022.pdf](https://childrightsenvironment.org/wp-content/uploads/2022/11/First-Draft_General-Comment-No.-26_November-2022.pdf); CESCR Drafting Group, 'Issues Paper on Sustainable Development and the International Covenant on Economic, Social and Cultural Rights', Sept. 2021.

<sup>70</sup> New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: <https://www.ohchr.org/sites/default/files/ccpr.pdf>.

<sup>71</sup> UN Human Rights Committee, *Billy et al. v. Australia*, 22 Sept. 2022, UN Doc. CCPR/C/135/D/3624/2019, para. 3.7.

<sup>72</sup> *Ibid.*, para. 8.14.

<sup>73</sup> The complexity surrounding the extent to which child and FG rights converge/diverge is not always recognized by those working in the context of international law and the environment; see 'Status Report on Principles of Human Rights International Law', in World's Youth Climate Justice et al., *The Youth Justice Climate Justice Handbook* (WYCJ, 2023), which presents the CRC as outlining treaty obligations related to future generations with no justification for that approach.

<sup>74</sup> Maastricht Principles, n. 35 above, Principle 1. For a useful discussion of the role and nature of guiding principles see M. Sepúlveda Carmona, 'Human Rights Guiding Principles: A Forward-Looking Retrospective', in F. Adamson et al. (eds), *Realizing the Abidjan Principles on the Right to Education* (Edward Elgar, 2021), pp. 25–51.

<sup>75</sup> Maastricht Principles, n. 35 above, Principle 22(c). A similar understanding of the definition of FG and the relationship between children and FG is reflected in the UN Secretary General's policy brief 'Our Common Agenda: Policy Brief 1: To Think and Act for Future Generations', 7 Feb. 2023, UN Doc. A/77/CRP.1, p. 3 ('While children and young people alive today may have overlapping interests and a special affinity with future generations, they are not the same. Young people alive today should not bear the burden of advocating for our descendants, but they are deserving of a separate and dedicated place at the table'); see also *ibid.*, p. 16.

However, while constituting a significant authoritative interpretation of what FG should be understood to be for the purposes of IHRL,<sup>76</sup> the specific nuances of the relationship between the rights of children and those of FG in IHRL ultimately remain to be worked out by those entities tasked with the interpretation and application of IHRL standards (notably UN treaty bodies). The same is true with regard to the extent to which children can serve as representatives or proxies for FG for the purposes of protection through complaints and other monitoring mechanisms under IHRL.

A key opportunity for treaty body consideration of the Maastricht Principles – and the issue of the overlap (or not) between children and FG, as well as their rights more broadly – was presented by the UN Committee on the Rights of the Child’s General Comment No. 26 on Children’s Rights and the Environment with a Special Focus on Climate Change (GC).<sup>77</sup> This soft law document, published in August 2023, merits special attention for two reasons in particular.<sup>78</sup> Firstly, it is the most explicit engagement yet by any international and regional human rights body with the rights of children in the context of environmental harm, including with regard to intergenerational equity and future generations. Secondly, it has received considerable academic, policymaker, advocate and media attention, reflecting its significance and value both in terms of child rights law and IHRL in this area more broadly.<sup>79</sup> However, while the Committee made reference to FG in different parts of the GC, its overall treatment of this issue, and of intergenerational equity/justice generally, leaves much to be desired.<sup>80</sup>

The introduction to the GC includes a quote from a child stating that ‘I would like to tell [adults] that we are the future generations and, if you destroy the planet, where will

<sup>76</sup> Not all IHRL commentators would fully agree with this description. E.g., the current UN Special Rapporteur on Human Rights and Climate Change has noted that ‘[t]he authors state that the aim of the Maastricht Principles is to “clarify the present state of international law” as it applies to the human rights of future generations, although it may be argued that the Principles are more prescriptive than clarificatory. Nevertheless, they provide a very useful basis for giving further consideration to how to develop legal norms on intergenerational equity at the international level. The General Assembly should give due consideration to the Maastricht Principles and explore how they could be incorporated into the Summit of the Future, to be held in 2024’: Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, ‘Report on Exploring Approaches to Enhance Climate Change Legislation, Supporting Climate Change Litigation and Advancing the Principle of Intergenerational Justice’, 28 July 2023, UN Doc. A/78/255, para. 61, available at: <https://www.ohchr.org/en/documents/thematic-reports/a78255-report-special-rapporteur-promotion-and-protection-human-rights>.

<sup>77</sup> CRC, ‘General Comment No. 26 on Children and the Environment with a Special Focus on Climate Change’, 22 Aug. 2023, UN Doc CRC/C/GC/26 (GC No. 26).

<sup>78</sup> For more on UN treaty body General Comments as soft law see H. Keller & L. Grover, ‘General Comments of the Human Rights Committee and Their Legitimacy’, in H. Keller & G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012), pp. 116–98; M. Bódig, ‘Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights’, in S. Lagoutte, T. Gammeltoft-Hansen & J. Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, 2016), pp. 69–88.

<sup>79</sup> See, e.g., A. Nolan, ‘General Comment No. 26 on Children and the Environment: A Milestone in International Human Rights Law?’, *EJIL:Talk!*, 11 Sept. 2023, available at: <https://www.ejiltalk.org/general-comment-no-26-on-children-and-the-environment-a-milestone-in-international-human-rights-law>.

<sup>80</sup> The ensuing discussion of GC No. 26 builds on Nolan, *ibid.*



we live?’.<sup>81</sup> Later in the document, in a section on ‘Intergenerational equity and future generations’, the Committee states that ‘[w]hile the rights of children who are present on Earth require immediate urgent attention, the children constantly arriving are also entitled to the realization of their human rights to the maximum extent’.<sup>82</sup> It is not clear whether these ‘constantly arriving’ children are FG in the view of the Committee or whether it is simply highlighting that as more children are born, they are entitled to have their rights realized in the here and now against a backdrop in which the interests of FG are taken into account in an unspecified way.

In the relevant paragraph, the Committee appears to have drawn on language used in a 2018 report by John Knox as then UN Special Rapporteur on the Environment and Human Rights, in which he stated that ‘the division between present and future generations is less sharp than it sometimes appears to be’ and that ‘the line between future generations and today’s children shifts every time another baby arrives and inherits their full entitlement of human rights’.<sup>83</sup> While ‘[c]oncerns about future generations and sustainable development often focus on the state of the environment in particular years in the future, such as the year 2030 or 2100’, he noted that ‘many people that will be living in 2100 are not yet born, and in that sense truly belong to future generations. But many people who will be living then are already alive today’.<sup>84</sup> On that basis, he argued that ‘discussions of future generations [should] take into account the rights of the children who are constantly arriving, or have already arrived, on this planet’.<sup>85</sup> As highlighted above, in 2020, Knox argued in favour of a ‘future generation’ being defined as ‘those people who will be alive at a specific time in the future’.

However, the Committee does not explicitly take this approach in its work – although its adaptation of the 2018 language could be taken to reflect tacit agreement with Knox’s view in the 2018 report that ‘[i]t is difficult, if not impossible, to define the rights of individuals who are not yet alive’.<sup>86</sup> Certainly, the Committee did not respond to the recommendations of those in favour of a more explicit recognition of the rights of

<sup>81</sup> GC No. 26, n. 77 above, para. 3.

<sup>82</sup> *Ibid.*, para. 11.

<sup>83</sup> ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’, 24 Jan. 2018, UN Doc. A/HRC/37/58, para. 68.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, para. 67. In his comments on the draft GC No. 26, Knox praised the Committee’s approach, stating that ‘[t]he draft General Comment does not attempt to address the rights of future generations in any detail. I agree that it should not do so. The issues raised by attempting to assign rights to all future generations of humanity are well beyond the scope of this General Comment, and possibly beyond the scope of the Convention itself’. He made clear that he agreed with ‘the approach that the draft has taken instead, which is to emphasize that “discussions of future generations should take into account the rights of children who are already present on this planet and those constantly arriving”’. Knox argued that too often discussions of future generations treat such generations as composed solely of people who have yet to arrive on this planet and asserted that ‘a far more accurate and productive approach is to think of the people who will be alive as of a certain point in the future’: J. Knox, ‘Comments on the UN Committee on the Rights of the Child Draft General Comment No. 26’, available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

FG within the draft.<sup>87</sup> Furthermore, the Committee makes no reference in the GC to the very significant body of recent work in the IHRL context with regard to FG rights, including the Maastricht Principles, the work of the UN Secretary General in relation to the ‘Summit on the Future’ that is set to take place in September 2024 (which adopts a very similar approach to the relationship between children and FG as the Maastricht Principles);<sup>88</sup> nor does it have regard to the pending UN Declaration for Future Generations.<sup>89</sup> This is despite the fact that the Committee was certainly aware of these developments.

The GC makes clear that ‘[t]he Committee recognizes the principle of intergenerational equity and the interests of future generations’<sup>90</sup> but it does not then go on to define that principle in any detail or address the relationship between FG interests and those of current/present generations, including children. The Committee’s final statement in the section on intergenerational equity and FG is that:

[b]eyond their immediate obligations under the Convention with regard to the environment, States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades.<sup>91</sup>

This formulation clearly embraces state responsibility and causality, but it does not make clear how such responsibility relates to FG (or does not). Nor did the Committee engage with the issues of age or birth cohort discrimination in its discussion of Article 2 (prohibition on discrimination in the enjoyment of CRC rights) in the GC,<sup>92</sup> a topic that could have been used to provide some sense of the scope of intergenerational responsibilities in terms of the CRC.

<sup>87</sup> See, e.g., Center for International Environmental Law, ‘Comments on the UN Committee on the Rights of the Child Draft General Comment No. 26’, available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>88</sup> See, e.g., UN General Assembly (UNGA) Resolution on Modalities for the Summit of the Future, 12 Sept. 2022, UN Doc. A/RES/76/307; UN Secretary General’s ‘Our Common Agenda: Policy Brief 1: To Think and Act on Future Generations’, 7 Feb. 2023, UN Doc. A/77/CRP.1. The language in this document on the definition of FG and the relationship between FG and child rights were so similar to Principle 1 of the Maastricht Principles (n. 35 above) as to suggest very strongly that the authors were relying on a copy of the text of the Maastricht Principles which had been shared prior to publication of that document. For more see Sepúlveda Carmona, n. 74 above. See also the most recent draft of the ‘Declaration on Future Generations’ (15 Aug. 2024) at the time of writing, which refers to future generations as ‘all those generations that do not yet exist, and who will inherit this planet’, para 4, available at: <https://www.un.org/sites/un2.un.org/files/sotf-declaration-on-future-generations-rev3.pdf>. See also the more recent draft of the ‘Pact for the Future’ (27 Aug. 2024), which states: ‘We recognize that children and youth are distinct groups from future generations’, para 62, available at: <https://www.un.org/sites/un2.un.org/files/sotf-pact-for-the-future-rev.3.pdf>.

<sup>89</sup> See, e.g., Intergovernmental Process for a Declaration on Future Generations, ‘Declaration on Future Generations: Summary of Dialogues’, p. 1, available at: <https://www.un.org/pga/77/wp-content/uploads/sites/105/2023/06/Declaration-On-Future-Generations-Summary-of-Dialogues.pdf>. For more see n. 88 above.

<sup>90</sup> GC No. 26, n. 77 above, para. 11.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, paras 14 and 15. The Committee was urged to engage with age discrimination by the Child Rights Information Network, ‘Comments on the UN Committee on the Rights of the Child Draft General

The Committee's decision to omit any reference to the concept of sustainable development (which was present as a 'key concept' in the first draft of the GC) further reduces the potential for the GC to provide a meaningful roadmap for putting intergenerational equity into practice. This is particularly so with regard to balancing the rights and interests of children in the here and now with those of not yet living children (that is, future generations of children) and other future human rights bearers in a context of finite resources.

Interestingly, the Committee's approach does not appear to have been adopted in response to a strong steer from states on this issue. In fact, the language on FG and intergenerational equity drew limited state attention. Although several states made reference to FG in passing in their comments on both the GC concept note and the first draft, very few addressed the relevant sections of the draft in any depth.<sup>93</sup> A very small number of states did express concern about the Committee addressing FG. France's comment on the GC concept note stressed that the conceptions of 'future generations' and 'intergenerational equity' do not figure in the CRC and asserted that the GC should be limited to the principles and rights contained in the Convention.<sup>94</sup> However, the Committee went on to mention both of these issues specifically. Interestingly, while France's later comments on the draft GC reiterated the general point about Committee restraint in relation to a number of aspects of the draft GC, it did not address the FG section.<sup>95</sup>

Furthermore, although Canada asserted that the Committee's focus in terms of FG (and intergenerational equity) should be limited to born/living children<sup>96</sup> (reiterating points made in its input on the GC concept note),<sup>97</sup> the GC does not explicitly limit its scope to children in the here and now. Nor did the GC's approach fully follow Kenya's recommendation in response to the concept note that:

[u]ndertaking a child rights perspective requires broadening the perspective from the immediate present to the distant future. Children's rights should be read by States in line with environmental principles of sustainable development as well as inter and intra-generational equity.<sup>98</sup>

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Comment No. 26', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>93</sup> 19 states made submissions in relation to the GC concept note, while 17 states submitted comments on the draft GC.

<sup>94</sup> France, 'Submission on the Concept Note for the General Comment on Children's Rights and the Environment with a Special Focus on Climate Change', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>95</sup> France, 'Comments on the UN Committee on the Rights of the Child Draft General Comment No. 26', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>96</sup> Canada, 'Comments on the UN Committee on the Rights of the Child Draft General Comment No. 26', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>97</sup> Canada, France, 'Submission on the Concept Note for the General Comment on Children's Rights and the Environment with a Special Focus on Climate Change', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>98</sup> Kenya, 'Submission on the Concept Note for the General Comment on Children's Rights and the Environment with a Special Focus on Climate Change', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

Finally, it is worth noting that the Committee did not respond to the point made by Germany in its comments on the draft GC that the Committee should explain the source and the foundation contained in the Convention on which the principle of intergenerational equity and the interests of FG are based.<sup>99</sup>

Thus, while a hugely important and valuable source of guidance on children's rights and the environment, the GC leaves key questions unanswered regarding the extent to which 'future generations' coincide with currently living children (whether as children or future adults) and/or the extent to which FG (however defined) are afforded protection under the UNCRC.<sup>100</sup> It fails to engage with the implications of children's rights for the interpretation and application of the principle of intergenerational equity. We may therefore reluctantly conclude that (at the time of writing at any rate) IHRL does not provide authoritative assistance on these wider points to judges and litigators who might look to it for guidance when addressing gaps and confusions in the domestic human rights law.

One area of potential progress for IHRL in this regard will be the advisory opinions on the scope of state obligations in the context of climate change that are currently pending before the International Court of Justice (ICJ)<sup>101</sup> and the Inter-American Court of Human Rights (IACtHR).<sup>102</sup> Requests for these advisory opinions were submitted by the UN General Assembly and the Republic of Colombia and the Republic of Chile, respectively.<sup>103</sup> Both requests raise the issue of rights of FG

<sup>99</sup> Germany, 'Comments on the UN Committee on the Rights of the Child Draft General Comment No. 26', available at: <https://www.ohchr.org/en/calls-for-input/2023/call-comments-draft-general-comment-childrens-rights-and-environment-special>.

<sup>100</sup> For a more recent engagement of the Committee with the issue of FG see Committee on the Rights of the Child, 'State of the Committee on the Rights of the Child on Human Rights Day 2023', 10 Dec. 2023, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/activities/crc-stm-hr-day-2023.pdf>. Here, the Committee continued to fail to clarify the specific relationship between children and FG, referring to children as 'the most significant future decision makers for future generations' and urging a 'child rights perspective' on FG.

<sup>101</sup> UNGA, 'Request for Advisory Opinion on Obligations of States in respect of Climate Change', 29 Mar. 2023, available at: <https://www.icj-cij.org/case/187>.

<sup>102</sup> 'Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile', 9 Jan. 2023, available at: [https://www.corteidh.or.cr/docs/opiniones/soc\\_1\\_2023\\_en.pdf](https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf).

<sup>103</sup> A request was also submitted to the International Tribunal on the Law of the Sea (ITLOS): Case No. 31, 'Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)', 12 Dec. 2022, available at: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal>. This request and the ITLOS May 2023 invitation to states parties to the UN Convention on the Law of the Sea (UNCLOS), the Commission of Small Island States on Climate Change and International Law, and other intergovernmental organizations to present written statements by 16 May 2023, made no mention of human rights and/or FG: ITLOS, 'Press Release', 16 Dec. 2022, available at: [https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR\\_328\\_EN.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_328_EN.pdf). Nor did any of the submissions received focus specifically on the rights of children or FG in such a way as to make this likely to be a key focus of the advisory opinion. This is unsurprising, given the contents of UNCLOS (Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm)). Ultimately, the advisory opinion did not engage with children's rights or FG rights at all (or with human rights more broadly to any extent). ITLOS Advisory Opinion in Case

expressly.<sup>104</sup> Although children are not mentioned explicitly in the request to the ICJ, they are accorded specific, climate-relevant rights under the ICCPR and ICESCR, both of which instruments are cited.<sup>105</sup> In contrast, the request to the Inter-American Court includes a detailed section ‘regarding the differentiated obligations of States in relation to the rights of children and the new generations in light of the climate emergency’.<sup>106</sup>

Written statements submitted to the ICJ (and written comments on those statements) remain confidential at the time of writing.<sup>107</sup> However, at least one written opinion submitted to the IACtHR has stressed the importance of the Court adopting a clear definition of future generations (or indeed ‘new generations’) and that, whatever definition is chosen by the Court, the relationship between ‘future generations’ and living children must be made clear.<sup>108</sup> Other written opinions have highlighted the importance that the Court should engage with the principle of intergenerational equity in relation to future generations of children.<sup>109</sup>

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No. 31 of 21 May 2024, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory\\_Opinion/C31\\_Adv\\_Op\\_21.05.2024\\_orig.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf).

<sup>104</sup> The Request to the ICJ asks: ‘What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations’ as well as ‘what are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to ... peoples and individuals of the present and future generations affected by the adverse effects of climate change?’: UNGA, n. 101 above. For references to ‘future generations’ in the Request to the IACtHR see n. 102 above, pp. 1 and 6, as well as the body text related to n. 107 below.

<sup>105</sup> See, e.g., Art. 24 ICCPR, n. 70 above; Arts 10 and 12 ICESCR, n. 68 above.

<sup>106</sup> Request for an Advisory Opinion on the Climate Emergency and Human Rights submitted to the IACtHR, n. 102 above, p. 10.

<sup>107</sup> On 15 Dec. 2023, the ICJ extended the deadline for such submissions (and hence the requirement of confidentiality of such) to late March 2024: ICJ, ‘Press Release’, 19 Dec. 2023, available at: <https://www.icj-cij.org/sites/default/files/case-related/187/187-20231219-pre-01-00-en.pdf>.

<sup>108</sup> See ‘Observations submitted by the Child Rights International Network and the University of Nottingham Human Rights Law Centre in the Inter-American Court of Human Rights Request for an Advisory Opinion on the Climate Emergency and Human Rights’, 18 Dec. 2023, paras 33–8, available at: <https://static1.squarespace.com/static/5afadb22e17ba3edd90c02f/t/659fe65cb53f872196e86920/1704978013954/CRIN%2C+HRLC%2C+ACRISL+IACtHR+amicus.docx.pdf>. As this article went to press, the IACtHR released a decision in an environmental pollution case in which the main judgment stressed the relationship between the rights of children and of FG in the context of intergenerational equity: *Caso Habitantes La Oroya v. Peru*, Decision on Preliminary Objections, Merits, Reparations and Costs, Judgment of 27 Nov. 2023, para. 141. A concurring opinion on the part of three judges explicitly referred to child and youth as ‘present generations’: Concurring Opinion of Judges Ricardo Pérez Manrique, Eduardo Ferrer Mac-Gregó Poisot and Rodrigo Mudrovitsch, para. 253. As such, it seems likely that the advisory opinion will ultimately differentiate between living children and FG.

<sup>109</sup> See, e.g., ‘Amicus Brief from Global Action Plan and Kyklos (Chile): Children’s Rights: Q IV.C(1)’, 18 Dec. 2023, para. 21, available at: <https://www.doughtystreet.co.uk/sites/default/files/media/document/GAP%20%26%20KYKLOS%20Amicus%20Brief%20for%20IACtHR%20AO.pdf>. For an example of a submission focusing on ‘future generations’ more generally see ‘Amicus Brief submitted by the Sabin Center for Climate Change Law on Climate Science and Human Rights Obligation’, 2 Nov. 2023, available at: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231103\\_18528\\_na.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231103_18528_na.pdf).

The decision of the European Court of Human Rights (ECtHR) in *Verein KlimaSeniorinnen v. Switzerland*<sup>110</sup> may also to play a role in this respect. While that decision did not involve children's rights, and expressly made clear that the obligations under the European Convention on Human Rights<sup>111</sup> extend only to 'those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party',<sup>112</sup> the Court's judgment expressly distinguished between 'the different generations of those currently living' and 'future generations'.<sup>113</sup> Given the historic influence of the ECtHR jurisprudence on the work of other regional and international human rights bodies, the Court's differentiation between currently living and future generations may well inform the approach of the IACtHR and the ICJ when considering the respective rights enjoyed by children and FG.<sup>114</sup>

These advisory opinions are very likely to feed into domestic constitutional litigation strategies and judicial decision making as a result of both the legally binding nature of the Inter-American Court's jurisprudence in some constitutional systems and the 'moral authority and legal weight' of the ICJ's advisory opinions.<sup>115</sup> However, the degree to which these opinions will address the lacuna identified in this article will depend on the extent to which, and how, the two courts engage with the definition of FG, particularly in relation to children.

Ultimately, I am not arguing that there is (or could be) a perfect definition of FG that all courts everywhere should adopt: a key part of litigation and adjudication of group-specific rights over time has entailed engagement with the precise scope of potential groups of rights holders for the purposes of constitutional rights protections.<sup>116</sup> Nor am I suggesting that, even if there were such a definition under IHRL, all courts and litigators could or should automatically adopt it. To do so would ignore, firstly, the very different levels of openness of the domestic constitutional systems to IHRL (both hard

<sup>110</sup> ECtHR, *Verein KlimaSeniorinnen v. Switzerland*, Appl. No. 53600/200, Judgment, 9 Apr. 2024 (*KlimaSeniorinnen*). For a detailed discussion of the treatment of FG and intergenerational equity in that decision see A. Nolan, 'Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' *KlimaSeniorinnen Decision*, *EJIL:Talk!*, 15 Apr. 2024, available at: <https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision>.

<sup>111</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG).

<sup>112</sup> *KlimaSeniorinnen*, n. 110 above, para. 420.

<sup>113</sup> *Ibid.*, paras 419–20.

<sup>114</sup> This is particularly so with regard to the IACtHR, given the judgments in the *Caso Habitantes La Oroya v. Peru* decision, discussed briefly in n. 108 above.

<sup>115</sup> ICJ, 'Advisory Jurisdiction', available at: <https://www.icj-cij.org/advisory-jurisdiction>. For more on how the advisory opinion could affect future domestic climate litigation see M. Wewerinke-Singh's presentation at the seminar 'Advisory Opinions on Climate Change before the ICJ, IACtHR and ITLOS', organized by Doughty Street Chambers, London (UK), 16 Nov. 2023, at 35:57–44:17, available at: <https://www.doughtystreet.co.uk/event/advisory-opinions-climate-change-icj-iacthr-and-itlos>.

<sup>116</sup> This has been particularly clear in the context of constitutional equality protection. For examples focused on specific groups see S. Osella, 'Reinforcing the Binary and Disciplining the Subject: The Constitutional Right to Gender Recognition in the Italian Case Law' (2022) 20(1) *International Journal of Constitutional Law*, pp. 454–75 (transgender persons); A. Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Hart, 2017) (gay people).



and soft law) as a source of authority in constitutional interpretation<sup>117</sup> and, secondly, the way in which broader jurisdiction-specific constitutional context necessarily impacts on the interpretation and application of constitutional standards, even novel ones drawing on sources external to that constitution. However, the effects of the lack of clear definitions of FG for the purposes of constitutional law in many jurisdictions should not be underestimated. In the next section I turn to the difficulties posed by this definitional lacuna in terms of delineating and enforcing rights claims in the context of climate justice litigation involving child and FG rights.

#### 4. The Challenges Posed by the Definitional Lacuna

I highlighted in Section 2 that children may be regarded as appropriate representatives or ‘proxies’ of FG for the purposes of standing to bring complaints focused on those interests, and discussed a number of cases in which this has taken place. However, the willingness of courts to allow children to assert the rights of FG is far from uniform. As Bertram notes, when it comes to operationalizing intergenerational modalities of legal representation, existing case law demonstrates that judicial concerns about the ability of children to speak for FG in intergenerational litigation weighs less heavily in cases in which present children ‘can stand in for their future iterations’, but is more complicated when it comes to representing not yet living FG.<sup>118</sup> This is unsurprising given that distance between generations increases uncertainty as to the effects of specific environmental decision making, as well as the nature of the environment or preferences of FG.<sup>119</sup>

Of course, the relative indeterminacy of the situations and potential rights-related harms faced by children and FG in the far future will remain regardless of the definition of FG. Indeed, arguably the only way in which this indeterminacy could be reduced is if a definition of FG were to be adopted that operated to exclude not yet living FG – an approach that would raise very serious concerns in terms of the extent to which it reflected a meaningful conception of intergenerational justice beyond the interests of those alive in the here and now. Ultimately, while a convincing definition of FG may encourage (or even mandate) courts to engage with the rights of that group in cases

<sup>117</sup> This is evidenced by the contrasting approaches adopted to IHRL treaties and the statements of UN treaty bodies by courts in jurisdictions in which such treaties of constitutional hierarchy (see, e.g., Argentina discussed in n. 58 above) and judicial approaches in jurisdictions – particularly monist jurisdictions where the relevant standards have not been domestically incorporated – where IHRL standards (and the soft law outputs of UN treaty bodies) have a much more limited role. See, e.g., the decision of the UK Supreme Court in *R (on the application of AB) v. Secretary of State for Justice* [2021] UKSC 28, paras 64–5.

<sup>118</sup> D. Bertram, “‘For You Will (Still) Be Here Tomorrow’: The Many Lives of Intergenerational Equity” (2023) 12(1) *Transnational Environmental Law*, pp. 121–49, at 137–8. Bertram also flags that some potential FG may never come into existence as a result of the environmental protection-related decisions of current generations: *ibid.*, p. 138. This article treats such persons as not yet existing FG, as the potential possibility of ensuring their existence means that they may legitimately be portrayed as ‘not yet born’ for the purposes of contemporary decision making.

<sup>119</sup> A. Gosseries, ‘On Future Generations’ Future Rights’ (2008) 16(4) *The Journal of Political Philosophy*, pp. 446–74, at 447.

that come before them, it cannot serve as an ‘indeterminacy’ panacea when it comes to judicial engagement with FG rights issues in the context of cases involving child rights.

However, although there are problems with regard to judicial engagement with litigation involving FG and child rights that closing the definitional gap will not resolve, there are others that are created and/or severely exacerbated by the current confusion. Firstly, and at the most basic level, if the courts are going to outline, interpret, and apply rights and obligations on the state in relation to specific groups, they must be able to identify the persons to whom those rights adhere and to whom the obligations imposed by those rights are owed; if there is no clear constitutional understanding of FG, this will be very difficult, if not impossible.<sup>120</sup> It will also restrict courts from saying with confidence who is entitled to assert the rights that are associated with FG, including children, despite the increasing number of cases including FG and children’s rights argumentation coming before them. In turn, this seems likely to contribute to judicial reluctance to engage with FG rights claims at all.

Secondly, where courts are reluctant to engage with FG rights in cases that raise both these claims and child rights arguments, this may create the temptation to adopt ever-broader understandings of children’s rights in order to encompass FG-related issues – potentially at the cost of a coherent framework focused on rights harms faced by children in the here and now. Where courts fail to engage with FG but instead use children’s rights as a vehicle for addressing issues of intergenerational concern, this may risk child constitutional rights being reduced to ‘future generations rights by other means’. This in turn poses a threat to children’s rights as a set of legal protections for living children, as such an approach may lead to those rights being co-opted, instrumentalized or reconceptualized (admittedly in good faith) by those bringing and those deciding on climate justice litigation to advance the rights of others beyond born children.

Nor would children’s constitutional rights *simpliciter* necessarily prove up to the task of dealing adequately with FG rights. While decision making on children’s rights may certainly involve balancing the current and future rights-related interests of children (for instance, in balancing rights related to child autonomy and best interests), scholarship and practice in this area have not centred in any detail on balancing the rights of children in the here and now with those of other children in the future – or even with the rights of those same children as future adults. Admittedly, time plays a key role in terms of child rights given that such rights are generally by definition time-bound, and said time-boundedness is often cited as a justification for urgent action on child rights issues, including in the context of environmental harm.<sup>121</sup> However, the issue of intertemporal rights claims remains a considerably under-explored concept in

<sup>120</sup> As highlighted in Section 3 (see, e.g., n. 44 above), this has been a key challenge for litigators globally in developing argumentation in climate justice cases involving children and FG rights claims.

<sup>121</sup> See, e.g., GC No. 26, n. 77 above, where the Committee stated that successive mitigation measures and updated pledges should represent the efforts of states in a progression over time, ‘keeping in mind that the time frame for preventing catastrophic climate change and harm to children’s rights is shorter and requires urgent action’: *ibid.*, para. 98.

children's rights, both at the constitutional level and indeed in IHRL.<sup>122</sup> Furthermore, given the limited scope and specificity of children's rights, a dependence on that framework to explore key issues related to a group that may in some instances have significantly different rights and interests from children could lead to an undesirable distortion of the development of FG constitutional rights. The potential damage from such conceptual inexactitude goes in both directions.

Thirdly, flowing from the first two points and of particular importance given the focus of this article, the definitional gap impacts directly on the ability of courts (and indeed litigators) to identify the respective interests of children on the one hand and FG on the other. It cannot be assumed that the interests of children and FG with regard to environmental harm will be identical, particularly when there is a significant time gap between the living periods of child rights holders and FG rights holders.<sup>123</sup> For instance, it is certainly possible to imagine situations in which measures aimed at ensuring the longer-term protection and sustainability of the environment may impact negatively on the resources available to address other pressing rights challenges faced by children in the here and now (such as poverty and intragenerational inequality).<sup>124</sup> Judicial efforts to address potential inconsistency, divergence, and conflict between the constitutional rights and interests of the two groups will be extremely difficult (if not impossible) if it is not clear what the parameters of FG are and what is the extent to which that group (and its rights/interests) overlap and/or diverge from children. One cannot balance effectively or accord an appropriate priority to interests/rights the scope of which and the bearers of which one cannot identify.

Finally, as I have alluded to above and argued in detail elsewhere,<sup>125</sup> children and FG potentially raise very different issues with regard to key constitutional law tenets that are argued and applied in judicial enforcement of child and FG rights claims, including

<sup>122</sup> This is despite the issue of time and intertemporal claims occupying a growing space in constitutional and IHRL scholarship. From an IHRL perspective see, e.g., K. McNeilly & B. Warwick (eds), *The Times and Temporalities of International Human Rights Law* (Hart, 2022). There is a wide-ranging and rich literature on the role of constitutions in relation to intertemporal responsibilities/claims in the intergenerational equity context.

<sup>123</sup> For an example of a case where the potential implications of such a time gap were not addressed in the context of very wide-ranging judicial statements on the rights of not yet living future generations in a case involving children see *Future Generations v. Ministry of the Environment & Others*, n. 1 above. See also Section 2 above.

<sup>124</sup> This issue, of course, is not limited to the issue of climate change. An example from another context is cuts made to child-specific programmes in the here and now that are stated to be motivated by a concern with ensuring the sustainability of social security systems for not yet living FG.

<sup>125</sup> See A. Nolan, 'Protecting the Environment for "The Voiceless": The Role of the Courts in Securing the Rights of Children and Future Generations in Environmental Protection Cases' (paper on file with author). The arguments in this article have been presented at numerous research events, which include 'Of Courts and Constitutions: Climate Justice Litigation and the Rights of Children and Future Generations', paper presented at the workshop on 'Future Generations Litigation and Transformative Changes in Environmental Governance Joint Workshop', organized by ELTE University and Aarhus University, Budapest (Hungary), 8–9 June 2023; 'Climate Justice Litigation, the Rights of Children and Future Generations and the Courts', paper presented at seminar on 'Climate Justice for Children and Future Generations', organized by the Sabin Center for Climate Change Law, Columbia Law School, New York, NY (US), 9 Mar. 2023, available at: <https://www.youtube.com/watch?v=5JQjIHOe1HM>; 'Climate Change, the Courts and the Rights of Children and Future Generations',

the separation of powers doctrine and the counter-majoritarian objection. This discussion goes beyond the scope of this article but, in short, it is strongly arguable that the inability of children and FG to exercise either direct or indirect influence on the elected branches of government should serve as the basis of an enhanced role for the courts in protecting their rights in climate change litigation.<sup>126</sup> It is clear, however, that the rights of existing children focused on the here and now may raise different issues with regard to democratic citizenship, diverse forms of representation, the legitimate scope of majoritarian decision making, and judicial review than is the case for the future rights claims of existing children as future adults or those of not yet existing FG. For instance, the extent of effective virtual representation of not yet living FG and that of children on the basis of shared interests with current voters (or on the basis of empathy or compassion) – and the resultant need for (and legitimacy of) judicial intervention to secure their rights – will almost certainly differ.<sup>127</sup> If the courts are to engage with the realities of the position of these groups vis-à-vis democratic political decision making on the environment when deciding whether to impose constitutional constraints on said decision making, this cannot be achieved where the groups of rights holders at issue are not clearly identified or identifiable.

## 5. Conclusion

We are at a crucial juncture in terms of the litigation and adjudication of the rights of children and FG. The immediate and long-term impacts of environmental harm are ever-more evident and pressing; the courts are an increasingly frequent and important destination for those seeking to challenge executive and legislature failure to take meaningful action to secure the constitutional rights of people in the here and now and those of the future. However, in many instances judicial and litigation efforts have been hampered by the lack of precision of definitions of ‘future generations’ under both comparative constitutional and international human rights law.

While not arguing for a specific definition of ‘future generations’ to be employed universally, this article has made clear that it is vital that the definitional lacuna should be recognized and addressed by courts in the cases appearing before them. Without this, the capacity of litigation and adjudication to secure convincing and coherent protection for child and FG rights holders in climate justice cases – whether on the basis of their status as children, members of FG, or both – will remain out of reach. With this

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public lecture at the University of Ulster, Belfast (UK), 10 Nov. 2022, available at: <https://www.youtube.com/watch?v=ULzsmz7BHqc>.

<sup>126</sup> Ibid. For an accessible overview of this argument see A. Nolan, ‘Democracy is Failing to Protect the Environment for Future Generations: So the Courts Are Stepping In’, *Prospect*, 28 June 2021, available at: <https://www.prospectmagazine.co.uk/politics/37749/democracy-is-failing-to-protect-the-environment-for-future-generations.-so-the-courts-are-stepping-in> (drawing on the German Federal Constitutional Court’s decision in *Neubauer*, n. 2 above, and the Norwegian Supreme Court’s ruling in the *Greenpeace Nordic Association* case, n. 6 above).

<sup>127</sup> For more on how such virtual representation operates in the context of children and how this should affect the judicial role see A. Nolan, *Children’s Socio-Economic Rights, Democracy and the Courts* (Hart, 2011).

groundwork laid, the next stage is for a context-sensitive approach to the whole question of constitutional definition(s) of FG, but that is work for another day (and another article).

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