

# Taking Future Generations Seriously: A Rejoinder to Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla; and Peter Lawrence

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A cartoon in the *New Yorker* on 12 July 2023 with the title ‘Solve That Problem!’ depicts two besuited older white men on a game show panel before whom a microphoned compère intones: ‘The clock is ticking – will you solve the problem or pass it on to future generations, Congressman?’<sup>1</sup> The obvious appeal of the joke is the starting point for an article I recently published in this journal, titled ‘Against Future Generations’: the invocation of future generations is intuitive and powerful, even visceral. Of course we want the congressmen to ‘solve the problem’ and not pass it on to ‘future generations’. But in this move – a niggling feeling I had – we may miss something: the problem is ours – it is a problem in the present. What, actually, do future generations have to do with it? And if we do take ‘future generations’ seriously – to pursue the point – which future generations, where and, not least, when? How are ‘their’ interests and concerns any different to ‘ours’, globally, today? If they are somehow different, wherein lies the distinctiveness? If they are not, why raise them at all? Who are they anyway? Is there, in fact, a ‘they’ there? (I mean ‘there’?) And who are ‘we’?

My worry was that if legislators cannot or will not ‘solve the problem’ for those alive today – the poverty, inequality and vulnerability, the encroaching insecurity and wildfires and heatwaves and hurricanes – and not just within their own borders, but globally – given the USA’s (to stick with the *New Yorker* setting) immense responsibility for climate change – it is hard to see why any particular version of ‘future generations’ would produce a better outcome: future generations in the world as a whole? In the USA as a whole? Or just in (say) New York? Do we mean future constituents? Voters? ‘Our children and grandchildren’? In 10 or 500 or 10,000 years’ time? Clearly everything depends on the boundaries we choose, in both space and time; policy conclusions

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<sup>1</sup> B. Loper, ‘Daily Cartoon, Wednesday, July 12th’, *New Yorker* (12 July 2023).

will vary dramatically according to our choice. But, I fear, it is precisely this boundary-precision that the easy appeal to future generations tends to elide. So my further worry, as I thought it through, was that the category itself tends to decay, on close inspection, into farce.<sup>2</sup> Perhaps the language is irredeemably fuzzy? And, worse, perhaps the more we talk about these vague future beings, the more it tends to obscure the scale and extent of the actual inequity facing concrete present generations.

After all, to focus on present generations – to do so fully and properly – involves a conscious effort to see past national borders: this, at least, has always been the premise of climate ethics. ‘Future generations’ discourse claims to do likewise, but the challenge of imagining global future generations into perpetuity is, I fear, exorbitant (literally). In practice, when hard choices arise, one would expect that ‘local’ future generations will always be preferred in any given context (a slippage that begins with an implicit appeal to our children). The worry, then, is not only that a ‘future generations’ language is not easily defined but also that, in practice, it may slide easily into localism or nationalism. And, indeed, this is what one finds wherever future generations are invoked concretely – in courts, legislation or institutions.<sup>3</sup> The invocation of future generations in local or national settings may be a good thing locally, but for global climate policy it could equally be disastrous – after all, different places are impacted differently by different levels of global temperature rise (for some, we are already past the limit), and different countries have vastly different technological and adaptive capacity to deal with the consequences: for some, the trade-offs are truly invidious.<sup>4</sup> If each country acts for ‘its’ future generations, there will be many losers.

<sup>2</sup> This is to paraphrase Theodor Adorno’s critique of Georg Hegel’s account of a universal history, in which ‘the concept of reality decays into farce’. T. Adorno, *Negative Dialectics* (1973 [1966]), at 330.

<sup>3</sup> Humphreys, ‘Against Future Generations’, 33(4) *European Journal of International Law (EJIL)* (2022) 1061, at 1064–1066, 1086–1087, 1089 (on the *Neubauer* ruling). Among my interlocutors, Wewerinke-Singh, Garg and Agarwalla, ‘In Defence of Future Generations: A Reply to Stephen Humphreys’, 34(3) *EJIL* (2023) 000, point out that ‘the outcome’ in *Neubauer* ‘cannot solely ... be attributed to its future generations framing’, blaming ‘[o]ther factors, such as the court’s adherence to traditional principles of national jurisdiction or hesitance to venture into complex transnational legal issues’ (at 000). This was, though, essentially the point I was attempting to make, perhaps insufficiently clearly: ‘courts generally present as territorially bounded creatures, unprepared to prioritize foreign persons even in the present, much less in the future’ (at 1087). Both my interlocutors query my admittedly oblique expression, regarding the Colombian case *Andrea Lozano Barragán*, that it is ‘the exception that proves the rule’ (at 1065, n. 9). *Andrea Lozano Barragán, et al. v. Presidencia de la República et al.*, Sentencia de la Corte Suprema de Justicia del 5 de abril del 2018, MP Luis Armando Tolosa Villabona, STC 4360-2018, Radicación no. 11001-22-03-000-2018-00319-01. While I wonder at the reach of the judicial dicta in this case, as reported (in partial translation), I accept the ruling needs more exposition. Peter Lawrence notes that the statutory basis of the Welsh future generations commissioner mandates it to consider ‘global well-being’. Indeed it does: I had discussed this language in an early draft of the article, but subsequently removed the entire section (on historical responsibility – Wales itself being a historically high emitting territory) to which the passage belonged. Fuller analysis of this clause would require examination of the activities and jurisdictional reach of the commissioner – but it must inevitably be read in light of the significant budgetary, legal and political constraints facing the commissioner (to be clear: I respect her work immensely). Peter Lawrence, ‘International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys’, 34(3) *EJIL* (2023) 000.

<sup>4</sup> See, e.g., ‘The Choice between a Poorer Today and a Hotter Tomorrow’, *The Economist* (7 June 2023).

So, for example, the ‘future generations’ register, historically emanating from the old West, typically focuses on rapid mitigation. But steep mitigation is relatively less painful in rich countries – where there is also greater capacity to adapt. By contrast, many poorer states face exceedingly high costs *both* from the changing climate *and* from fast mitigation. ‘Which’, asks *The Economist* of such cases, ‘is a wiser use of the marginal dollar: alleviating acute poverty straight away or doing your country’s bit to stop baking the planet?’<sup>5</sup> Their analysis puts the current shortfall for dealing with combined climate and poverty costs in developing states *today* at around US\$3.4 trillion.<sup>6</sup> Wealthy states, it is generally agreed, have a historical responsibility to underwrite these immense costs. But the money is not coming. A case to stump it up can be made in the name of ‘future generations’, but a quieter case against doing so is also imaginable: this is, after all, our children’s inheritance – better, surely, to keep or at best loan (some of) it? In any case, large transnational transfers are not where future generations language leads. In climate law, it is precisely the policies aimed at *present* generations (abroad) – adaptation funding, technology transfer and now, inevitably, ‘loss and damage’ – that are most neglected. Some developing countries could thus perhaps be forgiven – with ‘their own’ future generations in view – for betting on fossil fuels today and adaptation tomorrow: ‘[w]ithout fossil-fuel revenues, at least a dozen poor countries ... would face unmanageable debt burdens’.<sup>7</sup> This is an ethical dilemma to be sure, but it is also hard politics. The incalculable failure of historically responsible states to act on adaptation and technology (or even on mitigation) may leave others with little choice but to safeguard their own future generations however they can, in an increasingly hotter world.

My article aimed to shake out these worries. I am of course (as the article reiterates) ‘for’ future generations – certainly, in the abstract sense that the expression invites, as fellow future humans brought forth into the unknowable,<sup>8</sup> how can one not be?<sup>9</sup> My concern, though, is with the imprecision of this rhetorical appeal, the conceptual slipperiness, the poor referentiality. In an early draft of my original article, I expressed my unease with this register ‘on both epistemological and normative grounds’. Epistemological because I doubt that, on inspection, the signifier ‘future generations’ has a determinate referent. Normative because I doubt it is ethically sound or sensible

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, citing the Grantham Research Institute at the London School of Economics.

<sup>7</sup> *Ibid.*, citing the International Monetary Fund. Richer states are not only historically irresponsible but baldly hypocritical: ‘European leaders demand poor countries stop subsidising fossil fuels, and skip developing gas and coal as domestic energy sources altogether, all the while bringing coal power plants online at home and increasing imports of gas from Africa.’

<sup>8</sup> I am also ‘for’ long-term thinking, as my *EJIL* piece likewise makes clear, though I imagine my critique extends also to some recent expressions of ‘long-termism’. See, for example, A. Ahuja, ‘We Need to Examine the Beliefs of Today’s Tech Luminaries’, *Financial Times* (10 May 2023); J. O. Conroy, ‘Power-hungry Robots, Space Colonization, Cyborgs: Inside the Bizarre World of “Longtermism”’, *The Guardian* (20 November 2022).

<sup>9</sup> The writers to whom I am responding direct my attention to the Maastricht Principles of the Human Rights of Future Generations, 3 February 2023, co-drafted by one among them, and with whose broad principles it is difficult to disagree. See too my caveats in Humphreys, *supra* note 3, at 1062, 1063.

to build policy around fuzzy categories. I later dropped this language (it risked taking the piece itself into a more abstract register than I wished) – but the basic premise still drives the piece: since I am called upon to defend the argument, at least in part, in this less formal setting, I hope its articulation here might be helpful.

I am privileged to have had two elegant responses to that article, from four distinguished authors. It is a real honour to be invited by the *European Journal of International Law (EJIL)* to respond in turn. My title was intended to be provocative, but the piece is not seeking argument for its own sake, and I can see my interlocutors understand this. The ethical, as well as practical, challenges raised by climate change are seismic, and I believe we all agree that a lot rides upon the terms we use: how we speak and think about ‘responsibility’ and ‘vulnerability’, where we direct our research and political energies, what sorts of politics we are willing to countenance as viable and valuable. Moreover, I believe that we are all in essential agreement on many, and probably most, matters to do with climate policy and ethics: we are all, in short, on the same side. It is a pleasure, therefore, to respond, and I will do so in a spirit of progressing a shared understanding of this immense challenge. My hope is that, in doing so, we can provoke and contribute to a larger debate on responsibility and timeliness in climate matters.

That said, the two responses do not articulate identical points of disagreement – indeed, in some respects, they pull in quite different directions. In what follows, I will begin by laying out the principal points I hoped to convey in my original argument in synoptic form. I will then turn to the two papers and my responses to these respectively.

## 1 How (and Why) ‘against’ Future Generations?

The take on ‘future generations’ discourse laid out in my *EJIL* article is not, for me at least, new: it had a lengthy prehistory. I had presented a (very different) paper with a similar title to the Oxford Martin School back in 2012. Before then, a report I authored in 2008 on climate change and human rights for the International Council on Human Rights Policy listed 25 themes for future research in an appendix.<sup>10</sup> ‘Future generations’ was not among them. This was not an oversight: I had consulted widely in drafting that report, and this matter had been raised by some of my interlocutors. It seemed to me attractive but foggy. I have since had the good fortune to have had several conversations with scholars whose work features in the footnotes of my *EJIL* article, whom I respect and admire immensely and from whom I take my cue on many matters of climate ethics. But on this one, I felt, and still feel, that the *pathos* risks overwhelming the *logos* – the appeal to emotion subsumes the appeal to reason.

I recall, for example, a 2013 roundtable at the Villa Moynier in Parc de Mon Repos in Geneva, which was convened under United Nations (UN) auspices. We discussed emergent human rights dimensions of climate policy: equity, extraterritoriality, mitigation, litigation, causation, adaptation and, inevitably, the ‘rights of

<sup>10</sup> International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008), at 85–90, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551201](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551201). The report owes much to Robert Archer’s meticulous editing.

future generations'. It was an interesting and serious discussion, geared to policy, but through the range of well-intentioned views I found myself wondering what this register is *for*, given the extraordinary urgency of global warming. Already by then, warming was nearly 1 degree Celsius above pre-industrial temperatures. Typhoon Haiyan struck the Philippines in late 2013, with the fastest hurricane speeds ever recorded (they have since been superseded), leaving 6,300 people dead, 12,000 injured and 4.1 million homeless in its wake. Surely the duty to those alive today in climate matters would meet any related concerns of future generations by default?

To pursue the point, imagine a 10 year-old born in 2012. Had the necessary steps been taken to head off Typhoon Haiyan, climate change would not now present a concern for that child or their generation – not, at least, in terms of climate impacts (though there are trade-offs hidden within this counter-factual that merit attention). We knew what steps were needed from 1992 at the latest, when the UN Framework Convention on Climate Change was opened for signature, that is, within the same generation as Haiyan.<sup>11</sup> It is now too late for the victims of Haiyan but not for others now alive. Indeed, we need to accelerate dramatically, just to protect the present.<sup>12</sup> And to pursue the point further, were we now ready to take the (significant, arduous) climate-related steps necessary to protect that child's human rights today – and those of their counterparts in hurricane-prone territories or, say, sinking islands – this would, again, already meet the needs of the generations to follow, at least on this important matter. It is hard to imagine any point in the past in which the fulfilment of a duty of care for present generations globally – were we capable of exercising such a thing – would not have carried forward for future generations too. The claim of present generations is felt, known, concrete and tangible: indeed, we are saturated in relevant knowledge. If we are unable to act decisively on these felt palpable claims, why assume we are better able to act on the abstract claims of non-existent beings? The point seems obvious, but apparently it needs stating.

So what is added through a distinct concern with future generations? I worry it arises, conversely, only if we cannot (or will not) meet the climate threat to the present. Or, more starkly again, even to consider the rights of future generations as distinct from those of present generations appears already to assume failure with regard to the latter. At that point – once we believe we must consider the rights of future generations *because* we are failing the present – it seems to me that we are on a very slippery slope indeed: we are, at that point, engaged in determining the best interests of people we do not know (in their billions, apparently) in a context we cannot conceive (but necessarily globally), precisely because it is not the same as the familiar context we have failed to address – while, at the same time, consigning the immense sacrifices borne by present persons to a kind of ethical oblivion. There is more than a whiff of hubris here, even if the primary motif is failure.

<sup>11</sup> United Nations Framework Convention on Climate Change 1992, 1171 UNTS 107.

<sup>12</sup> One headline today as I write reads: H. Mance 'Extreme Wildfires Are Here to Stay. Can Human Beings Really Fight Them?', *Financial Times* (13 July 2023).

Moreover, what if it is precisely the impossibility of effectively imagining a global solidarity for the concrete present – the intractable politics, the failing institutions, the devilish detail – that leads instead to the invocation of a global future mass for whom we can still act (hopefully)? At this point, the only advantage to a future generations discourse would appear to be its relative non-specificity, its ‘unknown quality’, as Reinhardt Koselleck put it.<sup>13</sup> This seems problematic to me. Moreover, a likely consequence of failing to meet the structural equity concerns of present generations today must surely be to pass them on, in effect, to actual future generations.<sup>14</sup> Paradoxically, future generations rhetoric itself may work against future generations.

‘Against Future Generations’ pursues a number of interrelated arguments beyond these points. It may be (as at least one of the reviewers felt) that these might have been more appropriately propounded at book length; but whereas I (unfortunately) could not foresee a window to do so, I also hoped that the shorter format might prove more digestible. I have already touched on several planks of the argument. To these, I would add several more:

- I aimed to make explicit the degree to which the discourse of future generations involves an assumption of sacrifice and to begin to articulate how we might think about sacrifice in the context of climate change. Drawing on Jacques Derrida’s writing, the principal point I wished to make is that arguments concerning a readiness to ‘sacrifice’ for abstract future persons are belied by an apparent unwillingness to make sacrifices for concrete present persons – and that the relative inarticulacy of the relevant ‘sacrifice’ towards future generations appears insuperable if not disingenuous.<sup>15</sup>
- I aimed to take seriously, and to make accessible to legal academics, the enormous existing climate science base for discussing ‘future generations’ more concretely. Climate scenarios are not only highly developed by now, with a vast number of resources and data at their disposal, they have also become key elements of the policy recommendations channelled through the Intergovernmental Panel on Climate Change and elsewhere. My examination of these scenarios points to several shortcomings, some of which might be addressed in part through the engagement of social scientists such as international lawyers, but it is in the main intended to open a discussion among legal academics on a highly evolved area of climate science that is of immense importance to the topics we now debate under the ‘future generations’ rubric.
- I aimed to notice that a focus on future generations tends to displace the long-standing discussion, in the climate context, of past responsibility (though I ultimately removed from the published article this argument as initially conceived). Given the failure of rich states (and private entities) to take responsibility

<sup>13</sup> R. Koselleck, *Futures Past*, translated by K. Tribe ([1979] 2004), at 22.

<sup>14</sup> Humphreys, ‘Equity before “Equity”’ 86 *Modern Law Review* (2023) 85.

<sup>15</sup> Humphreys, *supra* note 3, at 1080–1084; J. Derrida, *The Gift of Death*, translated by D. Wills (1995 [1992]).



for the impacts of their past actions on present generations, the appeal to an abstract future may appear self-serving.

## 2 Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla

I enjoyed this piece immensely and learned a lot from it. I do not believe that the authors and I disagree on very much – and they apparently think likewise: insofar as we diverge, my sense is that our differences amount to ripples in a larger sea of common concern and relate more to emphasis than substance.<sup>16</sup> Wewerinke-Singh, Garg and Agarwalla weave, as they say themselves, ‘a rich tapestry’ of legal sources relating to future generations, focusing on the global South, showing in the main the degree to which an ‘intergenerational’ register has been embraced or incorporated into some judicial rulings and elsewhere. My sense is that these observations do not contradict the points I was hoping to make myself – for reasons I will expand on below – but I certainly welcome the fascinating discursive window this literature opens up and am grateful to these scholars for opening it.

In framing their piece, Wewerinke-Singh, Garg and Agarwalla draw a contrast between, on one hand, the ‘white male scholars at elite institutions in the global North’ who are, in the main, the targets of my critique, and, on the other, ‘diverse voices’ and ‘sources’ from the global South, to whom they draw attention in their article.<sup>17</sup> It is entirely apposite to juxtapose these differing registers regarding future generations, and it provides, I think, a complementary angle on the points I hoped to make myself. Indeed, there are doubtless many more than two registers at issue here: a universalizing all-subsuming discourse, on one hand, and a multiplicity of distinct voices, on the other. I do not find this characterization entirely unproblematic – a point I will return to – but I quite accept that there are several kinds of ‘future generations’ registers, and I am grateful for the welcome pointers in this piece.

To me, this frame, counterposing what we might call a ‘master-discourse’ to ‘subaltern’ voices, is not only valid, but it is also immensely valuable and, I think, under-examined. It is not accidental, I assume, that one finds such easy universalism precisely within the traditional halls of power.<sup>18</sup> Indeed, it was once put to me that the policy relevance of a ‘future generations’ register is exemplified precisely by these elite institutions themselves – the Oxfords, Harvards and the like – that have lasted many

<sup>16</sup> For instance, the authors write: ‘[Humphreys] points out that an over-emphasis on the future can come at the expense of present concerns and that certain invocations of future generations can be parochial and hypocritical. While we agree with Humphreys on these points, we reject his conclusion that future generations discourse should be dismissed altogether.’ Wewerinke-Singh, Garg and Agarwalla, *supra* note 3, at 000. I am genuinely pleased that we agree on so many points, but would clarify that I do not conclude that ‘future generations discourse should be dismissed altogether’. My article includes a range of caveats that hopefully show otherwise. Humphreys, *supra* note 3, at 1062 and 1063.

<sup>17</sup> Wewerinke-Singh, Garg and Agarwalla, *supra* note 3, at 000.

<sup>18</sup> See, in this regard, the discussion of universalism in Wewerinke-Singh, Garg and Agarwalla, *supra* note 3, at 000, n. 11.

centuries and expect to last many more, and that self-consciously hold something in trust for the future, growing wealthier, more powerful and more secure over time, passing on a happy legacy to future generations (or to a lucky few among them – this being the critical caveat). Not only can such stately institutions adopt a long-term lens, but trans-generational longevity is a central element of their institutional identities. This analogy seems to me instructive. In visiting one such institution, I was struck by memorable conversations with a college gardener, whose views on landscaping were enviably long term: an oak planted today, for example, could frame a fountain on a side lawn viewed from a library window, in say 60 years' time, perhaps to be set off by maturing chestnuts to be cultivated in the backdrop 20 years hence. It is a deeply privileged viewpoint – the prerogative of the landscape architect – and premised, of course, on profound security of tenure. (In Oxbridge, only 'fellows' and 'masters' get to peruse many of these gardens: even the elite has an elite.)

This point has much broader ramifications: it is worthy of a paper in its own right. Where do we find exemplary preparations for future generations? Dynasties, monarchies, churches, pension funds? Wherever we find 'endowments', 'legacies', 'trusts', various kinds of (in a notable irony) 'equity' – buildings named for benefactors, long-term assets. Future generations thinking is, in fact, already everywhere. From a certain perspective, it is the capacity to think or plan long term that makes an elite 'elite'. Or, to take the point further, perhaps it is the unwillingness of the 'haves' to part with their wealth today – to pass it on to present generations (that is, through taxes) despite the evident need, or our broader reluctance to require them to do so, that drives contemporary inequality, giving rise in turn to the enormous inequities of climate impacts and policies: this is 'patrimonial capitalism'.<sup>19</sup> We live in a low-tax world with a super-rich upper crust and tiny transnational transfers, and no one believes in the 'trickle-down effect' anymore.<sup>20</sup> So where does all the money go? Whose is the future?

In my partial defence on this point, an excised section of my article as published, dealing with historical responsibility for climate change, touched on this set of issues by looking explicitly at the role of colonial-era interventions in setting off and shoring up the particular wealth distribution that prevails today and so, in turn, underpins climate inequity.<sup>21</sup> The section (which itself needs to be book length: this is a vast topic) focused on the very poor acknowledgement of historical responsibility with regard to both colonial and climate wrongs, despite detailed evidentiary documentation. Look, for example, at the University College London database on the compensation paid to British Caribbean slaveowners after abolition in 1833 – vast fortunes provided by the state, passed on to the scions of the plantation landlords, which – when invested and hedged over decades – underpins the fortunes of numerous 'establishment' figures

<sup>19</sup> T. Piketty, *Capital in the Twenty-First Century*, translated by A. Goldhammer (2014), at 191, 215.

<sup>20</sup> In Britain, for example, '[h]ome ownership and housing wealth are the biggest drivers of the wealth divide within each generation', and 'the gap is widening'. J. Burn-Murdoch, 'Home Ownership in Britain Has Become a Hereditary Privilege', *Financial Times* (14 July 2023).

<sup>21</sup> I have touched on these matters in Humphreys, 'Climate Change: The Claim of the Past', 5 *Journal of Human Rights and the Environment* (2014) 134.



today,<sup>22</sup> some among whom are now moved to offer (relatively tiny) reparation funds in partial recognition of this vile history.<sup>23</sup>

At the same time, the descendants of those same slaves have struggled to prosper, certainly as a group. In one important jurisdiction, the indignity of entrenched racism, poverty and mass incarceration has just been crowned with the loss of the symbolic agency of ‘affirmative action’. Others – in the Caribbean say – experience repeated pounding by stronger and more destructive storms year after year. Nothing speaks more to this entrenched inequity than the refusal, in Paris in June 2023, of Western states, banks and international financial institutions to back Barbados Prime Minister Mia Amor Mottley’s plan for condign funding for climate mitigation, adaptation, technology and loss and damage in countries where money is needed *now*.<sup>24</sup> This refusal emanates from some actors whose own vast wealth today stems in some degree from their historical involvement and investment in those same islands, leaving them first depopulated, then enslaved, then ‘under-developed’ and now ravaged by climate change. It is as though the West’s wealthiest feel, with few exceptions, no responsibility for the actions of their forebears. But, then, what is the money for – the vast wealth of today’s world? Where does it go? To whose future does it belong? Of course, this is much more than a 200-year-old story: climate inequities have a very long tail. So I entirely agree with Wewerinke-Singh, Garg and Agarwalla that a story making sense of contemporary events can only be told from the global South, allowing us to ‘broaden our temporal horizons and remind[ing] us of the interconnectedness of past, present, and future’.<sup>25</sup>

The body of judicial rulings analysed by Wewerinke-Singh, Garg and Agarwalla, and the range of jurisdictions encompassed, is hugely impressive. It includes case law from Pakistan, Nepal, India, Kenya, South Africa, Philippines and Colombia as well as the Inter-American Court of Human Rights (IACtHR) and the UN Children’s Rights Committee. I am not well placed to comment on this large body of important judicial work nor even to address the many interesting points raised therein. I will focus on just two broad observations that seem to emerge from this impressive survey. The first is that the notion of future generations is often articulated in terms, as the IACtHR put it (cited by the authors), of ‘the close ties of indigenous people with the land’.<sup>26</sup> Rebecca Tsosie too is quoted in a footnote: ‘most indigenous peoples maintain the concept of caring for the land in a way that benefits the current people, as

<sup>22</sup> University College London Centre for the Study of the Legacies of British Slavery, available at [www.ucl.ac.uk/lbs/project/details/](http://www.ucl.ac.uk/lbs/project/details/).

<sup>23</sup> See, e.g., J. Nevett, ‘Laura Trevelyan: My Slavery Link to MP Shows Reality of Reparations’, *BBC News* (2 April 2023), available at [www.bbc.co.uk/news/uk-politics-65125332](http://www.bbc.co.uk/news/uk-politics-65125332). See ‘Caricom 10-point Plan for Reparatory Justice’, *Caricom*, available at <https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/> (including, e.g., technology transfer).

<sup>24</sup> See, e.g., M. Wolf, ‘The Green Transition Won’t Happen without Financing for Developing Countries’, *Financial Times* (20 June 2023), followed by M. Wolf ‘The West Must Recognise Its Hypocrisy’, *Financial Times* (11 July 2023); ‘2022 Bridgetown Initiative’, 23 September 2022, available at [www.foreign.gov.bb/the-2022-barbados-agenda/](http://www.foreign.gov.bb/the-2022-barbados-agenda/).

<sup>25</sup> Wewerinke-Singh, Garg and Agarwalla, *supra* note 3, at 000.

<sup>26</sup> *Ibid.*, at 000, n. 19.

well as future generations'. Indeed, this 'tie' forms the burden of the first section of their reply: the claim that land, for many indigenous peoples, ties past to present to future generations, and, therefore, the interests of future generations are partly met through the conservation in indigenous hands of indigenous lands (and, presumably, of post-colonial lands in post-colonial hands – though, in practice, this tends in a much more radical direction). I am not equipped to judge a claim of this sort – I certainly have no disagreement with anything stated here – but notice that the concern is with security of tenure articulated in terms whose relationship with the colonial past is complex. The authors point to a broader relevance to climate concerns that I agree will bear greater examination.<sup>27</sup>

My second observation, which follows from my first, and picks up the next set of claims put forward by Wewerinke-Singh, Garg and Agarwalla (I touch on their third set further below), is to notice that the concrete examples here are almost entirely and explicitly local: the claims are made on behalf of the 'future generations' of specific communities – Iroquois, Pakistani, Indian, Nepalese, Kenyan. This is quite as it should be, of course. But it complements (I believe) my own argument in two respects. In the first place, it underlines, and even demonstrates, the degree to which a future generations discourse is, as suggested in my piece, prone to a localist/nationalist inflection. We may wish to care about 'all' future generations, but the very thought is overwhelming – indeed, impossible: concretely, we are likely to arrive onto much sounder grounding if we direct our care towards our 'own' in some sense, socially, culturally, ethnically, nationally or perhaps just temperamentally. In the case of indigenous and post-colonial lands – and I am aware that I am generalizing here – this appears to make *prima facie* sense: such has been the hardship visited on previous generations – in so many cases, with group identity itself placed at risk in the colonial process – that we might conclude that community survival depends upon there *being* a future generation located on a terrain within which to carry it forward. This is all to the good, but, as my article attempts to show, acting in the interests of local/national 'future generations' need not produce optimal outcomes for global future generations, and may do the reverse.

In these cases, however, the local emphasis runs counter to the universalizing tendency that I had attempted to identify, and here is the second sense in which I believe it complements my case. The appeal to future generations in the specific cases cited by Wewerinke-Singh, Garg and Agarwalla resists a modernizing, (post-)colonial impulse by limiting, for example, mineral extraction, deforestation and (in one case) cement production and by opposing water and air pollution in Kenya and South Africa respectively.<sup>28</sup> Clearly, any benefits will accrue both to the present and future. And

<sup>27</sup> In this regard, see Gonzalez, 'Racial Capitalism, Climate Justice, and Climate Displacement', 11(1) *Oñati Socio-Legal Series* (2021) 108.

<sup>28</sup> Supreme Court of India, *Goa Foundation v. Union of India & Ors.*, Writ Petition (Civil) no. 435 of 2012, Judgment (21 April 2014); Supreme Court of Pakistan, *D.G. Khan Cement Company v. Government of Punjab*, 2021 SCMR 834; High Court of Kenya, *Waweru v. Republic of Kenya*, (2006) 1 KLR (E&L) 677–696; High Court of South Africa, *GroundWork Trust & Vukani Environmental Justice Alliance Movement in Action v. Minister of Environmental Affairs & Others*, Case no. 39724/2019, [2022] ZAGPPHC 208 (2022).

whereas shielding the local 'natural' environment from the market, in the name of future generations, may derail old colonial and post-colonial trajectories, it does not abandon the sovereign claim to territorial dominion. It is, in this sense, post-modern as well as post-colonial, embedding the modern impulse while also reorientating it (in this, we might hope and expect these cases to reflect a broader, even global, trend). Yet, despite the occasional grandstanding statement on behalf of humanity as a whole, absent is the long-standing tendency of the old West – visible and even dominant in climate policy – to subsume the world's interests into its own. Perhaps it is this wrinkle that distinguishes the local from the parochial.

Where the cases deal explicitly with climate matters – three from Pakistan and one from Nepal – there are, I think, complexities.<sup>29</sup> On my reading, the invocation of future generations plays a decidedly rhetorical/*obiter* function in these rulings.<sup>30</sup> More to the point, in all of these cases (except the three-page *Maria Khan* ruling), climate adaptation is at issue rather than mitigation.<sup>31</sup> The reorientation of future generations language, in the global South, towards adaptation reinforces, I think, the register diversity identified by Wewerinke-Singh, Garg and Agarwalla. And it matters, of course, because it is in meeting their profoundly onerous adaptation obligations that many countries will face the most difficult trade-offs. These trade-offs are far more concerning for poorer than richer countries, especially given the negligible adaptation support received from the historically high emitters, the exorbitant adaptation costs and the need for economic wherewithal to meet them – demands that, in turn, will tend to constrain mitigation options. This is why China, Brazil and Indonesia have grown to join the world's highest emitters (in absolute, not per capita, terms) throughout the period of climate awareness. Wewerinke-Singh, Garg and Agarwalla acknowledge this inconvenient truth, noting that steep mitigation requirements in the 'global South ... may sometimes seem to be at odds with climate justice'.<sup>32</sup> The concern that my article aimed to raise is that this trade-off is likely to be at its most acute precisely when taking future generations seriously.

<sup>29</sup> The cases are *Khan Cement*, *supra* note 28; Lahore High Court, *Ashgar Leghari v. Federation of Pakistan*, Case no. 25501/2015, Order of 4 September 2015; Lahore High Court, *Maria Khan et al. v. Federation of Pakistan et al.*, Writ Petition no. 8960/2019, 15 February 2019; Supreme Court of Nepal, *Shrestha v. Office of the Prime Minister et al.*, NKP 2075 (2018), 61(3), Decision no. 10210.

<sup>30</sup> So I am not quite sure I see the evidence for the claim that 'litigants are able to seek urgent and pressing climate justice through judicial protection by using the powerful device of future generations' rights'. Wewerinke-Singh, Garg and Agarwalla, *supra* note 3, at 000.

<sup>31</sup> The order requires the Pakistani government to fulfil its international obligations under the Paris Agreement for the reasons already stated in *Leghari*, *supra* note 29; Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

<sup>32</sup> Wewerinke-Singh, Garg and Agarwalla, *supra* note 3, at 000, citing Juan Auz. I am paraphrasing here, as the quote refers to 'remedies delivered by global South courts' but I am unaware that there are any such 'remedies' regarding mitigation, which must surely be at issue here. Auz, 'Two Reputed Allies: Reconciling Climate Justice and Litigation in the Global South', in C. Rodríguez-Garavito (ed.), *Litigating the Climate Emergency* (2022), 145.

### 3 Peter Lawrence

The second response to my intervention was written by a pre-eminent scholar in this field, Peter Lawrence. Lawrence is the author of the well-wrought and carefully argued *Justice for Future Generations*, a book that shares some real resonance with the argument I make in 'Against Future Generations'.<sup>33</sup> Lawrence and I agree on many points. We are both sceptical of the Rawlsian approach to 'future generations' – indeed, Lawrence's critique is the more thorough.<sup>34</sup> We both hold Henry Shue's scholarship in the highest regard.<sup>35</sup> Shue is an exceedingly profound and complex thinker whose work has been inestimably influential – for myself and for many others besides. Shue's recent *The Pivotal Generation* is a must-read on this topic, unmatched in its power and perspicacity, and a testament to a lifetime of nuanced, conscientious and constantly evolving interdisciplinary thought on matters of enormous complexity.<sup>36</sup>

Lawrence raises several concerns with my article, but, in the main, these appear to be based on misunderstandings. It is possible that I did not express myself with sufficient clarity or nuance, but, turning to the first two of the three positions Lawrence attributes to me to structure his response, the arguments presented are not mine. I did not claim either that 'intergenerational framings are incapable of translation into legal rights and policy' nor that 'pursuing national institutions for future generations ... is not an appropriate approach for developing countries'. Quite the contrary in both cases. I am much rather concerned that intergenerational framings can and will be translated into rights and policy – but in a manner that fails to meet broader equity concerns – and I have no institutional prescriptions for developing countries (but, if I did, I cannot imagine opposing 'future generations commissions', for reasons that I hope are clearer from the foregoing).<sup>37</sup> Even the third position that Lawrence attributes to me – that 'future generations discourse tends to prioritize intergenerational over intra-generational justice' – does not appear to take seriously the ambiguities that I had flagged with regard to these particular terms and the nuance with which I had hoped to invest them. (To overcome these infelicities, I opted to restrict the term 'present generations' to a 20-year radial buffer surrounding the present – an approach

<sup>33</sup> P. Lawrence, *Justice for Future Generations* (2014).

<sup>34</sup> *Ibid.*, at 51–55, especially 54.

<sup>35</sup> Lawrence claims that I quote Henry Shue out of context; I do not believe I do. My debt to Shue is profound, whereas I regard my disagreements with him as relatively minor, if important. See H. Shue, *Climate Justice: Vulnerability and Protection* (2014); R. Kanbur and H. Shue (eds), *Climate Justice: Integrating Economics and Philosophy* (2018); H. Shue, *The Pivotal Generation* (2022).

<sup>36</sup> Shue (2022), *supra* note 35.

<sup>37</sup> See Humphreys, *supra* note 3, at 000, n. 134 (where I clarify that I 'do not claim to be outlining actual policy in, or with regard to, India', for example). My comments on future generations' institutions were not that they are 'not beneficial' (Lawrence, *supra* note 3, at 000), but that they will likely focus on national interests rather than adopting a global one, particularly in cases of divergence. Humphreys, *supra* note 3, at 1064–1066. To do so may, of course, be beneficial locally without being so globally. My (embarrassingly simple) point was that 'future generations' are not homogenous, neither temporally nor spatially.

that shares something, in fact, with Lawrence's own.<sup>38</sup>) Several other claims that Lawrence attributes to my text are likewise, in my view, misplaced.<sup>39</sup>

But rather than nit-picking, let me pick up on a point I take from Lawrence's often wonderful and consistently well-researched book. Chapter 6 of his book focuses on 'the dramatic disconnect between the powerful ethics and justice-based rationale for strong mitigation action on climate change and the extremely weak international climate change regime'.<sup>40</sup> Lawrence undertakes a form of discourse analysis to explain this observation, relying, in particular, on the work of John Dryzek.<sup>41</sup> He notes the success of 'vested interests' in 'project[ing] their interests as broader social interests' and draws on the Marxist scholar Antonio Gramsci's notion of hegemony to explain this: "'hegemony" entails the exercise of power not through coercive control but through ideologies reproduced by civil society, the church, academia and the media, whereby particular interests are projected as the general, societal interests.'<sup>42</sup> I find the analysis that follows – which I cannot recount with the nuance it deserves here – entirely plausible. Indeed, the account in many ways provides excellent historical context for the case I aim to make in my own piece. For Lawrence, developing states had long refused 'future generations' discourse because the trade-offs between present and future are so much more demanding for poorer countries than for wealthier countries.<sup>43</sup> Nevertheless, 'intergenerational justice' concerns begin to enter developing country negotiating positions in the post-Kyoto period – that is to say, language already adopted by wealthier countries was increasingly adopted by poorer countries too – but tied to a demand for strong mitigation policies in wealthier countries, given the latter's historical responsibility. 'The implication', Lawrence says, 'is that industrialised countries have *global responsibility* for future generations of *all countries*'.<sup>44</sup> The

<sup>38</sup> See Humphreys, *supra* note 3, at 1066–1067, nn. 12–20. In his book, Lawrence flags similar issues. See, e.g., Lawrence, *supra* note 33, at 15: 'In this book, 'future generations' will be defined ... as referring to generations where "none of its members is alive at the time the reference is made"'. (Though I am unsure this successfully removes the many ambiguities.)

<sup>39</sup> At critical points, Lawrence, *supra* note 3, argues against 'implications' he finds in my article – that developing countries do not care about their own future generations (at 000) and that climate litigation should not be concerned with future generations (at 000 and again at 000). My sense is the first implication runs counter to what I actually say (see, e.g., Humphreys, *supra* note 3, at 1065–1066, 1091); I say nothing whatever about the second and would not dictate what 'climate litigation' should be concerned with. Lawrence, *ibid.*, further claims I imply that 'individuals alive now – including young people, for example – necessarily have identical interests with persons born in the future' (also at 000). I do not imply this (and I am not sure I believe it). Lawrence also appears to misunderstand my section on the IPCC scenarios, which is not intended to criticize their existence or conclusions but rather to highlight the great difficulty of putting flesh on these abstract entities (at 000).

<sup>40</sup> Lawrence, *supra* note 33, at 150.

<sup>41</sup> *Ibid.*, citing J. Dryzek, *The Politics of the Earth* (1997) and Dryzek and Stevenson, 'Global Democracy and Earth System Governance', 70 *Ecological Economics* (2011) 1865.

<sup>42</sup> *Ibid.*, at 151, 152, citing A. Gramsci, *Selections from the Prison Notebooks* (1971).

<sup>43</sup> *Ibid.*, at 160 (see notably the quote from Ross Garnaut). For a recent restatement of this vital contextual point, see *The Economist*, *supra* note 4. The piece comprises another lament for the failure of the Mottley Bridgetown Initiative in June 2023.

<sup>44</sup> Lawrence, *supra* note 33, at 158 (emphasis in original).

story he tells may involve a discursive shift; it did not, however, entail a policy shift as the wealthier states did not rise to the challenge.<sup>45</sup>

This is a well-told story, capturing, I think, something important about the progressive circulation of this remarkable term of art ('future generations') through the arteries of international legal discourse across a critical time period. For me, the principal take-away arrives in the next chapter, however, where Lawrence writes: 'an attraction of the neo-Gramscian framework is its dynamism: discourses are not set in stone and may change over time.'<sup>46</sup> This sounds right. But, to me, Lawrence's account of Gramsci looks oddly partial: he appears to remove both the 'dialectic' and the 'materialism' from what is otherwise a Marxist account. Discourses do not just change dynamically (Gramsci might argue): if they develop at all, it is through the counter-position of contrary terms leading to some kind of synthesis ('for' and then 'against' future generations, we might say dialectically, leading to some new discursive position). More to the point, discourses remain 'ideological', legitimating rather than determining: to understand their effect, we must attend to the actual state of events 'on the ground', so to speak (this being the 'materialism'). What then, we might ask, is happening *on the ground*, as the term 'future generations' becomes more widely adopted among an 'international community'?

It seems, on the accounts of all four of my interlocutors, that some developing countries at least have retained or turned to future generations language in recent years, despite the relative non-responsiveness of the 'global North' to their conditional demands. Lawrence, like Wewerinke-Singh, Garg and Agarwalla, points to the reference to 'future generations' in Vanuatu's request for an advisory opinion to the ICJ.<sup>47</sup> The situation for Vanuatu and many other Pacific islands is heart-breaking. I wonder, though, whether the request for an advisory opinion is appropriately read as a success for the language of 'future generations'. Surely, it is much rather an act of desperation in the face of existential threat, due to the unconscionable failure of responsible states to take the measures that would have warded off a terrible fate, the profound insecurity of tenure, facing people who are very much alive today. This plea strikes me as better read in the mode of tragedy.<sup>48</sup>

For what is facing future generations – those of the rich and poor worlds alike – who will get to archive this petition and its consequences is the horror of having had this tragedy unfold before the very eyes of their forebears, i.e. 'us'. This is because, it seems, we were too stubborn or blind to act on behalf of our global neighbours as events unfolded against them – a story of bystanding that is reminiscent of so many horrors of the recent past – and because we failed to take responsibility for the people suffering right before our eyes or to take responsibility for past and present, even as the seas rose and the fires blazed all around us.

<sup>45</sup> *Ibid.*, at 165.

<sup>46</sup> *Ibid.*, at 171.

<sup>47</sup> For the wording of the question proposed by Vanuatu and adopted by the United Nations General Assembly on 29 March 2023, see 'ICJ Resolution', *Vanuatu ICJ Initiative*, available at [www.vanuatuicj.com/resolution](http://www.vanuatuicj.com/resolution).

<sup>48</sup> See I. Venzke, 'Tragedy and Farce in Climate Commentary', *European Review of Books*, vol. 3 (19 April 2023).