

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

**25 May 2023**

# Introduction

* 1. Robert F. Kennedy Human Rights UK and Hogan Lovells International LLP jointly present this submission to the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change (“**Special Rapporteur**”) as a contribution to his report on “Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice” to be presented to the United Nations General Assembly (“**UNGA**”) in October 2023 (“**Report**”). In particular, this submission addresses questions 15, 16 and 17 of the Special Rapporteur’s call for inputs on his Report, which relate to the advancement of the principle of intergenerational justice, namely “*the principle that people must protect current and future generations from the adverse impacts of climate change*”.[[1]](#footnote-2)
	2. In 2010, Judge Cançado Trindade observed that “*it can hardly be doubted that the acknowledgment of intergenerational equity forms part of conventional wisdom in International Environmental Law*”.[[2]](#footnote-3) Over a decade later, while future generations are being increasingly invoked in the climate debate context as a focus of responsibility for present generations,[[3]](#footnote-4) references to the principle of intergenerational justice in international law and domestic law remain limited.
	3. This submission provides some examples of good practices and describes additional mechanisms that may further advance the principle of intergenerational justice at the international and domestic levels. Where we refer to domestic law in this submission, we consider the law of England and Wales and/or UK legislation as appropriate.
1. ***Question 15: What options are available for enshrining the principle of intergenerational justice in international law?***
	1. Starting from the observation that “*international law is created through a dialogue among States, State-empowered entities, and non-State actors*,”[[4]](#footnote-5) the following actors may play a pivotal role in the progressive enshrinement of the principle of intergenerational justice in international law:[[5]](#footnote-6) States through the adoption of international treaties and domestic laws; international organisations through the issuance of resolutions and reports; and international courts through the issuance of advisory opinions.

**(a) States: the adoption of international treaties and domestic laws**

* 1. At the international level, States can actively contribute to the progressive recognition of the principle of intergenerational justice through the adoption of multilateral treaties recognising this principle. The United Nations Framework Convention on Climate Change (1992) (“**UNFCCC**”) expressly formulated the goal of “*protecting the climate system for present and future generations*” and adopted the principle according to which, parties to the UNFCCC (“**Parties**”) “*should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities*” when implementing the provisions of the UNFCCC.[[6]](#footnote-7) In 2015, the Paris Agreement acknowledged that, when taking action to address climate change, Parties should respect, promote and consider their respective obligations on human rights, including intergenerational equity.[[7]](#footnote-8) However, the Paris Agreement did not provide a definition of the principle of intergenerational equity, which would, in our submission, benefit from being clarified in subsequent treaty-making. In particular, we submit that the duty to combat climate change should be expressly tied to the principle of intergenerational justice and Parties should be required to have due regard for the benefit of current and future generations when implementing their obligations under the Paris Agreement. We note that the International Youth Climate Delegate Program at the upcoming COP28 will embed 100 youth within the international climate policy negotiation process, with the objective of ensuring that youth views and proposals are fully integrated into global climate policymaking and dialogues. Discussions arising out of the International Youth Climate Delegate Program may be able to inform subsequent treaty-making.
	2. At the domestic level, States may adopt legislation expressly requiring public authorities to have due regard for current and future generations’ rights and wellbeing when adopting measures aimed at tackling climate change. Domestic legislation can evidence state practice, which together with *opinio juris*, form the basis of customary international law.[[8]](#footnote-9) Examples of good practice can be found in the UK’s Wellbeing of Future Generations Bill, which reached the second reading stage before the House of Commons of the UK Parliament in May 2022,[[9]](#footnote-10) or the Wellbeing for Future Generations Act (Wales) adopted by the Welsh Government, in 2015. These are addressed in further detail in response to Question 16 below.

**(b) International organisations: the issuance of UNGA resolutions and UN Special Rapporteurs’ reports**

* 1. The UNGA may play a pivotal role in the progressive enshrinement of the principle of intergenerational justice in international law,[[10]](#footnote-11) including by issuing resolutions that would expressly recognise and identify the contours of the principle of intergenerational justice in the context of climate change. Indeed, UNGA resolutions have a unifying potential to build on existing norms and establish new international legal parameters for the rapidly evolving circumstances of the climate and biodiversity crises. In this regard, UNGA Resolution  76/300 on the human right to a clean, healthy and sustainable environment provides a valid precedent to build on, including in particular its recognition that sustainable development and the protection of the environment contribute to and promote human well-being and the full enjoyment of human rights “*for present and future generations*”.[[11]](#footnote-12) While UNGA resolutions are not binding as a matter of international law, they can play a role in relation to two of the traditional sources of international law set out in Article 38(1) of the Statute of the International Court of Justice (“**ICJ**”):[[12]](#footnote-13) international treaties and customary international law. First, UNGA resolutions can encourage and lead to the adoption of treaties.[[13]](#footnote-14) Second, UNGA resolutions can constitute the starting point for the development of customary international law.[[14]](#footnote-15)
	2. Additionally, UN special rapporteurs are particularly well-positioned to contribute to the progressive development of the principle of intergenerational justice in the international arena, as demonstrated by the Special Rapporteur in respect of the present call for inputs.

**(c) International courts: the issuance of advisory opinions**

* 1. In addition to judicial decisions,[[15]](#footnote-16) international courts and tribunals may contribute to the progressive enshrinement of the principle of intergenerational justice under international law through the issuance of advisory opinions. Since December 2022, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights and the ICJ have all received requests for advisory opinions on climate change.[[16]](#footnote-17) For example, on 29 March 2023, the UNGA adopted a resolution in which it requested the ICJ to issue an advisory opinion on “*the obligations of States in respect of climate change*”.[[17]](#footnote-18) In its request, the UNGA put specific emphasis on the principle of intergenerational equity and asked the ICJ to opine on (i) 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 gasses (GHG) for States and for present and future generations*” and (ii) “*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 […] [p]eoples and individuals of the present and future generations affected by the adverse effects of climate change*”.[[18]](#footnote-19) This forthcoming advisory opinion provides a unique opportunity to the ICJ to consider and advance the legal bases for the principle of intergenerational justice.
1. ***Question 16: How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?***

**(a) Legislation**

* 1. At the domestic level, the principle of intergenerational justice can be incorporated in national law through the enactment of new legislation, and through the development of case law (under English law, caselaw sets binding precedent). New legislation can be enacted both at the UK level (by Parliament in Westminster), or in respect of the devolved administrations of Scotland, Wales and Northern Ireland (by the respective parliaments of those regions). Since the UK operates under a dualist legal system, international treaties ratified by the UK, while legally binding at an international level, do not have direct legal effect in the UK unless they are brought into force by domestic legislation.
	2. The leading model for the implementation of intergenerational justice in the UK is the Well-being of Future Generations (Wales) Act 2015 (“**FGA 2015**”), which applies only in Wales. With the enactment of the FGA 2015, Wales became the first country in the world to establish a legal duty towards future generations.[[19]](#footnote-20) Under the FGA 2015, public bodies have the duty to set "well-being objectives" for how they will contribute to the achievement of national "well-being goals" (which include goals related to climate change) and to take all reasonable steps to meet them.[[20]](#footnote-21) Public bodies are required to carry this out in accordance with the “sustainable development principle", under which they must “*act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs*”.[[21]](#footnote-22) This gives weight to the interests of future generations in policy-making decisions at all levels of government. The FGA 2015 sets out considerations that a public-body must take account of in order to act in this manner, including “*the importance of balancing short term needs with the need to safeguard the ability to meet long term needs*”.[[22]](#footnote-23) In essence, the FGA 2015 works by requiring Welsh public bodies to create and pursue development strategies, in ways that protect the interests of future generations.
	3. Moreover, since future generations do not yet exist, the FGA 2015 provides for the appointment of a Future Generations Commissioner (“**FGC**”) and a network of oversight boards (“public services boards”) to act as guardians of the interests of future generations. These entities are assisted by the publication of reports on projected future well-being, which may also facilitate increased scrutiny from the public and civil society. The FGC’s functions are to increase awareness of sustainable development principle, to provide advice and research on the same, to review the performance of public bodies regarding their well-being objectives and to issue recommendations on the well-being goals.[[23]](#footnote-24) Public authorities are not obliged to follow the FGC’s recommendations, although they must publish a public statement explaining their reasoning where they choose not to do so.[[24]](#footnote-25) The public services boards perform a similar function at a local level, providing advice and scrutiny in respect of local authorities.[[25]](#footnote-26)
	4. In the UK Parliament, the Wellbeing of Future Generations Bill sought to implement aspects of the FGA 2015 at the UK level. The Wellbeing of Future Generations Bill was initiated as a private member’s bill, and was debated in 2021 and 2022. The bill went further than the FGA 2015 in some key respects, including by introducing an enforcement mechanism under which a court can "*make such order…as it considers just and appropriate*" where a public authority is in breach of its obligations under the bill.[[26]](#footnote-27) However, the bill’s progress through the UK legislature was halted by the discontinuation of the Parliamentary session 2022, and has not resumed since. A further “Wellbeing of Future Generations Bill” has been proposed as a member’s bill in Scotland. While this proposed bill has not yet been published or debated in the Scottish Parliament, it was the subject of a public consultation in early 2023, and is intended to emulate the FGA 2015 regime.

**(b) Other avenues**

* 1. When considering the approach of national legislatures, we would observe that it is not just through legislation that action can be taken. Even where action is not specifically badged as action for intergenerational justice, that can nevertheless be its effect. Commitments to net zero and a fair and just transition away from fossil fuels will have an impact on the state of the planet for future generations, and these commitments can be advanced by public bodies other than the national government. For example:
		1. The UK Infrastructure Bank (“**UKIB**”) is a government-owned policy bank, focused on increasing infrastructure investment across the UK. UKIB partners with the private sector and local government to increase infrastructure investment in pursuit of two strategic objectives, one of which is to help tackle climate change, in particular meeting the government’s net zero emissions target by 2050;[[27]](#footnote-28) and
		2. The Bank of England has stated that a key aspect of its mission is to manage the financial risks and economic consequences arising from the physical effects of climate change and the transition to net-zero emissions of its policy functions and internal operations. This includes climate-related supervisory expectations for regulated financial institutions (with the consequent real-world impact that these entail).[[28]](#footnote-29)
1. ***Question 17: Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?***
	1. A key tool to promote youth representation in courts is that of raising awareness and ensuring that youth are aware of their human rights. Article 42 of the UN Convention on the Rights of the Child (“**UNCRC**”) enshrines “*knowledge of rights*” as a key right of the child and requires that “*[g]overnments […] actively work to make sure children and adults know about the [UNCRC]”.[[29]](#footnote-30)*  In addition to States, awareness-raising can also be performed by foundations and charities through the organisations of workshops in schools. This is one of the key activities of the Robert F. Kennedy Human Rights UK organisation, which has the primary aim of educating, inspiring and mobilising young people. In particular, Robert F. Kennedy Human Rights UK has developed the “Speak Truth to Power” human rights education programme, which is aimed at empowering young people to make a change in their communities by providing free resources and training for schools to deliver the programme across a range of subjects.[[30]](#footnote-31) Some samples and highlights of the “Speak Truth to Power” human rights education programme are attached as Annexe 1 and available [here](https://www.youtube.com/watch?v=EpYXSJ2KjPc)[[31]](#footnote-32) and [here](https://www.youtube.com/watch?v=GAuSdDxWW2Y&list=PLdrr7ftPH5d5lMe0PiBzI0ipYt0nyVIz2).[[32]](#footnote-33)
	2. Another powerful tool to promote youth representation in courts consists in the filing of *amicus curiae* submissions by charities and associations representing the rights of the youth in judicial proceedings. This is what has been done by several associations and charities in the context of the current *Duarte Agostinho and Others v. Portugal and 32 Other States* proceedings currently pending before the European Court of Human Rights,[[33]](#footnote-34) in which six Portuguese youth filed a complaint against 33 countries alleging that these countries have violated their human rights by failing to take sufficient action on climate change.[[34]](#footnote-35) In their application, the youth-applicants relied on the provisions of the European Convention on Human Rights (“**ECHR**”), which apply to every individual in the jurisdiction of contracting parties to the ECHR without distinguishing on the basis of age, including in particular on articles 2 (right to life), 8 (right to respect for private and family life) and 14 (prohibition against discrimination) of the ECHR.[[35]](#footnote-36) Among other arguments, the applicants relied on the principle of the best interests of the child set out in the UNRC,[[36]](#footnote-37) as well as the principle of intergenerational justice.[[37]](#footnote-38) This case, which is currently being heard in fast-track proceedings, will provide a unique opportunity for a supra-national court to issue a judgment on this question.
	3. As a matter of English law, a minor[[38]](#footnote-39) is able to take part in litigation but will normally be represented by a “litigation friend”, who is appointed to conduct the court proceedings on the minor’s behalf[[39]](#footnote-40).

**List of Annexes:**

* **Annexe 1**: samples received from schools as part of Robert F. Kennedy Human Rights UK’s “Speak Truth to Power” initiative.
1. 2015 Paris Agreement, Preamble, p. 2 [↑](#footnote-ref-2)
2. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 135, para. 122 (separate

opinion by Trindade, J.). [↑](#footnote-ref-3)
3. Stephen Humphreys, *Against Future Generations*, EJIL (2023), Vol. 33 No. 4, p. 1061. [↑](#footnote-ref-4)
4. Anthea Roberts and Sandesh Sivakumaran, *4 The Theory and reality of the sources of international law*, *in* Malcolm

D. Evans (ed.), International Law, Fifth Edition, OUP (2018), p. 89. [↑](#footnote-ref-5)
5. Due to page limitations, this submission focuses on a few actors that may contribute to the advancement of this

principle under international law and is not intended to be comprehensive. [↑](#footnote-ref-6)
6. UNFCCC, Preamble and Article 3(1) (emphasis added). [↑](#footnote-ref-7)
7. 2015 Paris Agreement, Preamble, p. 2. [↑](#footnote-ref-8)
8. Malcolm Shaw, International Law, Eight Edition, Cambridge University Press (2017), p. 60 (“*What is State Practice?*

*[…] It is how States behave in practice that forms the basis of customary law, but evidence of what a state does can*

*be obtained from numerous sources. Obvious examples include administrative acts, legislation, decisions of domestic courts, and activities on the international stage, for example treaty-making*”). [↑](#footnote-ref-9)
9. [Wellbeing of Future Generations Bill [HL]](https://bills.parliament.uk/bills/2869/stages/16161): the Bill did not progress, so has not entered into law in the UK. [↑](#footnote-ref-10)
10. Pursuant to Article 13, paragraph (1)(a) of the Charter of the United Nations, the UNGA is vested with the mandate to

encourage the progressive development of international law. [↑](#footnote-ref-11)
11. [UNGA Resolution 76/300 adopted on 28 July 2022](https://cleanair.london/app/uploads/CAL-455-UNGA-R2HE-resolution-adopted-280722.pdf), Preamble, p. 2 (emphasis added).

See also [UNGA Resolution 76/300 adopted on 28 July 2022](https://cleanair.london/app/uploads/CAL-455-UNGA-R2HE-resolution-adopted-280722.pdf), pp. 2-3 (“*[E]nvironmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights*”). [↑](#footnote-ref-12)
12. ICJ Statute, Article 38(1): “*1. The Court, whose function is to decide in accordance with international law such*

*disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*.” [↑](#footnote-ref-13)
13. The Universal Declaration of Human Rights annexed to UNGA Resolution 217A (III) (1948), led to the drafting and

adoption of the International Covenant on Civil and Political Rights. [↑](#footnote-ref-14)
14. UNGA resolutions may evidence state practice when a given State has consistently voted in favour of UNGA resolutions

affirming and reaffirming a particular principle (Malcolm Shaw, International Law, Eight Edition, Cambridge University Press (2017), p. 85). UNGA resolutions may also evidence the existence of *opinio juris* depending on the circumstances surrounding the adoption and application of a UNGA resolution: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, pp. 99-100 (“*This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".”*). [↑](#footnote-ref-15)
15. See below at paragraph 4.2. [↑](#footnote-ref-16)
16. For a summary of these three requests, see:

[Claire Nevin, “*Bridging the Implementation Gap: The Role of Advisory Opinions in Clarifying States’ Legal Duties on the Climate Crisis*”, Francis Taylor Building Chambers, 14 April 2023](https://www.ftbchambers.co.uk/elblog/view/bridging-the-implementation-gap-the-role-of-advisory-opinions-in-clarifying-states-legal-duties-on-the-climate-crisis). [https://www.ftbchambers.co.uk/elblog/view/bridging-the-implementation-gap-the-role-of-advisory-opinions-in-clarifying-states-legal-duties-on-the-climate-crisis - :~:text=On%2012%20December%202022%2C%20the,the%20Law%20of%20the%20Sea%20(%E2%80%9C.](https://www.ftbchambers.co.uk/elblog/view/bridging-the-implementation-gap-the-role-of-advisory-opinions-in-clarifying-states-legal-duties-on-the-climate-crisis#:~:text=On%2012%20December%202022%2C%20the,the%20Law%20of%20the%20Sea%20(%E2%80%9C.) [↑](#footnote-ref-17)
17. [ICJ, Press Release No. 2023/20, 19 April 2023](https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf.). [↑](#footnote-ref-18)
18. [ICJ, Press Release No. 2023/20, 19 April 2023](https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf.). [↑](#footnote-ref-19)
19. Hayden Davies, "The Well-being of Future Generations (Wales) Act 2015: duties or aspirations?", *Environmental Law*

*Review* (Env. L. Rev. 2016, 18(1), 41-56). [↑](#footnote-ref-20)
20. [*A Sustainable Wales Better Choices for a Better Future: Consultation on proposals for a Sustainable Development*](https://www.gov.wales/sites/default/files/consultations/2018-01/130621response6v2.pdf)

*Bill.* WG17030 (3 December 2012), paras 2.23-2.25. [↑](#footnote-ref-21)
21. FGA 2015, section 5(1) (emphasis added). [↑](#footnote-ref-22)
22. FGA 2015, section 5(2)(a). [↑](#footnote-ref-23)
23. FGA 2015, sections 19 and 21. [↑](#footnote-ref-24)
24. FGA 2015, section 22. [↑](#footnote-ref-25)
25. FGA 2015, section 36. [↑](#footnote-ref-26)
26. Wellbeing of Future Generations HL Bill (2021-22) [↑](#footnote-ref-27)
27. [Strategic plan | UK Infrastructure Bank (ukib.org.uk)](https://www.ukib.org.uk/strategic-plan). [↑](#footnote-ref-28)
28. [The Bank of England’s climate-related financial disclosure 2022 | Bank of England](https://www.bankofengland.co.uk/prudential-regulation/publication/2022/june/the-bank-of-englands-climate-related-financial-disclosure-2022). [↑](#footnote-ref-29)
29. [UNCRC](https://www.unicef.org.uk/wp-content/uploads/2019/10/UNCRC_summary-1_1.pdf), Article 42. [↑](#footnote-ref-30)
30. [Robert F. Kennedy Human Rights UK website | Our Work](https://www.rfkhumanrights.uk/projects). [↑](#footnote-ref-31)
31. This video was designed by the young people themselves to show their comprehension of the “Speak Truth to Power”

human rights education programme (<https://www.youtube.com/watch?v=EpYXSJ2KjPc>.) [↑](#footnote-ref-32)
32. <https://www.youtube.com/watch?v=GAuSdDxWW2Y&list=PLdrr7ftPH5d5lMe0PiBzI0ipYt0nyVIz2>. [↑](#footnote-ref-33)
33. For a list of these *amicus curiae* submissions:

see [Climate change litigation database | Duarte Agostinho and Others v. Portugal and 32 Other States.](http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/) [↑](#footnote-ref-34)
34. [Complaint dated 9 February 2020](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf). [↑](#footnote-ref-35)
35. [Complaint dated 9 February 2020](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf), paras 23-28. [↑](#footnote-ref-36)
36. [UNCRC](https://www.unicef.org.uk/wp-content/uploads/2019/10/UNCRC_summary-1_1.pdf), Article 3(1): “*The best interests of the child must be a top priority in all decisions and actions that affect*

*children.”* [↑](#footnote-ref-37)
37. [Complaint dated 9 February 2020](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf), para. 28. [↑](#footnote-ref-38)
38. For these purposes, a minor is a child under the age of 18 years. [↑](#footnote-ref-39)
39. In family proceedings, a “guardian ad litem” may be appointed. [↑](#footnote-ref-40)